Kiringi v Rajab & another (Civil Appeal E0177 of 2021)
[2023] KEHC 22011 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 22011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E0177 OF 2021

DKN MAGARE, J

JULY 10, 2023

BETWEEN

KARISA JUSTINE KIRINGI ..... APPELLANT

AND

ZAINAB WANJIRU RAJAB ..... 1ST RESPONDENT

AUTOBOX MOTORS LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable Sandra Ogot Senior Resident Magistrate in Msambeweni SRMCC No. E 059 of 2020 delivered on the 1st of October 2021. The Appellant was the Plaintiff in the lower court. The Appellant fled a memorandum of appeal which has 7 grounds of appeal.

2. Order 42 Rule 1 provides that the grounds of appeal ought to be concise. Although there are seven grounds of appeal, the grounds of appeal raise only one issue. The grounds are prolixious, repetitive and verbose. 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:

"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 any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

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

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
>
> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

4. 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.

5. The appeal is only on two grounds, that is;

   a. The Court erred in dismissing the suit on liability against the weight of evidence.

   b. The quantum of damages.

6. The grounds of failure to consider submissions in a subordinate court cannot stand alone. This is because the court considers the case by way of a retrial. the case of Albert Yawa Katsenga v Kenya Revenue Authority [2020] eKLR, the Court, Hon. Lady Justice Hellen Wasilwa held that: -

> " The rule provides circumstances under which this Court can grant orders for review and this include circumstances as indicated, in the Applicant's position, review sought on the account of an error on record because the Court failed to consider their submissions which had been filed, indeed, the time of writing this judgement, the Respondent's submissions had not been filed. They were also not on record. That notwithstanding, this Court considered the evidence of the Respondents on record and also considered the law and facts in arriving at Court's determination. Failure to consider the submissions of the Respondents does not in My view prejudice the Respondents at all since all facts and the law in this case was considered. There is therefore no valid reason for me to consider a review order as sought."

7. The Plaintiff filed suit on 8/7/2020 regarding the accident of 3/13/2020 involving the Motor Vehicle Reg. No KCX 750 W belonging to the Defendant and Motor -Cycle KMEZ 225X, where the Plaintiff was a rider.

8. The Plaintiff set out the particulars of negligence in paragraph 5 of the Plaint. The Plaintiff also set out the particulars of injuries suffered at paragraph 6 of the Plaint. The particulars of the injuries as set out in the Plaint are that the Plaintiff suffered: -

    a. Fracture right distal radius (forearm) bone.

    b. Blunt trauma and strain/sprain left hip.

    c. Cut/laceration wound on the left knee.

    d. A lifetime of recurring post fracture pains in the right forearm/wrist especially during times of cold weather and when undertaking manual activities/walking.

    e. Post traumatic arthritis and stiffness of the right wrist joint.

    f. Fracture site is a point of weakness and can easily fracture in future.

    g. Diminished capacity to work and undertake other activities of daily living

    h. Further particulars of injuries to be furnished at the hearing hereof by way of medical report.

        i. And the Plaintiff suffered 6 % disability.

Duty of the Court

9. 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.

10. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal 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..."

11. The duty of the first Appellate Court is now settled. 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 set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth: -

> " An appeal from the High 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 demeanor of a witness is inconsistent with the evidence generally."

12. In relation to this matter, this court has the same powers as the court of Appeal vis-à-vis the lower court. This court therefore is to bear in mind that it did not see nor hear the witnesses. I will defer to

the trial court on the demeanour and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.

13. The 1st Respondent filed defence on 25/8/2020 and admitted paragraphs 1 to 4 of the Plaint. At paragraph 5 of the defence, the 1st Respondent set out particulars of sole and contributory negligence of the Plaintiff. The 1st Respondent also denied the particulars of damages, injuries and loss.

14. The Appellant filed a reply to defence on 7/9/2020. Issues were joined. The matter proceeded for hearing and judgment was delivered. This necessitated this Appeal. The appeal was filed on 14/10/2021.

15. The Record of Appeal is unnecessarily bulky due to the authorities attached. In appeal filed, it is only necessary to file the submissions, but not the reported authorities. Only unreported authorities need to be attached. This is because the only operative submissions are the submissions at the appellate court and authorities relied on by the court.

Evidence

16. The Appellant called PC Dominic Asumwe of Diani Police Station. He testified that the record indicates that the motor vehicle Registration No KCX 750 W hit the motorcycle KMEZ 225X Haojin ridden by the Appellant. The occupants of the motorcycle fell off to the left side of the road to Diani beach and were injured.

17. His source of information was the investigation diary. This is then transferred to the police abstract. He said the driver was not charged because he left the country. This last bit of information was elicited during cross-examination.

18. In re-examination, the witness stated that the driver was to be charged for failing to take due care and attention and for turning without giving way.

19. Dr. Daniel Wambua Kiema testified that he is a medical practitioner. He examined the Appellant and found 6% disability. He needed painkillers for a year.

20. PW3 was the appellant, he said he used to ride a motorcycle but after the accident, he now roasts maize. He adopted his report. He was not cross-examined on the occurrence of the accident but on the charging of the driver. I equally note that had the Appellant been to blame, he was also liable to be charged. Nevertheless, neither the Appellant nor the Respondent driver were charged. The Plaintiff closed his case on 29/4/2021.

21. The report by Dr. Udayan Oteh dated 24/9/2020 and field in court on 14/10/2020. On 29/4/2021 it was produced by consent. The driver did not testify. The defence did not have evidence on liability.

22. The Appellant's witness statement stated that 'Motor Vehicle Reg. No KCX 750 W Toyota Vitz was so negligently driven and at a very high speed and on reaching the Gulf area the driver of the said motor vehicle lost control and veered off the lane and crushed into me as a result of which I sustained serious injuries and pain all over my body.' I shall revert on this part.

Submissions

23. The parties filed comprehensive submissions. The Appellant submitted that the occurrence of the accident was not controverted hence the Defendant should be held liable.

24. The Defendant relied on the authority of Blyth v Company of Proprietors of Birmingham Waterworks as cited by the Court as cited in Kenya Power & Lighting Co. Ltd v Mathew Kabage Wanyiri [2016]

eKLR as an authority for the burden of proof in an action for damages for negligence. The court in that matter stated as doth: -

> " It is important to recall the holding in the old English case of Blyth vs The Company of Proprietors of the Birmingham Waterworks where it was held inter alia:-
>
> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do...."
>
> In Halsbury's Laws of England it is stated as follows:-
>
> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established."

25. They also relied on the authority of Statpack Industries v James Mbithi Munyao [2005] eKLR, where the court stated as doth; -

> " In Wilsher vs Essex Area Health Authority (1988) 2 W. L. R. 557 the House of Lords held that where a Plaintiff's injury could have been caused by six possible factors of which the defendant's negligence was only one, the onus was on the Plaintiff to establish "causation", and that, in that case he had failed to establish that the defendant's negligence was the cause of the accident. It is instructive to note that in the Wilsher case, the House of Lords noted that at least one of the factors of negligence could be attributed to the defendant. Here in this case before me, not a single element of negligence has been pleaded or proved against the Appellant, who took all reasonable steps to provide protective clothing, and to instruct employees on safety issues."

26. Finally, they relied on Kiema Mutuku versus Kenya Cargo Handling Services Limited (1991) 2 KAR 258. Reliance was placed on section 47A of the *Evidence Act* which provides as follows: -

> " Proof of guilt.
>
> A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

27. The 1st Respondent relied on other authorities, basically on the burden of proof. They make an alternative submission that the parties should be found 50:50 liable.

28. After analysing the submissions, the court gave Judgement in the following terms;

The Plaintiff's suit is dismissed with costs.

General damages Ksh. 180,000

Special damages Ksh. 2,350.

Specials Ksh. 3,000 per month for 2 years

physiotherapy Ksh. 25 000 for a year.

29. The Plaintiff in the lower court was aggrieved by the decision and appealed to this court vide a seven-paragraph memorandum of appeal. The appeal was on quantum and liability.

30. The Appeal was opposed by the respondents through their written submissions.

Analysis

31. The Court was given a rock-solid case. She unfortunately veered off the road and started her own case. In that case she found facts outside the of the facts that were before the court. The court was operating under a fallacy that facts must be documented. When you have testimony, the same is sufficient and primary facts.

32. The Plaintiff's testimony was that was he was lawfully cycling when the Respondent's motor vehicle veered off his lane and came to the Plaintiff's lane. It is irrelevant how he veered off his lane.

33. The 1st Respondent did not cross-examine the Appellant on the how the accident occurred. The only questions asked were: -

    a. The time of the accident.

    b. Whether the driver was charged.

34. Both these questions did not go into liability. Whether the driver is charged is a matter of the discretion of the Office of the Director of Public Prosecution. I am required under section 60(1)(o) of the *Evidence Act* to take judicial notice of the matters of general or local notoriety. I thus take judicial notice that the accident occurred on 31/3/2020. At that time, there was a worldwide pandemic of Coronavirus later known as Covid-19. The National Council of Administration of Justice limited the cases to be filed to serious cases of murder, gender-based violence and sexual offences. Traffic offences were not being taken to court. Even causing death by dangerous driving was not serious enough to be included.

35. In any case, the charging of a person does not connote in any way they are negligent or otherwise. I have also seen a mistaken belief that the court can impeach the police abstract. The abstract indicated that the driver of KCX 750 W was indicated as intended to be charged for driving without due care and attention. The Court appeared determined to have the 1st Respondent set free against the weight of the evidence before it.

36. The 1st Respondent had submitted that the court could find them 50:50 liable. This can be seen from the arguments in the case of Simon Waweru Mugo v Alice Mwongeli Munyao [2020] eKLR, where Kemei J stated as doth; -

> " 22. Where negligence has been established and where there is a head on collision the court is required to make a call on apportionment of liability. Spry V P in Lakhamshi v Attorney General, (1971) E A 118, 120 rendered himself thus:
>
> "It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in

conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident."

37. The above could be true where there is doubt as to the liability if any of parties. In this case, it is doubtful that the 50: 50 case applies. In the case of Omar Farah v Lento Agencies [2006] eKLR, and it held as follows:

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

38. The Appellant tendered cogent evidence of liability. However, the standard of proof placed on him were of criminal nature, that is to say, beyond reasonable doubt. The court erred on placing road blocks on succinct and uncontroverted evidence of the Appellant.

39. The Respondent had an evidentiary burden to prove that the veering off the road was not due to negligence but had occurred without negligence on their part. In In the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ), the Supreme Court held that: Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial" with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

40. The court continued as doth in the said case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another[Supra]: -

> " According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:
>
> "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.

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."

41. 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."

42. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

43. There was no rebuttal of the Appellant's evidence. The case before the court was cogent and the burden of proof was met and surpassed. In the end, the finding that the Plaintiff did not prove his case is without basis. I set it aside. The 1st Respondent did not tender evidence on contributory negligence. Without being given evidence, the Court has no authority to apportion liability of contributory negligence on the Appellant.

44. I agree with Justice C Kariuki in Leo Investment Limited v Mau West Limited & another [2019] eKLR when he stated as doth, as hereunder: -

> " The appellant chose not to call any witness despite it having filed a defence. In Shaneebal Limited vs County Government of Machakos [2018] eKLR, Odunga J while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:
>
> ".....According to Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:
>
> Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are

not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...."

45. Pleadings are baseless when no supported by evidence. Pleadings are not proof in themselves. They must be supported by evidence. There is no basis to find the party even equally liable.

46. I therefore dismiss any guilt for contributory negligence as unfounded Once the Appellant had proved that the motor vehicle veered off its lane and hit him, the onus was upon the 1st Respondent to tender evidence to displace the evidentiary burden.

47. In this case, the Appellant's evidence is cogent and uncontroverted. The minor deviations between the police and Appellant is to be expected. The police had reported evidence while the Appellant had first hand evidence. The standard is beyond reasonable doubt, not beyond a shadow of a doubt.

48. In Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR, the court, Justice R. Nyakundi, stated as doth: -

> " As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to me considered the greatest jurist of our time Lord Denning: "That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence

49. Once the Defendant opted not to testify, their defence became worthless. It is not evidence. Those are surmises and conjectures. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was, stated as doth: -

> " Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

50. Similarly, in the case of Hyrdo Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR)

(Commercial and Tax) (10 August 2021) (Judgment), the court, justice, JOHN M. MATIVO J, as then he was correctly stated as doth: -

> " The existence of a contract between the parties was not disputed. Since the defendant filed a defence but failed to attend the trial, the plaintiff's evidence which showed that the defendants were in breach of contract was uncontroverted."

51. The Appellant's evidence is thus uncontroverted vis a vis liability. Even where the defence does not tender evidence, the burden of proof on damages is not lessened. In the case of Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia [2021] eKLR, justice Edward Murithi stated, and I fully agree with him that: -

> 21. It is not in dispute that Counsel for the Appellants proceeded on the mistaken interpretation of the provisions of Order 10 Rule 6 that he was not required to call any evidence with respect to the aspect of liability for the claim of negligence. The Court also failed to point out to the Counsel of the need to have the matter heard on liability. The Court and the Appellant's Counsel made use of the term formal proof, which term this Court observes is not defined in the Civil Procedure Rules. The term formal proof has been considered by Emukule J in Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR and approved by Havelock J in Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR as follows: -
>
> > "In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;
> >
> > " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."
>
> 8. Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.
>
> I respectfully agree.

52. I therefore set aside the Court's finding on liability and in lieu thereof find the 1st Respondent 100% liable. I agree with the Court that there was no evidence of service on the 2nd Respondent. The case against them thus remains dismissed.

Quantum

53. In ground 6 of the Memorandum of Appeal, the Appellant poses the issue of quantum. The same is verbose but clear in terms of the complaint that the award of damages of the court was plainly wrong. The Appellant pleaded serious injuries as shown in paragraph 6 of the Plaint.

54. The Appellant had submitted a sum of Ksh. 600,000 to be adequate. The 1st Respondent submitted a sum of Ksh. 180,000. The 1st Respondent relied on the case of Patrisia Adhiamno Omolo vs Emily Mandala (2020) eKLR where the Court confirmed Ksh. 150,000 for the forfeiture of the forearm radius and bone.

55. The Appellant on the other hand relied on a 10 year old case of Kennedy Ago Lidweye vs Steel Plus Ltd (2012) eKLR, where justice Ang'awa Jas then she was awarded 400,000/=. These were, for Compound fractures, regent distal radial ulna and soft tissue injuries. In the circumstances this authority does not reflect the injuries suffered and is of no use, being over 10 years old.

56. As regards to damages, the court of appeal pronounced itself succinctly on these principles in the Court of Appeal in Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2) [1987] KLR 30 held 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."

57. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, 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..."

58. 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. It must be that the figure awarded is inordinately high or low to represent an entirely erroneous estimate. This was settled in Butt vs Khan [1981] 1 KLR, 349, 356 where Law JA stated as doth:

> " An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. Further, In George Kirianki Laichena vs Michael Mutwiri, (2011) (eKLR) The court rendered itself as follows:-

> "It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. west & Son Ltd vs Shepherd [1964] AC 326 at page 353:-
>
> "The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong, the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does however not proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

59. The duty therefore is not to substitute the discretion of the court but to see whether the court exercised its discretion judiciously. It is not enough that were I sitting in this matter, I would have given a different figure. It is important to note that cases are different, damages are the same. No one case is like another.

60. Justice Majanja pronounced himself in Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR 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."

61. The Appellant suffered Fracture right distal radius (forearm) bone and sprain of the left hip. He has 6% permanent disability. This has resulted in post traumatic arthritis and stiffness and reduction of power of grip of the right hand.

62. There is a lifetime of recurring post fracture pains in the right forearm especially during times of cold season.

63. The future medical care required Ksh. 3,000 per month for 1 year and physiotherapy at Ksh. 50,000 for a year. This was also Dr. sheath's report which I have not laid down my views on. The document was not part of the record of the Appeal. The 1st Respondent has not raised the same in their submissions.

64. Dr. Daniel Wambua Kiema testified and explained his medical reports. The court made a finding that she was inclined to agree with Dr kiema's findings though Dr Seth was an orthopaedic surgeon. The court did not disregard Dr Kiema's report but believed it. There is no challenge to that finding. This court has no reason to depart from the finding. Though Dr Seth's report was admitted into evidence by consent, the doctor did not explain the difference.

65. Despite misgivings on the substance, I find the findings by Dr. Kiema consistent with the Appellant and the observation by court at page 132 of the record where the court states: -

> " I note that the Plaintiff walked with a slight limp and dragged his foot and sat down during his testimony."

66. I note with great admiration that the Court recorded proceedings in a very clear and understandable manner. She also recorded her observations which have been very useful in my decision. In spite of the findings, I still commend the court for a superb job in tidiness of proceedings.

67. The operative injuries were as shown in Dr. Kiema's report. The Court noted that the Appellant had deformities. I therefore do not find the report by Dr. Sheth to be a proper reflection of the injuries suffered by the Appellant.

68. The Court awarded Ksh. 180,000 as general damages. She relied on the decision of Patrisia Adhiambo Omolo versus Emily Mandala (2020)eKLR. In that case, the claimant therein suffered, Fracture of the left forearm radius and ulna bones, Colles fracture of the left forearm, Swollen deformed distal aspect of the left forearm, Multiple bodily injuries and Injuries on the left forearm with swelling. In arriving at a conclusion that 180, 000/= was adequate, the court in the above case relied on the decision of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko Nairobi HCCA 203/2001. This decision was 18 years too old. That case turned on its own facts and does not represent the current trend in such matters and injuries of that magnitude.

69. The Court observed that there was a limp but the limp was not in contention. The Court felt that it was the hand that was injured.

70. The Court misdirected itself on the injuries. There was a sprain on the hip which had been pleaded.

71. The P3 showed tender left knee and distal and left hip together with a fractured right radius. The report at page 107 of the record bears witness to that. It was indicated as blunt object trauma and strain of the left hip and laceration wound on the left knee. The scar on the knee is 3 by 8 cm.

72. In effect, the Court in arriving at its decision disregarded evidence of the sprain and strain of the left leg and the 3 by 8cm (24cm) wide injury on the left leg. Thi was pleaded as particulars No. (II) and (III) of paragraph 6 of the Plaint.

73. In so doing, the court arrived at an award for damages that was so inordinately low as to amount to an erroneous estimate of damages.

74. An award of Ksh. 180,000 for tissue injuries and 6% permanent disability is not commensurate with the pain, suffering and loss of amenities the appellant suffered.

75. The Appellant must at all times know that damages are not gratuitously given. The court does not in any way regard or restore the body. It is to compensate for pain and suffering.

76. In the case of Joseph Njuguna Gachie Vs Jacinta Kavuu Kyengo, Hcca No. 31 Of 2017,, the court awarded 600,000 for slightly more serious injuires. In the case of Joseph Njuguna Gachie v Jacinta Kavuu Kyengo [2019] eKLR, the court awarded 600,000/= for had a fracture of the left radius with dislocation of the ulna bone and plating was done.

77. In the case of Lawrence Wairimu Wainyoike & another v Joseph Letting [2021] eKLR, the court reaffirmed 500,000/= for fracture of the clavicle.

78. In the recent decision by justice S MGithinji, Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another [2020] eKLR the court re-affirmed 500,000/- for similar injuries.

79. In that the damages are not I have no choice other than to set aside the entire award of Ksh. 180,000. I have seen comparable authorities and a sum of Ksh. 500,000 as damages for pain and suffering of amenities.

Copy Authorities

80. The Court awarded Ksh. 3,000 per month for pain killers. There was no appeal on the same, I therefore allow the same. There is equally no appeal to the award of Ksh. 25,000 per year for physiotherapy. The award of special damages of Ksh. 2,550 is equally unchallenged.

81. In the end, I set aside the Judgement on both quantum and liability as aforesaid.

Determination

82. At the end of the day, I find the Appeal merited and I allow the same. I set aside the Judgement and Decree of Sandra Ogot SRM given on 1/10/2021 and in lieu thereof enter Judgement for the Appellant against the 1st Respondent as follows;

a. Judgement for the Appellant against the 1st Respondent on liability at 100%

b. General damages for pain, suffering and loss of amenities Ksh. 500,000.

c. Special damages Ksh. 2,550

d. Costs of future medical expenses;

i. Painkillers (Ksh 3000 x 24 months = Ksh. 72,000)

ii. Physiotherapy Ksh. 25,000

Total Ksh. 97,000

e. Costs of Ksh. 90,000 for the Appeal.

f. Respondent's bear the Appellant's costs in the subordinate court.

g. The case against the 2nd Respondent stands dismissed.

h. Stay of execution for 30 days.

i. The Judgement herein be served personally on Hon. Sandra Ogot.

j. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent.

Court Assistant - Brian