Siku v Kilifi Plantation (Civil Appeal 157 of 2016)
[2024] KEHC 6914 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 157 OF 2016

DKN MAGARE, J

JUNE 6, 2024

BETWEEN

NATHANIEL KAHINDI SIKU ..... APPELLANT

AND

KILIFI PLANTATION ..... RESPONDENT

(Being an appeal from the decision of Honourable Nyakweba delivered on the 26th October, 2016 in Mombasa in the Senior Resident Magistrate's Court Case No. 44 of 2011)

JUDGMENT

1. When this matter is finally closed, the heavens will dance and dungeons of hades shake. This is because a great thing will have happened. It is a file that has seen more than 2000 seasons. It is a study in collegiality, or non-collegiality at its best.

2. The matter started as a work injury claim filed way back in 2011. The judgment was delivered on 26/10/2016 in Mombasa CMCC 44 of 2011. The Appellant filed. The appellant was a successful party in the lower court. the judgment was for:

    a. Kshs.800,000/= general damages.

    b. Loss of earning capacity Kshs.866,746.80/=.

    Total – Kshs.1,666,764.80/=

    c. Liability – 85:15.

    d. Artificial limb/costs of future medication – Kshs.120,000/=.

    e. Special damages – Kshs.2,000/=

    Total – Kshs.1,538,750.10/=

Pleadings

3. The Appellant filed suit on 1/2/2012 as Mombasa CMCC 44 of 2012. They claimed for injuries resulting from work injury. The injury suffered was amputation of a fore arm.

4. The Appellant sought loss of future earning of Kshs.209/= per day and costs of future operation Kshs.120,000/=.

5. Defence was filed on 18/4/2012. Since liability is not an issue I shall not dwell much on it.

6. The suit file appears to have been lost and had to be reconstructed on 26/11/2015. Be it as it may the suit was heard and determined.

7. The P3 indicated that the appellant was then 30 years. The P3 showed the degree of injury is harm. Form Dosh 1 assessed earnings at 209/= per day. The matter was heard. Parties filed submissions and judgment read.

8. According to Dr. Ajoni Adede the Appellant had 48% incapacity. The Appellant testified that though he has recovered he lost his arm. The Report by Dr. Tudayan Sheth dated 14/8/2023 was produced as exhibit by consent. The court delivered its judgment finding the Respondent 85%:15% liability and gave quantum.

9. On loss of earning capacity the court worked out for 30 years. This worked out to Kshs.866,767.80/=. General damages the court awarded Kshs.800,000/=. The court used awarded appeals at that time.

Parties' Submissions

10. The Appellant submitted that the appellant could not work hence a percentage of the salary should be used. The appellant stated that the court has no evidence of loss of 48%. They should have used full salary. On the aspect of loss of earning they submitted that a sum of Kshs.2,181,860/= will suffice. On quantum on General damages they submitted that a sum of Kshs.2,000,000/= could have sufficed. They relied on cases ranging from 2015 to 2021.

11. The Respondent filed submissions on 20/1/2023. They stated that the suit is expected to be subject to adjudication pursuant to Section 52 of the *Work Benefits Act*. They stated that the appeal cannot be heard for want of jurisdiction pursuant to the Supreme Court decision in *Law Society of Kenya v Attorney General*. They therefore addressed the court solely on jurisdiction.

Analysis

12. The appeal is a study in subterfuge and hyperbole. The matter was initially transferred to the ELRC Court upon issuance of directions by the Chief Justice. The same was re-transferred back to this court. The court could not deliver judgment as the file was indicated transferred and closed. The court had to await administrative action to re-open the portal and then deliver the judgment.

13. It is noted that the respondent relied on Section 52 of the *Work Injury Benefits Act*, 2007in defense of the Appeal. The same posits as follows:

> " 52.
>
> (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period

send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision."

14. For purposes of this appeal the section is irrelevant. The lower court has already determined liability of parties. That is not in issue in the appeal. The only logical conclusion is that the appeal is not saddled with limitations.

Duty of the first Appellate court

15. 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.

16. In the case of *Mbogo and Another v Shah* [1968] EA 93 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."

17. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. 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.

19. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

21. 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.

22. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

23. 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.

24. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."

25. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. 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.

27. 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.

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

29. For the appellate court, 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. On the Appeal itself, there are two main aspects, that is general damages and loss of earnings. There appears to have been a confusion in respect of loss of earnings and loss of earning capacity.

31. The Appellant was plainly wrong in dealing with loss of earning capacity. This is related to the capacity of the Appellant. Capacity is diminished by percentage of disability.

32. If the Appellant wished to get a different figure he should have pleaded loss of earnings. This is calculated on basis of actual loss. Loss of earning capacity was not pleaded. I therefore do not find any merit in the appeal on loss of earning capacity.

33. The principles to be considered in making an award for loss of earning capacity were set out by the Court of Appeal in *Butler v Butler* [1984] KLR 225, as follows:-

a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

33. In the circumstances, the court cannot award that which was not pleaded. Parties are bound by their pleadings. 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: -

> " 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. v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v 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."

34. In the case of *Malawi Railways Ltd v 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....
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> 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."

35. 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 v 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.....'"

36. On the second limb is the question of quantum of damages. The court will have to have regard that damages are being decided today having regard to the inflation whereas the court delivered judgment in 2016. The court will compare comparable injuries.

36. The court will not award an amount that could not have been awarded then. If in in 2016 an award of Kshs.800,000/= was proper, then the court will not interfere with the award. If on the other hand, it was inordinately low, the court will disturb the award. In *Coussens v Attorney General* [1999] 1 EA 40 the court stated that the object of assessment is as follows:

> " The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered and the heads or elements of damage recognized as such by law are divisible into two main groups: Pecuniary and non- pecuniary loss, with the former comprising of financial and material loss incurred such as loss of business profits, loss of income or expenses such as medical expenses, while the latter comprises all losses which do not represent in road upon a person's financial or material assets such as physical pain or injury to feelings."

37. In the case of *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR, the court confirmed an award of Ksh 2,000,000/= for Amputation of the left hand(Below elbow amputation left forearm) and complains of pain in the amputation stump and difficulty in performing simple tasks like buttoning the shirt or bathing. This were more severe injuries than suffered by the Appellant herein.

38. In the case of *Swaleh Sifuna Ali v Evans Maina & 2 Others* [2006] eKLR the court awarded the Plaintiff Kshs 1,300,000/- where the plaintiff lost his arm as a result of a traffic road accident.

39. In the case of *Robert Joseph Bandu v Falcon Coaches Ltd & Katana Kalume* [2008] eKLR, the Plaintiff lost his forearm in this case as well and suffered 70% disability. Similarly, the court awarded him Kshs 1,300,000/- on this head.

39. In the case of *Joseph Ibrahim Alasau v Steering Ship Contractors & Anor* [2008] eKLR, the Appellant had his arm amputated following injuries sustained while at his place of work. The Court of appeal awarded him Kshs 1,300,000/- on this head.

40. Given the inflations to 2016, an award of Ksh 1,500,000/= will have sufficed. The award of Ksh 800,000/= was as such inordinately low. It is thereby substituted with a sum of Ksh 1,500,000/=. The Appellant shall have costs.

41. 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.

42. In the circumstances, I allow the Appeal with costs as aforesaid

31. In circumstances I make the following orders:

    a. The appeal is allowed to the extent that the award of general damages is set aside and in lieu thereof I substitute with a sum of Ksh 1,500,000/=

    b. I dismiss the Appeal on loss of earning capacity.

    c. Costs of Ksh 225,000/= to the Appellant.

    d. The file is closed.

DATED, SIGNED AND DELIVERED IN NYERI ON THIS 6TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mrs. Osino for the Appellant

Miss. Wangu for the Respondent

Court Assistant – Jedidah