**Kimani & another v Matinde (Civil Appeal E578 of 2023)**
**[2024] KEHC 7085 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7085 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL APPEAL E578 OF 2023**

**DKN MAGARE, J**

**JUNE 11, 2024**

**BETWEEN**

**MOSES KINUTHIA KIMANI ..... 1ST APPELLANT**

**MUNA AHMED BASBASS ..... 2ND APPELLANT**

**AND**

**MAKONGO WILLIAM MATINDE ..... RESPONDENT**

***(Being an appeal from the Judgment of the Hon. R. Liluma - SRM in Milimani CMCC No. E13389 of 2021, delivered on 26th May, 2023)***

## JUDGMENT

1. This is an appeal from the Judgment and Decree given on 26/5/2023 by Hon. Rawlings Liluma, SRM in Nairobi CMCC E13389 of 2021. The court below entered judgment as follows:-

    a. Liability – 100%

    b. General damages – Kshs.160,000/=

    c. Special damages – Kshs.3,550/=

    d. Costs and interest

2. The Appellant filed a 10-paragraph memorandum of Appeal. It is prolixous and unseemly for a one or two issue memorandum to be such repetitive. Such a memorandum lacks conciseness required under Order 42 Rule 1 of the *civil procedure Act*, which provides as hereunder: -

    " 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 in regard to rule 86 of the Court of Appeal rules (which is pari materia with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

3. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
>
> "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. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

5. 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."

6. 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."

7. 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.

8. 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..."

9. 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."

10. 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.

11. 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.

12. 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.

13. 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..."

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. It is not clear what the Memorandum of Appeal is meant to achieve. Nevertheless the appeal is on both liability and quantum.

20. The Respondent filed suit vide a plaint dated 17/12/2021. He claimed the following injuries:

    i. Blunt injuries to the head with transient loss of consciousness.

    ii. Blunt injuries to the right side of anterior chest wall.

    iii. Blunt injuries to the right leg.

21. The Respondent testified on 8/2/2023 before R.L. Musiega, blaming the appellant and motor vehicle registration KCY 001R. The said motor vehicle was said to come from the opposite direction.

22. Cpl. Zadock testified that he was the investigating officer. The motor vehicle Reg. No. KCY 001R was blamed. The accident occurred at 1.45 am and was reported at 1600hrs.

23. The defence closed its case without calling evidence. The court found the Appellants 100% liable and awarded Kshs.160,000/=, costs, interest and special damages of Kshs.3,550/=.

**Analysis**

24. The appeal on liability is untenable. The duty of the court was to analyze the evidence before it. On the other hand, the Respondent had a duty to prove its case while the Appellant had a duty to prove contribution. The burden of proof is on the responded on aspects of negligence and on the Appellant on contributory negligence. The standard is simply on a balance of probability. 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

25. 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."

26. 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; -

> "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."

27. The Respondent's evidence was cogent. The same was not rebutted. The court applied settled law and precedent in determining liability. I cannot find where the court misdirected itself. The particulars of contributory negligence became useless when there was no testimony to proof the same. Therefore an appeal on liability is dismissed in limine.

28. On the issue of general damages, the law has been settled. In Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470) the court stated as follows: -

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low."

29. It may be recalled that in Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

30. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, the court stated that 28TH DAY OF OCTOBER, 2021, that a sum of Ksh 180,000/= will be sufficient for far more serious soft tissue injuries.

31. In Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, on 2nd day of December, 2019, the court found an award of ksh 300,000/= excessive and reduced it to 175,000/= for serious soft tissue injuries.

32. Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next of friend) VAA [2019] eKLR, the court awarded 180,000/= for more severe injuries of soft tissue nature.

33. In Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, justice Nyakundi found a sum of Ksh 140,000/= as sufficient for a cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee.

34. The court considered and awarded Kshs.160,000/= for general damages. The same is reasonable. The court cannot substitute the same unless it is inordinately high or inordinately low. Consequently, the appeal is dismissed with costs.

**Determination**

a. The upshot of the foregoing is that the Appeal lacks merit and is accordingly dismissed with Costs of Kshs.50,000/= to the Respondent.

b. File is closed.

c. 30 days stay of execution.

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:-**

Ms. Nyatta for the Appellants

Ms. Sagwa for the Respondent

Court Assistant - Jedidah