**Joho v Thoya (Civil Appeal E104 of 2022)**
**[2023] KEHC 23452 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23452 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL E104 OF 2022**

**DKN MAGARE, J**

**SEPTEMBER 25, 2023**

**BETWEEN**

**YUSUF ABUBAKAR ALI JOHO ..... APPELLANT**

**AND**

**KATANA SYRIA THOYA ..... RESPONDENT**

***(Being an Appeal from the Judgement and Decree of Honourabe D. Sitati, Resident Magistrate delivered in Kilifi SPMCC No. E119 of 2020 on 17th October 2022)***

**JUDGMENT**

1. The Appeal arises from the Judgement and Decree of Court delivered on 17th October 2022 in Kilifi SPMCC No. E119 of 2020 in favour of the Respondent as follows:

    1. Liability 100%
    2. General Damages for pain and suffering Kshs. 750,000/-
    3. Loss of earning capacity Kshs. 100,000/-
    4. . Future Medical Costs. Kshs. 86,000/-
    5. Special Damages Kshs. 2,000/-

    Total Kshs. 938,000/=

    with costs of the suit and interest.

2. The Appellant being aggrieved by the Award filed this Appeal and preferred 5 grounds in the Memorandum of Appeal.

3. 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. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. 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..."

5. Hitherto, in the case of *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."

6. The Memorandum of Appeal raises only one issue, that is,

> The Leaned Magistrate erred in properly appraising the evidence and the law regarding the assessment of damages and so arrived and an erroneous and excessive award of damages.

7. The Appellant did not appeal against the liability which the Court awarded at 100% in favour of the Respondent.

8. The rest of the issues 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.

9. The matter was placed before me in an initiative to decongest the case backlog at the Malindi High Court. The Parties were directed to file submissions.

**The Appellant's Submissions**

10. The Appellant filed submissions in support of the Appeal contending that the award was inordinately excessive as the Trial Court failed to analyze the evidence.

11. The Appellant relied on the case of Sumaria & Another vs Allied Industries Limited and Selle and another Vs Associated Motor Board Company and Others (supra) to assert the position that this Court was entitles to re-evaluate the evidence and law and make a determination as to whether the damages assessed by the Trial Court amounted to an extraneous estimate.

12. It was the submission of the Appellant that the Trial Court disregarded the evidence by, PW1 confirmed during cross examination that he had been reexamined by the Appellant's Doctor, Dr. Noorani in September 2021 who had told him that the fractures had healed although he still experienced pain on his waist.

13. Further, the Trial Court did not take into regard that PW2, Dr. Kiema awarded the Respondent 7% permanent incapacity.

14. Counsel also relied on Abdi Haji Gulleid vs Auto Selection Kenya Limited (2015) eKLR where the Plaintiff sustained injuries to the upper limbs and wedge compression fracture at the back pf L1 spine and General Damages were awarded at Kshs. 750,000 in placed of Kshs. 300,000/ awarded by the Trial Court to assert that Award herein was excessive.

15. The Appellant submitted for the award of Kshs. 750,000/- as General Damages did not consider that the Respondent's incapacity was merely 7%. And there was variance in time the medical reports in this and the Decision in the case of Abdi Haji Gulleid (supra) where disability was assessed at 25% and proposed Kshs. 3000,000/= as reasonable and adequate compensation.

16. Counsel also cited the case of Getange vs Waridi Limited (2022) KEHC where the High Court upheld an Award of Kshs. 300,000/= for a Plaintiff who had sustained injuries on the neck and back, compressed cervical spine fracture C3 & C4

17. On loss of earning capacity, the Appellant submitted that should be specifically pleaded and proved and that the Respondent's evidence was that he was a carpenter and had resumed work after the accident. Reliance was placed on the case of *Tile and Carpet Centre Warehouse vs Okello* (2022) KECA and submitted that the Award of loss of earning capacity was wholly erroneous and without legal basis.

**Respondent's Submissions**

18. The Respondent submitted that the reasoning of the Trial Court in the award of the General Damages was sound and supported and was not erroneous.

19. It was the submission by counsel that the Respondent suffered fracture of lumbar 3 vertebra with loss of curvature blunt trauma to the neck and forearm and bruises and lacerations to the forearm, legs and face.

20. Further, it was submitted that in *Tomothy Maina Mwangi v Virginia Kuria* (2020) eKLR with a similar and comparable injuries, the Court awarded of Kshs. 1,000,000/=.

21. The respondent submitted that the award of diminished earning capacity was correct and well supported since there was evidence that the Respondent, though had resumed carpentry work, would work on and off due to recurrent pains. Reliance was placed on the case of *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR as cited in *John Kipkemboi v Morris Kedollo* 2019 eKLR.

**Analysis**

22. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except, however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

23. 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."

**Submissions**

24. I have not sighted the Respondent's submissions.

25. The Appellant opened by addressing the duty of the court as 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* (supra)

26. The circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of *Kenya Bus Services Limited vs. Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial

court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

27. This Appeal being on quantum only, the principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary.

28. The Court of Appeal has pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (No 2) [1985] eKLR as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.:

29. 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 v British Columbia Electric Co Ltd*, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'
>
> We find the words of Lord Denning in the *West (H) & Son Ltd* (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:
>
> I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

30. The words of Lord Denning were reiterated by Nyarangi, JA. in *Kigaragari v Aya* [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

31. Further, in the case of *Kilda Osbourne v George Barned* and *Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both

Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

> "The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

32. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional....."

33. With the above guide, if the Award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. 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.

34. The Court is this case awarded Kshs. 750,000/- in General Damages.

35. I have evaluated the authorities relied upon by counsel for the Appellant. I note that except Abdi Haji Gulleid (supra), the authorities cited by the Appellant do not present comparable injuries. The injuries suffered therein are not comparable and counsel was not candid.

36. In *Abdi Haji Gulleid* (supra), the injuries are comparable but this Court, like did the Trial Court notes that the injuries in that case and this are comparable and the award of Kshs. 750,000/ was reasonable based on the injuries suffered.

37. I wish to restate the position in that case of *Easy Coach Limited v Emily Nyangasi* [2017] eKLR where Court opined that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (*Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others* [2004] eKLR).

38. Therefore, it is trite law that in assessment of damages in this case, regard should be had to the nature, severity and extent of the injuries suffered by the Appellant which, as is clear from the evidence and medical report was fracture of lumbar 3 spine with loss of curvature and blunt trauma, bruises and lacerations.

39. I note too that the Honourable Court in awarding damages for the loss of earning capacity relied on him having resumed duties. However, the Court wrongly treated resumption of duty as a minus for loss of earning capacity. With 7% earning capacity, it means he had 93% earning capacity that is not lost.

40. The best way to settle this issue is to find reasonable earning less 93% capacity to get lost earnings. The award of Kshs. 100,000/-was thus on the lower side for the 54 year old. He would have worked well for the next 10 or so years at a minimum wage of Kshs. 28,487.42 for carpentry in Mombasa based on the Regulation of Wages (General) (Amendment) Order, 2022.

41. For instance, in the case of *Kibue & another v Ngige* (Civil Appeal E258 of 2021) [2022] KEHC 478 (KLR) (Civ) (6 May 2022) (Judgment) the court stated as follows when faced with an issue of assessing damages for loss of earning capacity:

> In assessing the same and contrary to the figure applied by the learned trial magistrate, I will apply a multiplicand of Kshs.18,319.50 being the minimum wage for a car/light van driver pursuant to the Regulation of Wages (General) (Amendment) Order, 2018

42. In this case, this then works out as current minimum wage of Kshs. 18,936.85 for ungraded artisan. The Respondent indicated that he was a carpenter. This was not challenged. He was 54. He could work for 10 more years this works as follows; -

> 10 x18,936.85 x 7% x 12= Kshs. 159,062.40

43. Further, in the case of Peter Kusimba Nyongesa & another v Willy Muli Musyoka Maati [2021] eKLR, the Court stated as follows: -

> " In assessing the same, I will apply a multiplicand of Kshs.18.595.20 being the minimum wage for a tailor pursuant to the Regulation of Wages (General) (Amendment) Order 2015. I also find the multiplicand of 10 years which was applied by the learned trial magistrate to be reasonable. I will further consider the degree of incapacity of 20% which was assessed in the first medical report. The same shall be tabulated as follows:
>
> Kshs.18,595.20 x 10 x 12 x 20/100 = Kshs.446,284.80."

44. The award of 100,000/= was well within the discretion of the court. In any case, the Respondent did not appeal against this Award and I cannot thus fault the Trial Court for the judgement passed in that respect.

45. I will not disturb the award of special damages and future medical costs, General Damages and Loss of Earning Capacity as the same are within the range of similar decisions.

46. In the circumstances, and based on the evidence and authorities, I find that the award by the Trial Court of Kshs. 750,000/- for General Damages was not inordinately high or low as to be wholly erroneous estimate of damages.

47. The Appellant did not lay basis for the court to disturb the award. Accordingly, in exercise of the powers granted to the Court under Section 27 of the *Civil Procedure Act*, I award costs of the Appeal of Kshs 90, 000/= payable to the Respondent within 30 days from the date hereof. In default execution to issue. It is so ordered.

**Determination**

48. In the upshot of the foregoing, I make the following orders: -

    i. I dismiss the Appeal with costs.

    ii. costs of the appeal are awarded at a sum of Ksh. 90,000/= to the respondent.

iii. The costs be payable within 90 days in default execution to issue.

**DELIVERED, DATED AND SIGNED AT MALINDI, VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER, 2023.** .

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Baraka for the Appellant

No appearance for Respondent

Court Assistant - Brian