



REPUBLIC OF KENYA



KENYA LAW
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**Mumiru v Sulubu & 2 others (Civil Appeal 126 of 2022)
[2023] KEHC 24384 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 126 OF 2022
DKN MAGARE, J
OCTOBER 24, 2023**

BETWEEN

MOSES GITHINJI MUMIRU APPELLANT

AND

BONIFACE NGELA SULUBU 1ST RESPONDENT

EXPRESS KENYA LIMITED 2ND RESPONDENT

ALEX OCHIENG ODUOR 3RD RESPONDENT

JUDGMENT

1. The matter arose from the decision of the Honourable Onalo J.K. Olaga given on 28/10/2022 given in Malindi CMCC 658 of 2020. Appellant then filed a humongous 11 paragraph Memorandum of Appeal dated 23/11/2022. The memorandum of Appeal is prolixious and unseemingly as it raises the same issues repetitively.
2. The Appellant should file concise Memorandum of Appeal. Under order 42 rule, 1 provides as follows: -
 - “ 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 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 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.

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 it 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 first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v 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. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
10. In the case of *Peters v Sunday Post Limited* [1958] 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...”
11. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR, Justice D.S 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.”
12. 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.
13. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 [1984] KLR where the Court of Appeal held at paragraph 8 as follows

“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 ofis 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.”



14. 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.
15. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
16. 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...”
17. 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.
18. The appeal raises only three issues, in addition to costs, these are :-
 - a. Whether the Learned magistrate erred in her findings on liability.
 - b. Whether the general damages of Kshs. 100,000/= were excessive and inordinately excusive as to amount to an erroneous estimate of damages.
19. When the mater came before me, I directed that the 2nd Respondent to file submission within 7 days. Judgment was for today.
20. I have perused the Court file and noted that the Appellant and 1st Respondent have filed submissions. However, the 2nd Respondent has not. The Appellant stated that the injuries were soft tissue injuries, that is: -
 - a. Cut on the left hand
 - b. Blunt injury to the lower limb.
 - c. Blunt injury to the lower back.



21. The Court awarded 150,000/=. The Appellant relied on cases decided in 2002 and 2006 where an award was made for 30,000/= and 60,000/=. Liability has already being dealt with so. I shall address quantum.
22. The 1st Respondent relied on Justice Nyamwega Ochoki & Another v Jomna Karisa Kipingwa [2021] eKLR where an award of 150,000/= was made.
23. In this matter, the question is not whether the damages were excusive but inordinately excusive. The High Court, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Serucie v 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.
24. 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 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...”
25. 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.
26. 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.
27. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
28. The injuries that were awarded were soft tissue in nature. The authorities relied by the Appellant. If the inflationary trend is taken into consideration the arrive at the same amount as the 1st Respondent. The damages are not excusive in any way.
29. Consequently, this court has no authority to substitute its own discretion, for the Magistrate’s discretion.
30. In the case of *Francis Omari Ogaro v JAO (minor suing through next friend and father God* [2021] eKLR, the court awarded 180,000/= for similar soft tissue injuries.



31. In the case of Ephraim Wagura Muthui 2 others v Toyota Kenya Limited & 2 others [2019] eKLR, Majanja J set aside the lower court award of Kshs. 55,000/= for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/=.
32. The injuries awarded are within range. Accordingly, I do find that the Appeal lacks merit and is accordingly dismissed with costs of Ksh 65,000/= to the 1st Respondent. The 2nd Respondent did not file submissions or oppose the Appeal. He shall bear their own costs.

Determination

33. The upshot is that the court makes the following orders: -
 - a. The appeal lacks merit and is this dismissed in limine with ousts of 65,000/= payable to the 1st respondent.
 - b. The payment be made within 30 days, in default execution to issue
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mohamed for Ms Waithera for the Appellant

Mr. Kilonzo for 1st Respondent

Court Assistant- Brian

