Muhoro v Stanley & another (Civil Appeal E031 of 2021)
[2024] KEHC 9788 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E031 OF 2021

DKN MAGARE, J

JULY 24, 2024

BETWEEN

JOSEPHINE WANJUGU MUHORO ..... APPELLANT

AND

MARITIM KIPLANGAT STANLEY ..... 1ST RESPONDENT

WILSON KARIUKI MWANGI ..... 2ND RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree of the lower court delivered on 22/6/2022 in Karatina SPMCC No. 45 of 2019 by Hon. V.S Kosgei, R.M. 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 5 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. Order 42 Rule, 1 provides as 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.

3. 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. 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..."

4. 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."

5. The memorandum of appeal raises only one issue, that is;

   a. The leaned magistrate erred in her finding on liability and the consequential dismissal of the Plaintiff's case.

6. 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.

7. In the Amended Plaint filed on 1/8/2019, the Plaintiff sought general damages for pain and suffering and loss of amenities, special damages of Kshs. 103,000/- and future medical expenses of Kshs. 50,000/- with costs and interest.

8. The claim arose from the accident that occurred on 10/6/2018 when the Plaintiff was a pillion passenger on motorcycle Registration No. KMDU 474 P when the 1st defendant's motor vehicle Registration No. KAZ 566J was negligently driven that it collided with the motorcycle causing the Plaintiff severe personal injuries.

9. The following injuries were pleaded:

    a. Fracture of the femur.

    b. Fracture of the right tibia and fibula.

    c. Fracture of the medial malleolus of the right ankle.

    d. Cut wound to the right foot.

    e. Blunt injury to the chest.

10. The 1st defendant never entered appearance. The 2nd defendant entered appearance and filed defence denying the averments in the plaint.

Evidence

11. The Appellant testified that she was a pillion passenger aboard motorcycle Registration No. KMDU 474P along Karatina-Nyeri road at Marua area. That motor vehicle Registration No. KAZ 566J collided with the said motorcycle hence the accident.

12. On cross examination, it was her case that the rider was carrying her. It was 8.00 pm, dark but there were lights. That she had no protective gear. The rider is not party to the suit and neither is the owner of motorcycle Registration No. KMDU 474P.

13. PW2 was the police officer who testified that the case was pending under investigation, and that the rider died on the spot. On cross examination, he had no sketch maps and he was not at the scene.

14. On the part of the 2nd defendant, Wilson Kariuki Mwangi testified as DW1 relying on his witness statement filed in court. It was his case that he was the driver of the accident motor vehicle. That the rider was overtaking. The rider then knocked him. He blamed the rider.

15. 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. 1,700,000/- would be granted for damages for pain and suffering and Kshs. 103,000/- for special damages. There was no mention of future medical expenses.

Submissions

16. The Appellant filed submissions in support of the appeal on 6/3/2024. 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.

17. Further, it was submitted for the Appellant that the 2nd defendant blamed the rider of the motorcycle but failed to file a third-party notice. I was urged to allow the appeal. I have not had sight of the Respondent's submissions.

Analysis

18. The court has considered the appeal and the submissions filed in court. The issue is whether the learned magistrate erred in dismissing the Plaintiff's case.

19. 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.

20. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. 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 form 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."

21. There is no appeal on quantum. The question in this matter then revolves around the burden of proof. 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.

22. 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.".

23. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition 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 fi no evidence at all were given as either side."

24. 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 that 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."

25. 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 even 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....."

26. 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 loose because the requisite standard will not have been attained."

27. 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 is better still 50.01:49.99, there can be no better equal chance.

28. I note that on cross examination, DW1 stated that the rider was overtaking. He blamed the rider. 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 ...
>
> > "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."

29. 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."

30. The Appellant alleged that the defendant was to blame. The 2nd Respondent refuted the claim and alleged that it was the rider. Whereas the Appellant had a duty to prove that the 2nd Respondent was to blame, she had no duty to prove that the rider was not to blame. The rider was not a party to the suit. What then was the utility of the evidence blaming the rider. The 2nd Respondent should have issued notice against the rider under Order 1 Rule 15 of the Civil Procedure Rules. The rule provides as follows, in as far as the same is material: -

> " (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-
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> (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
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> (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, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
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> (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
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> (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
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> (4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.
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> (5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a

party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule."

31. The respondent should have joined a third party, either the estate of the rider or the owner thereof. This was not done. The court cannot find liability against a non-party. In *2NK Sacco Drivers Self Help Group & 2 others v Kabiro & another (Civil Appeal E029 of 2021*) [2023] KEHC 1521 (KLR) (24 February 2023) (Judgment), I posted as follows: -

> " This therefore means, even though, on paper the Third Party was joined to the proceedings, he was never informed of the proceedings and or served for hearing. Having failed to prosecute the case against the third party, this court is precluded from determining issues of liability between the defendants and the third party. Therefore, this court cannot apportion liability between the Appellants and the 2nd respondent. This is in fact exampled by the Appellants herein closing the defence case without requesting the court to deal with the Third Party Case."

32. The attribution of negligence to a non-party, the deceased rider was not helpful. A person cannot be condemned unheard. In EN v Hussein Dairy Limited & 3 others [2020] eKLR, the Court posited as hereunder: -

> " I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."

33. The learned magistrate erred in finding the deceased rider liable. That was not before her. That is the essence of pleadings to enable parties know cases they are facing.

34. Secondly, this was a collision. The rider died on the spot. The speed leading to the collision cannot be said to have been low. There is also no explanation why the rider on the wrong side could hit the driver's side, it can only be head on. Therefore, overtaking offers the most plausible explanation that the motor vehicle was attempting to go back to its lane when the rider was veering off its lane towards the outside."

35. The only logical explanation therefore from the point of impact is that he was not on his lane. The 2nd Respondent referred to two eye witnesses but he did not bother to call them. The Appellant was a pillion passenger who did not cause the accident, rider being blamed was deceased.

36. I set aside the finding on liability. I find the Respondents jointly and severally liable at 100%. It is not the duty of court to apportion liability in the absence of a notice against a co-defendant.

37. Quantum was not subject to appeal. The court did not however award damages of future medical expenses. In the case of Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> " We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future

expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma (2004) 1 EA 91, this Court, stated: -

> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded." We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require..."

38. Further, in *Forwarding Company Limited & Another V Kisilu; Gladwell (third Party) (Civil Appeal 344 of 2018)* [2022] KECA 96 (KLR), the court posited as hereunder: -

> " In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

39. As was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

40. I therefore find that the Appellant pleaded future medical expenses based on the opinion in the medical report by the Appellant's medical doctor, Dr. Muchai Mbugua dated 26/2/2019. Therein, it was opined that the Appellant would require Kshs. 50,000/- to remove implants when the fractures are fully reunited. I therefore award Kshs. 50,000/- under this head.

41. The appeal is thus merited and is accordingly allowed. The next question is costs. Section 27 of the *Civil procedure Act* provides as follows: -

> " 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.

42. 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.

43. Given the results, I award costs of Ksh. 155,000/= to the Appellant.

Determination

44. In the upshot, I make the following orders:

a. Judgment of the lower court on liability is set aside and substituted with liability at 100% jointly and severally against the Respondents.

b. Special damages of Kshs. 103,600/- is not disturbed.

c. General damages of Kshs. 1,700,000/- is not disturbed.

d. The Appellant shall have future medical expenses of Kshs. 50,000/-

Total Ksh. 1,853,600/-

e. Costs of the appeal of Kshs. 155,000/= 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, being 1/8/2019.

h. Interest on General damages at court rates from the date of Judgment delivery being 22/6/2022.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah