Mumiru v Wanjiku & 2 others (Civil Appeal 112 of 2022)
[2023] KEHC 24328 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 112 OF 2022

DKN MAGARE, J

OCTOBER 24, 2023

BETWEEN

MOSES KITHINJI MUMIRU ..... APPELLANT

AND

MARY NJERI WANJIKU ..... 1ST RESPONDENT

EXPRESS KENYA LIMITED ..... 2ND RESPONDENT

ALEX OCHIENG ODUOR ..... 3RD RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Onalo J K Olga – SRM dated 28/10/2022 arising from Malindi CMCC No. 48 of 2020.

2. The Appeal is on both liability and quantum.

3. The matter is in a series of others, which I am also delivering their judgments, today. The finding on liability is the same for all the matters.

4. The Memorandum of Appeal, however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolitixious 11 - paragraph argumentative Memorandum of Appeal dated 23rd November 2022. The grounds are argumentative, unseemly and do not please the eye to read.

5. Order 42 Rule 1 that requires that the memorandum of Appeal be concise. The same 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."

6. 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..."

7. 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."

8. The Memorandum of Appeal raises only two issues, that is: -

   a. The quantum of damages

   b. Liability

9. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

10. The Plaint dated 14th September 2020 claimed damages for an accident on 26/11/2019 involving Motor Vehicle Registration Number KBG 734K owned by the 2nd Defendant. Motor Vehicle Registration No. KBY 740Y was driven and owned by the 1st Defendant. The Plaintiff set forth particulars of negligence for each of the vehicles. The Plaintiff pleaded Ksh. 2,550/= as Special Damages

and injuries as follows: Fracture of the right acetabulum hip socket borne and blunt injury on the right hip.

Record of Appeal

11. The Respondent took a considerable time and space complaining on the incompleteness of the Record of Appeal. The Record of Appeal is a creature of the Court of Appeal for the Court of Appeal. The Record of Appeal in the High Court is a matter of practice. The High Court is a Court of record. It is bound to refer to the Trial Court's notes and pleadings.

12. Section 79G of the *Civil Procedure Act* provides as follows: -

> " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:
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> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."

13. In other words, once a decree is filed, then the Appeal is ready for hearing. Most appeals delay because of delays in the preparation of the Record, which is unnecessary and undesirable.

14. The Record of Appeal is filed in the Court of Appeal. That is why the Court of Appeal does not call for the original court file. It relies on the competency of the Record from the High Court, since the High Court, is a Court of record as opposed to the Subordinate Court.

15. Therefore, it is a waste of judicial time to argue on the completeness of the Record of Appeal. The documents that must be complete are the Trial Court file. I shall therefore disregard complaints on the Record of Appeal, in absence of a Rule of practice making the record mandatory.

16. In fact, most Records of Appeal are unusable. For example, the one filed herein has documents that have no applicability in answering the issues in question in the Appeal. They include documents filed but not produced as evidence, orders, applications, affidavits and post-judgment applications. Though there is no requirement for filing a record, those who wish to file should file the following as per order 42 rule 13(4) of the Civil Procedure Rules: -

    a. Memo of Appeal

    b. Plaint and summons

    c. Defence and counter claim

    d. Reply to defence

    e. Proceedings

    f. Exhibits.

    g. Judgments and Decree

    h. Statements admitted in evidence.

1st Defendant's Defence

17. The first Defendant filed defence and blamed the Plaintiff and the 2nd and 3rd Defendants. The 1st Defendant is now the Appellant herein. I will use the record of written notes with the original file.

Record

18. I tried to read the Record of Appeal but gave up, it is unseemingly and cannot be said to be a record of the Court below.

Evidence

19. It was the Plaintiff's case that she was a passenger in the Bus from Malindi. She stated that the canter KBY 740Y was overtaking the Tipper when it hit them.

20. It was thus his case that Motor Vehicle KBY 740Y came to the side, it was being driven very fast. They collided while overtaking the vehicle that was on the left. The 1st Respondent had injuries as follows:

    a. Fracture of the right acetabulum hip socket.

21. PW2 introduced as No. 86096 PC Jonathan Mwendwa testified that the accident occurred on 26/11/2019. The accident involved KBG 374K bus, KBY 753 L canter and Tipper KCB 657. The minibus and Vitz were from Mombasa while the canter and Tipper were from Malindi to Mombasa, with KCB 657F in front.

22. That from Mombasa direction, the minibus was ahead. He blamed the motor vehicle that was overtaking the Tipper, that is the canter KBY 740Y and KCB 657F which are not subject of this Appeal.

23. On cross examination he stated that the canter was to blame. The accident occurred on the lane towards Malindi from Mombasa. This is the lane where the Vitz and minibus KBG 374K were.

24. The Court delivered its Judgment on 28/10/2022. The Judgment was as follows:

    a. Liability 80% against and the 1st Defendant.

    b. 20% against the 2nd and 3rd Defendants

    c. General Damages 460,000/=

    d. Special Damages 2,550/=

    Total Kshs. 462, 550/=

25. The Court did not indicate the apportionment. It is important when delivering judgments, the court comes up with the full, spectrum of the judgment. It should not let lawyers do the calculations on their own. This court should also indicate, at all times from which date special damages attract, interest. In default of so doing, the specials will always attract interest from the date of filing the suit.

26. The Appellant had issue with Wambua Munyoki and Insurance Investigator, whom they stated had their evidence ignored. They wondered how come the court did not raise any issue with PW2 Constable Mwendwa. Who was not the investigating officer.

27. It was their contention that the 2nd Respondent did not file submission or tender evidence, then the evidence by the Appellant is not only an afterthought but unsubstantiated. I surmise that they mean the 2nd Respondent. They relied on treatment notes as evidence that the bus collided.

Submissions

28. The parties were served with the hearing notice. The service was done on 9/8/2023. Only the Appellant and 1st Respondent turned up for hearing. Though submissions were to be filed 15/8/2023, the 1st Respondent filed on 24/8/2023 and the Appellant on 14/8//2023. I did not find reason to give any adverse order.

29. The Appellant raised issue that the evidence of Jonathan Mwendwa relating the tipper lorry. They state that none of the claimants suffered loss of consciousness. They relied on cases of Ndungu Dennis vs Ann Wangari & Another [2018] eKLR that the notes are filled immediately with a medical practitioner without an interest in the case.

30. They also refer to Timsales Ltd. v Wilson Libuya [2008] eKLR where Justice D.K. Maraga, held as doth: -

> " .... A medical report by a doctor who examines him much later is of little, if any help at all. Although it may be based on the doctor's examination of the Plaintiff on who he may, like in this case, have observed the scars, unless it is supported by Initial treatment card it will prove the Plaintiff indeed suffered an injury on the day and place he claimed he did."

31. This was also reiterated by Justice R E Ougo in Easy Coach Ltd v Joyce Moraa Asiago [2021] eKLR.

> " .... In my view, treatment notes are the basic documents as they are made immediately after the accident by the treating medical practitioner on injuries sustained) See Johnstone Koech v Ibrahim Abdi Maalim [2021] eKLR and are more credible compared to medical reports made along after the occurrence of the accident."

32. They rely on the statement made by the medical practitioner as evidence that it was a collision. The Appellant could be found 80% liable. They allude to the absence of defence evidence. Surprising they lament without suggesting to the court, what and why someone else is to be held liable.

33. The Appellant also dealt with quantum of damages relied on the locus classicus case of Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123, on the duty of the court.

34. On quantum they rely on the authorities which are over 15 years old which I do not see the need to regurgitate here.

1st Respondents submissions

35. The 1st Respondent went into English grammar on what constitutes collision.

36. They relied on the fact that the available testimony was that they were in a corner. They state that it is not prudence for the Appellant to overtake at that point.

37. On liability they relied on the case of Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, where the court of appeal, O'Kubasu, Githinji & Waki, JJ.A, stated as follows:

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

"107. (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.

38. Further, they relied on the case of Sammy Mugo Kinyanjui & Another v Kairo Thuo [2017] eKLR and submitted that Kshs. 600,000/= would be adequate compensation for the Plaintiff. They however did not challenge the Decision.

39. They urged me to dismiss the Appeal.

Analysis

40. 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.

41. In the cases of Peters v Sunday Post Limited [1958] EA 424, the 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..."

42. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

43. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Servcie 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."

44. 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 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..."

45. 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.

46. Damages are said to be at large. They must be commensurate with similar injuries.

47. The precedents used by the parties for quantum were archaic. There is need for the parties to rely on recent decisions with commensurate injuries. Using very old decisions does not further the Appellant's case. The rule of the thumb is that the authorities should not be more than 3 years old. Anything above three years is not recent.

48. The authorities relied on are otiose and are not commensurate with the injuries suffered. In this case the court awarded the 1st Respondent a sum of 130,000/= for soft tissue injuries.

49. The Appellant urges me to substitute the same with 150,000/-. It is not the duty of the court to substitute the finding of the court, with mine. Can the amount of Ksh 150,000/- be said to be inordinately high?. Will substituting it with Kshs. 400,000/= be a proper exercise of discretion.

50. I note that the 1st Respondent suffered a fracture if the acetabulum hip socket. The court in this case awarded Ksh. 460,000/=. There is nothing to show that the exercise of discretion was improper.

51. In Similarly, in Kennedy Ouma Dachi v Joseph Maina Kamau & Another [2018] eKLR an award of Kshs. 1,000,000/= was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to Kshs. 1,400,000/= on the grounds that:

> " A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility... the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis."

52. In Cold Car Hire Tours Limited vs. Elizabeth Wambui Matheri [2015] eKLR wherein the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the lower court award of Kshs. 1,400,000/= as general damages was upheld by the High Court on appeal in a decision delivered on 11 February 2015.

53. In this case however, there was no recommendation for hip replacement.

54. Similarly, in Geoffrey Maraka Kimchong v Frechiah Hugiru [2020] eKLR the sum of Kshs. 1,000,000/- was awarded for: (a)Cut wound on the cheek which was tender. (b)Blunt trauma to the pelvis which was tender. (c)Fracture of the right acetabulum.

55. All these show that the Appellant's proposed Award of Kshs. 150,000/= is inordinately low and is declined in the circumstances. The Award of Kshs. 400,000/- by the trial court is low but I will not interfere with it since the 1st Respondent did not appeal. The injuries are not completely symmetrical but the award of Kshs. 460,000/- for a fracture to the acetabulum based on the authorities is inordinately low.

56. I note that in Simon Mungai Kariuki v Fatma Hassan [2017] eKLR, on which the trial court relied, the Plaintiff suffered an hairline fracture on her right forearm, soft tissue injuries and cut wounds on her leg. The injuries in that case are distinguishable from this Appeal where the 1st Respondent suffered fracture of the acetabulum.

57. The Appeal on quantum therefore has no basis and as such is dismissed in limine.

58. On liability the Appellant correctly raises the issue of 80% liability awarded by the Court. This is based on the writing on the medical chits. The same is the basis for the postulation that the court was wrong on liability.

59. First, medical evidence is not evidence of liability. Evidence was tendered by the 1st Respondent who gave viva voce evidence on what transpired. His evidence was that the two sets of 4 vehicles, 2 each were proceeding to different directions. The Appellant's motor vehicle, was overtaking a series of two vehicles when the accident occurred.

60. There was a Vitz and a minibus. The vehicle belonging to the Appellant was overtaking a series of vehicles in a corner. By overtaking in a corner, even where there are two vehicles, in traffic lingua, it is known as overlapping. The Appellant and their driver assumed a dangerous risk. They were careless and had no regard or duty of care to other road users. All factors taken into consideration the accident was caused by the overtaking when it was not safe to do so.

61. The other vehicles could have been on high speed. However, there was no evidence led by the Plaintiff that the speed caused the accident. It is important to remember that the primary duty to testify was on the Plaintiff. The Plaintiff's evidence exonerated the 2nd and 3rd Respondent. It is irrelevant that they did not testify. The Plaintiff did not at any time place negligence at their footsteps.

62. In the case of Netah Njoki Kamau & another v Eliud Mburu Mwaniki [2021] eKLR, justice Mary Kasango, stated as doth: -

> " 18. The appellants faulted the trial court for dismissing their claim in the light of the respondent not calling any evidence. What the appellant did in laying the failure of their case on the trial court was that they failed to appreciate that they bore the burden of proof to prove the allegations in their pleadings. The Court of Appeal in the case Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau [2016] Eklr had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-
>
> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

63. However, in this case, the evidence that remained unrebutted was that the Appellant's vehicle was to blame. The 2nd and 3rd Respondents were not blamed. They had nothing to rebut. There was indeed no basis for holding the 1st and 2nd Respondents liable. However, they did not Appeal and the court

properly exercised its discretion against them. Otherwise, there was no basis for holding them liable. Nevertheless, the court below had already found there 20% liable. That liability remains.

64. The upshot of the foregoing is that there is no merit on the Appeal on liability. Therefore, I dismiss the entire Appeal in limine.

Determination

65. The consequence of the foregoing, I that I make the following orders: -

a. The Appeal on both liability and quantum is dismissed with costs to the 1st Respondent.

b. The 1st Respondent shall have costs of Ksh. 55,000/= for the Appeal.

c. 30 days stay.

d. The file is closed.

DELIVERED, DATED and SIGNED at Virtually on this 24th day of October,2023. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Kilonzo for the 1st Respondent

Mr. Mohamed for the 1st Respondent

Court Assistant- Brian