



**Auma v Safaricom Limited & another (Civil Appeal 612 of 2019)  
[2024] KEHC 8751 (KLR) (Civ) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8751 (KLR)

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

**CIVIL**

**CIVIL APPEAL 612 OF 2019**

**DKN MAGARE, J**

**JULY 15, 2024**

**BETWEEN**

**ELIZABETH AUMA ..... APPELLANT**

**AND**

**SAFARICOM LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HEZEKIAH OYUGI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appeal arises from the Judgment and Decree of the lower court delivered on 4/10/2019 in Milimani CMCC No. 8380 of 2017 by Hon. G.A. Mmasi, SPM. The court dismissed the Appellant's case with costs.
2. The Appellant being aggrieved preferred 6 grounds in the Memorandum of Appeal. I have perused the 8 paragraph Memorandum of Appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise Memorandum of Appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia.
3. Order 42 Rule, 1 provides as doth: -
  - "1. Form of appeal –
    - (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
    - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or



order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say in regard to Rule 86 (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. Firos 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. 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.”

6. The Memorandum of Appeal raises only two issue, that is;
- i. Liability
  - ii. Quantum
7. The rest of the grounds are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate’s court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.



8. In the Complaint dated 24/11/2017, the plaintiff sought general damages for pain and suffering and loss of amenities and special damages of Kshs. 2,700/-.
9. The claim arose from the accident that occurred on 16/1/2017 when the plaintiff was a pillion passenger on motorcycle Registration No. KMDN 644W when the 1<sup>st</sup> defendant's motor vehicle Registration No. KCB 967W was negligently driven by the 2<sup>nd</sup> defendant that it collided with the motorcycle causing the plaintiff severe personal injuries.
10. The following injuries were pleaded:
  - a. Compound fracture of the right tibia and fibula
  - b. Trauma to the chest
  - c. Blood loss
11. The defendants entered appearance and filed defence denying the averments in the complaint and blaming the accident on the rider and the plaintiff.

### **Evidence**

12. The Appellant adopted her witness statement and documents dated 15/1/2017 and testified that she was a pillion passenger aboard motorcycle along a murram road at Utawala. That motor vehicle registration No. KAZ 566J collided with the said motorcycle hence the accident.
13. On cross examination, it was her case that they were two pillion passengers. The road had one lane. The motor vehicle came from ahead of them and collided with the motorcycle. It was around 9 p.m. and there were no street lights.
14. The police abstract dated 13/5/2017 was produced as exhibit by consent of the parties.
15. On the part of the defendants, DW1 was the police officer. He testified that the motorcycle rammed into the motor vehicle and rider fled. It was his case that the motorcycle was to blame.
16. On cross examination, he testified that the 2<sup>nd</sup> defendant reported the accident. He stated that they blamed the rider and was being sought. The matter was pending under investigation.
17. The lower court considered the case and dismissed the Plaintiff's case for failure to prove liability against the defendants. The court also opined that if the Plaintiff had proved liability, an award of Kshs. 1,300,000/- would be granted for damages for pain and suffering and Kshs. 2,500/- for special damages.

### **Submissions**

18. The Appellant filed submissions in support of the appeal dated 14/11/2023. It was submitted that the court erred in dismissing the plaintiff's case. That there was evidence that the driver of the accident motor vehicle was negligent. It was submitted that if the evidence is insufficient, the court ought to have found the parties equally to blame than dismiss the case. They relied on *Simon Waweru Mbugua v Alice Mwangeli Munyao (2020) eKLR*.
19. On quantum it was submitted that the projected Kshs. 1,300,000/- was too low and an erroneous estimate of general damages. They proposed Kshs. 2,000,000/= though cited no authority in support. I was urged to allow the appeal.



20. The Respondents also filed submissions dated 22/1/2024. It was submitted that the lower court correctly found that it was the third party liable 100% for causing the accident based on the evidence presented to the court.
21. They relied on *Evans Nyakwana v Cephas Bwana Ongaro* (2015) eKLR and *William Kabogo Gitau v George Thuo* (2010) 1 KLR 526 to submit that the Appellant failed to discharge the burden of proof.
22. On damages, it was submitted that Kshs. 500,000/- would be appropriate award in general damages. They relied inter alia on *Tarbo Transporters Limited v Absalom Dora Lumbasi* (2015) eKLR and *Ann Namulembo v Mungai Mwangi & Another* (2019) eKLR.

### **Analysis**

23. The issue is whether the learned magistrate erred in dismissing the plaintiff's case. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
24. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. On liability, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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.

26. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

27. It follows that the initial burden of proof lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case. Therefore, the burden is not on the plaintiff, or the defendant, it is on the party who alleges.



28. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “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 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
29. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:
- “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.”
30. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;
- “The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”
31. Furthermore 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained.”
32. The accident can therefore not be said to have occurred by magic, or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01:49.99, there can be no better equal chance. I note that on cross examination, DW1 blamed the rider.



33. Further, there can be no liability without fault. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 the determinants of negligence were stated as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”

34. In *Caparo* case (*supra*) the Court stated:

“What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case.”

35. In the case of *Kiema Muthuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258, the court of appeal posited as doth:

There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

36. The Appellant alleged that the 2<sup>nd</sup> Respondent was to blame. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents refuted the claim and alleged that it was the rider. Whereas the Appellant had a duty to prove that the 2<sup>nd</sup> Respondent was to blame, she had no duty to prove that the rider was not to blame.

37. The Respondents issued a Third Party Notice dated 30/5/2018. I note from the proceedings that on 17/1/2019, the lower court entered judgement against the Third Party, Auto Industries Limited for failing to enter appearance having been served with the Third Party Notice and pleadings.

38. The Respondents therefore had invoked the provisions of Order 1 Rule 15 of the Civil Procedure Rules as follows:

- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
  - (a) that he is entitled to contribution or indemnity; or
  - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
  - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.



39. Therefore, it is my view that the lower court erred in dismissing the Appellant's suit. The Respondents joined a Third Party but failed to take directions for apportionment of liability. To this extent, the court in finding the rider 100% liable condemned the rider without a hearing. It was the duty of the defendants to prove contributory negligence which in my view they failed. In the case of *MacDrugall App V Central Railroad Co. Rbr 63 Cal 431* the court held that; -

“In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence”.

40. In the comparative jurisprudence in the case of *Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987* where Theobalds J enunciated as follows; -

“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.”

41. This is the rule in *Embu Road Services V Riimi (1968) EA22* and *25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201*, *Menezes Stylianicers Ltd CA No.46 of 1962* in which the courts held inter alia; -

“Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence”. See also *Odungas Digest on Civil case law and Procedure 3<sup>rd</sup> Edition Vol 7 page 5789* at paragraph (D).

42. I find that the finding that the defendants were not liable at all was not based on evidence. I find that the Respondents were jointly and severally 100% liable for the accident. In *Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR*, observed that:-

“The defence does not even allude to the said third party; the issue has just propped up in the submissions by the Defendant. In any case, the said third party is not a party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”



43. It is this rationale of the law that is imbedded in Order 1 Rule 17 of the Civil Procedure Rules as follows:
- If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice..
44. Therefore, by failing to take directions on the liability of the Third Party, default judgement having been entered, the Respondents proceeded with the case as against themselves and could only seek indemnity after judgement. Under Order 1 Rule 19 of the Civil Procedure Rules, it is stated doth:
- Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:
- Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just
45. On quantum there was no appeal on special damages, the court proposed Kshs. 1,300,000/-.
46. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.
47. In Justine Daniel Owino & Another v Elizabeth Atieno [2020] eKLR, the Plaintiff suffered compound fracture of the tibia and fibula, deep cut on the right leg and soft tissue injuries. The trial court awarded Ksh 600,000/=, but on appeal the same was reduced to Ksh 400,000/=.
48. In Sammy Mugo Kinyanjui & Another vs Kairo Thuo (2017) eKLR, Kshs. 600,000/= was awarded for the Plaintiff who had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula.
49. The award of Kshs. 1,300,000/- was out of doubt excessive. I set it aside and substitute it with an award of Kshs. 700,000/- in general damages as commensurate to the injuries suffered.
50. The appeal is thus merited.

### **Determination**

51. In the upshot, I make the following orders:
- a. The Appeal is allowed.
  - b. Judgment of the lower court on liability is set aside and substituted with liability of 100% jointly and severally as against the defendants.
  - c. The Appellant shall have General damages of Kshs. 700,000/=.



- d. The Appellant shall have Special damages of Kshs. 2,700/=.  
Total Ksh. 702,700/=.
- e. Accordingly, in exercise of the powers granted to the Court under Section 27 of the *Civil Procedure Act*, I award costs of the appeal of Kshs. 105,000/= payable to the Appellant
- f. The Appellant shall have costs in the lower court.
- g. Interest on Special damages at court rates from the date of filing the suit.
- h. Interest on General damages at court rates from the date of Judgment delivery.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15<sup>TH</sup> DAY OF JULY, 2024.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Nyaencha for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah

