Hatimy v Ali (Civil Appeal 86 of 2019) [2023] KEHC 21604 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 86 OF 2019

DKN MAGARE, J

JULY 6, 2023

BETWEEN

MOHAMED MOHAMED HATIMY ..... APPELLANT

AND

HASSAN SHEIKH ALI ..... RESPONDENT

((Being an appeal from the judgment /decree of the Hon. E. Mutunga SRM Dated 29th March, 2019 in RMCC 2608 of 2011)

JUDGMENT

Introduction

1. This matter came up before me for hearing of an appeal from the judgment and decree of the Hon. E. Mutunga SRM given on 29th March 2019. The same arose from an accident involving a lift in the premise said to be owned by the appellant the appellant, raised the following grounds of appeal: -

    a. That the learned trial magistrate erred in law and in fact in reaching the conclusion that the respondent had proved his case to the required standard.

    b. That the trial magistrate erred in law and in fact in reaching a finding that the appellant was liable to the respondent in the absence of any evidence that the appellant was the owner of the premises wherein the lifted the alleged cause of injury was housed.

    c. That the magistrate erred in failing to find that the respondent had failed to prove the nexus between the appellant and the premise wherein the said lift was domiciled.

    d. That the learned magistrate erred in law in failing to reach the conclusion that the respondent's evidence on record was suggestive of a party who was unsure as to the ownership of the premises whereon the subject lit was housed.

    e. That the trial court erred in law in making an award in damages that was manifestly excessive.

2. The Memorandum if Appeal was repetitive and prolixious. It repeats the issue of liability and is argumentative in is nature. This is not in line with order 42 Rule 1 of the Civil Procedure Rules which 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.

3. The court of Appeal had this to say in regard to rule 86 (which is pari mateira 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:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

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:
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> "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 two issues, that is: -

a. The Court erred in finding the appellant liable despite evidence to the contrary

b. The damages were excessive in the circumstances

Duty of the first Appellate court

6. 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.

7. 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."

8. The duty of the 1st Appellant 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."

9. In the case of Peters vs Sunday Post Limited [1985] 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..."
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> Pleadings

10. It pleadings that on 29th May 2019 the respondent went to the office of of an advocate at Zulfat Hatimy Complex, and the lift closed and knocked the Respondent on the right shoulder thereby sustaining injuries. The Respondent Blamed the appellant for the loss.

11. The Particulars of negligence and breach of statutory duty and care were enumerated. However, the statute whose duty was breached was not pleaded. This is contrary to order 2 rule 4(1) of the Civil Procedure Rules. The same provides as hereunder: -

> " 4. Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading.

12. The plaintiff pleaded the following injures;

    a. Complete tear (rapture) of the right shoulder joint tendon (supraspinatus)

    b. Blunt object injury to the right shoulder.

13. The plaint was subsequently amended to have the following special damages.

    a. Medical report 2000

    b. Medical expenses 307,455

    c. Shoulder replacement 150,000

    (artificial shoulder)

    a. Plaintiff's claim damages

14. The appellant filed amended defence dated 7th September 2015. In their amended defence they stated that the they had no defects at all and was regularly serviced. They also stated that there were no defects.

Evidence

15. Pw1 testified on 16th August 2017 how he had an accident at a lift. He was treated and went to the police. He was cross examined by Mr Mwakisha. He produced receipts totaling to 239,000.

16. Pw2 Abdi Ali Mohamed stated that he was go not 7th floor. They used a lift. the plaintiff had been insured. He stated that the lift was defective. He stated on cross examination that the used the lift again.

17. Dw1 Mohamed Mohamed Hatimy testified on 16th April 2018. He stated that the said premises belongs to his father the Ali Mohamed Hatimy. He was one of the administrators of the estate. However, he had been sued in his personal capacity as the owner of the building. He stated that there is a lift in his father's premises. It was bought in 2001. He stated he is not the owner of the premise. The lift was working properly and the incident did not occur.

Judgment

18. Upon parties filing submissions the court entered its judgment on 29th March 2019. He found the plaintiff case to have been proved and awarded Ksh 600,000 as general damages, Ksh 150,000 future medical expenses, special damages of 239,000 as costs and interest.

Liability

19. The respondent pleaded that the lift hit him. It is not enough that he was hit by a lift while it was closing. We do not yet have lability without fault. The lift closed on the Respondent. It is the nature of a lift to close. It cannot work without closing. The Respondent stepped into a lift and was closed on by the lift. So? There is nothing to show that it was indeed the lift was faulty. Respondent's own witness testified that he used the same lift the second time to go up.

20. I do not see how this court could have come to that conclusion on the face of the evidence tendered by the Respondent. There was no expert evidence to show what fault there is in the lift. The lift is automatically operated. There is on driver or other control elsewhere. The passengers owe themselves

a duty to be careful not to enter a closing lift. Where was the respondent in hurry to. It is telling that it is the shoulder that was hit. It is more likely than not that the Respondent was trying to squeeze into a closing a closing lift.

21. What could possibly have happened? The respondent had the burden of prove. 11. 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."
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> In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:
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> "Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "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."

22. 62. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

23. 63. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

24. The burden of proof on negligence was not discharged. No evidence of fault or negligence was adduced/ the respondent's witness was categorical that the noises came from the Respondent and not

the lift. It is my considered view that the injury the respondent suffered its self-inflicted. This is enough to dismiss the suit in the court below.

25. However, there is second aspect, that is the ownership of the premises where the lift was. It was common ground that the building was owned by a deceased person. Ali Mohammed Hatimy(deceased)

26. The Appellant is sued as the registered owner of the Zulfat Hatimy complex. The appellant is said to be an administrator. The owner thereof was deed. If they needed to sue him, then this need to sue the administrators. The appellant admitted to be an administrator of the estate of the deceased Mohamed Haitmy (deceased).

27. Nevertheless, he was sued in his personal capacity for estate actions deeds. From the explanation it is clear that the Respondent knew who the owners were. Evidence of ownership was not tendered at all. The duty to do so was on the party wishing the court to believe that very fact. Sections 107-109 of the *evidence act* is succinct in that respect. It provides: -

    107. Burden of proof

        (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. Incidence of burden

        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. Proof of particular fact

        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."

28. The same were not shown to arise out of negligence of the owners of the suit premises. The court was wrong in holding that the appellant cannot run away from being and administrator. It clearly a wrong misconception as a result of the misdirection, the court fell into error.

29. Parties are bound by pleadings. The appellant was sued as the owner. In the case of herein, the respondent placed on the Appellant a duty to ensure that the Respondent was safe to avoid the accident. This duty is onerous and does not arise from any common law duty of care. The Respondent did not show that the Appellant had a duty of Care and that duty was breached.

30. In the case, the court was plainly wrong in creating its on standard of proof. The court found the Appellant to be viciously liable without any particulars of negligence. There was evidence from PW2 that the lift was in good working condition. PW2 used the lift twice on the said date. There was no fault in the lift. The Respondent had a duty to produce evidence to show negligence.

31. Under Section 107 of the *Evidence Act*, if the respondent failed on that duty, I do not see any breach of duty at all. The consequence of the foregoing I find as follows;

    a. The appellant was not the registered owner of the Zulfat Hatimy complex and hence cannot be sued. To sue the late owner, the same must be done against administration of the estate.

b. On merit, the Respondent failed to prove liability against the appellant. Consequently, I set aside the judgment of the lower court and in lieu thereof substitute with an order dismissing costs

Quantum

32. In the case of Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice DS 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."

33. 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.

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

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....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."

35. 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.

36. The High Court, 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.

37. 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..."

38. 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.

39. 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.

40. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. The sentiments of the English Court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 were echoed by Potter JA in Tayab v Kinany (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326, at page 345 as follows:

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

41. 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.

42. In Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR the court affirmed an award of Kshs 300,000/- for a plaintiff that had suffered a dislocation of the shoulder.

43. In the case of Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR the plaintiff was awarded Kshs 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth.

44. These are fairly old authorities. An award of 600,000/ for the complete tear (rapture) of the right shoulder joint tendon (supraspinatus) and blunt object injury to the right shoulder is within the limits.

45. There was no appeal on special damages

Determination

46. The upshot of the foregoing is that the appeal has merit. Therefore, I make the following orders: -

    a. I set aside the judgment and decree of the honorable E. Mutunga and substitute it with an order dismissing the Respondent's suit, being Mombasa CMCC 2608 of 2011.

    b. Appeal on quantum is dismissed.

    c. The appellant shall have costs of the appeal of Ksh 80,000 and costs of the subordinate court.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Wachenje for Mwakisha for the Appellant

Mr. Origi for the Respondent

Court Assistant - Brian