REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E031 OF 2024

JAMES NGORIKI MAINGI alias
JAMES NGURIKI MAINGI ……

APPELLANT

VERSUS

JEREMIAH WILSON

MURIMI……RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. N. Kariuki (PM) delivered on 17.02.2022 in Nyeri CMCC No. E040 of 2020. The Appellant was the plaintiff in the suit. The suit had hitherto been struck out for being filed out of time. It was reinstated in my ruling dated 30.04.2025. This was after it was shown that leave to file appeal out of time had hitherto been granted though not filed in the appeal.

2. The trial court dismissed the suit, prompting this appeal. The Appellant raised six prolix grounds, all of which address a single issue, that is, liability. It is unnecessary to set out the said grounds as they are a waste of judicial time. Order 42 Rule 1 of the Civil Procedure Rules provides:

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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.**

3. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) 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

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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. 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."**

5. The appellant filed suit on 29.09.2020 seeking damages arising out of an accident on 1.02.2020 along Nyeri-Mweiga road at Mathari Hospital. The appellant was a rider of motor cycle registration number KMDJ 485 J. The defendant was the registered owner of motor vehicle registration number KCL 617 G. The said vehicle was said to be negligently driven resulting in the accident. The following injuries were pleaded:
    a. Bruises on the shoulder
    b. Deep cut wound on the left foot
    c. Swelling and tenderness on the left foot

6. The appellant pleaded special damages of Ksh. 3,550/=. The defendant filed defence on 26.10.2020 and denied there having been an accident as pleaded. It was their alternative position that the appellant was solely or substantially to blame.

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Evidence

7. PC Antony Opiyo from Nyeri Traffic Base testified of the occurrence of the accident. It was reported that the subject motor vehicle was coming from the direction of Mathari Hospital where at a junction, joined the main road and hit the motor cycle resulting in the injury of the motor cyclist. He produced a police abstract as exhibit 10. The investigating officer indicated in the record that the driver was to blame. On cross examination he stated that he could not confirm if the cyclist had protective gear. He also stated that the motor cyclists had 2 pillion passengers as opposed to one. The driver was to blame for failing to heed instructions when joining the main road to stop.

8. PW2 was the appellant. He adopted his statement dated 29.09.2020 and produced a list of documents. He testified that he was coming from Nyeri heading to Dedan Kimanthi University along Nyeri-Mweiga Road. He was wearing a helmet and so was the pillion passenger. He was on his rightful lane. Suddenly the motor vehicle joined the road from Mathari hospital and hit him without giving way. He set out injuries that he suffered. He was taken to Nyrei County Referral Hospital where he was admitted for a week. He was cross examined on irrelevant questions that have no bearing on liability. Filed suit against two respondents.

9. The respondent testified and adopted his statement. He stated that he indicated right and then had a loud bang. The motor

ORIGINAL

cycle hit his passenger side. He realized that the motor cycle had rammed into his vehicle. He was not charged in court. He blamed the appellant for the accident.

10. The court found a dilemma on the evidence and stated that the case was not proved. I have anxiously considered the matter and submissions and do not find it necessary to repeat them. I find it prudent to subsume them into the analysis for the sake of economy of space. This is also informed by three fundamental errors in the judgment that I find it prudent not to delve into unnecessary matters. These are: the role of a party joining a main road; whether there is need for corroboration in traffic matters; and the necessity to assess damages even where the case is dismissed.

Analysis

11. 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 firsthand. In the case of **Mbogo and Another vs. Shah [1968] EA 93**, the court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is

ORIGINAL

> 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."

12. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of **Selle and another Vs Associated Motor Board Company and Others [1968] EA 123**, where the Judges held 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."

13. 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.

14. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows: -

ORIGINAL

> "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…"

15. The court is called upon to determine the liability of the appellant. There is no dispute regarding the occurrence of the accident or the vehicle in question. The question concerns which party is liable for the accident involving motor cycle registration number KMDJ 485 J and motor vehicle registration number KCL 617G. There was no dispute how the accident occurred. The motor cycle registration number KMDJ 485 J was being driven on the main road Nyeri-Mweiga Road. The motor vehicle registration number KCL 617G was being driven from Mathari hospital. Effectively, the motor cycle had a right of way. The defence evidence alone confirmed the negligence of the Respondent. The respondent testified on two fundamental points; that is, he indicated right and he was hit on the passenger side. This brings me to the logic of such evidence. The only way such evidence could be true is that the respondent, entered the road on the wrong side of the road, and swept the motor cycle off its lane.

16. It also means that the respondent was on the road when he was indicating. There is no reason he could not see the motor cycle, except utter recklessness. There was no evidence led as

ORIGINAL

to the negligence of the motor cycle. The number of passengers the motor cycle was carrying is irrelevant when it is hit off its lane.

17. Before departing it is important to contextualize the lack of being charged for a traffic offence. History cannot be lost as at the date of accident, which was the height of Covid-19. The National Council for Administration of Justice had issued a circular limiting offences for which people could be charged. Careless driving was not one of them. In the circumstances, the court was plainly wrong in dismissing the suit. Judgment on liability is set aside. In lieu thereof, I substitute with a finding of 100% liability against the respondent.

18. The next question is quantum. Unfortunately, the court did not assess damages. The court has a duty to assess damages. This is because the lower court had the advantage of seeing the witness and making a proper assessment. It must be remembered that damages are at large. In **Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 others** (2019) eKLR, D.S Majanja J 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."**

19. The duty of the court regarding damages is settled that the state of the Kenyan economy and the people generally, and the welfare of the insured and the injured public must be at the back of the mind of the trial court. This was well elucidated in the case of **Butter Vs Butter** Civil Appeal No. 43 of 1983 (1984) KLR, where the Court of Appeal held as follows in paragraph 8.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

20. Finally, in deciding whether to disturb the quantum given by the lower court, the Court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously, considering the circumstances, to ensure that the award is not too high or too low as to be an erroneous estimate of damages. This cannot be done if damages are not assessed. Failure to assess damages makes the first appellate court grope in the dark. The hallmark of assessing damages is to enable the lower court to exercise discretion. The principles for disturbing damages were enunciated in the case of

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Kemfro Africa Ltd Vs 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.

21. The court has a duty to assess. Where this is not done the file is returned to the lower court for assessment. The Appellant pleaded the following injuries:
    a. Bruises on the shoulder
    b. Deep cut wound on the left foot
    c. Swelling and tenderness on the left foot.

22. The appellant in the lower court submitted that a sum of Ksh 350,000/= will suffice. Reliance was placed on an irrelevant decision, not worth quoting.

23. There was a second report produced by consent. It is clear that the injuries were serious soft tissue injuries. The P3 classifies the injuries as harm. Dr. Muleshe found the injuries had healed as of 13.08.2020. Though indicated as an open

ORIGINAL

fracture in one of the documents, it is clear that no fracture was found.

24. In **Michael Okello v Priscilla Atieno** [2021] KEHC 7266 (KLR), the court awarded Ksh. 250,000/= for injuries to the right shoulder, chest, back, and left leg, including a haematoma. On the other hand, in the case of **Lilian Anyango Otieno v Philip Mugoya Ogila** [2022] KEHC 1006 (KLR), the court awarded a sum of Ksh. 100,000/= for right-hand pain, right rib pain, and joint pain at the elbow. In **Michael Odiwuor Obonyo v Clarice Odera Ogunde** [2021] KEHC 4677 (KLR), an award of Kshs. 500,000/= was reduced to Kshs. 200,000/= for soft tissue injuries. The injuries were not as severe as the first decision. In the circumstances, doing the best I can, noting that I did not see the Appellant, an award of Ksh. 200,000/= will suffice.

25. On costs, the award of costs in this court is governed by Section 27 of the Civil Procedure Act. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

> "[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party

ORIGINAL

> shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

26. In the circumstances, the Appellant is entitled to costs against the Respondent.

Determination

27. In the upshot, I make the following orders: -

(a) The Judgment and decree of Hon. N. Kariuki delivered on 17.02.2022 in Nyeri CMCC No. E040 of 2020 is set aside. In lieu thereof, the order dismissing the appellant's suit is set aside and substituted with the following orders:

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(i) Judgment on liability for the appellant against the Respondent at 100%.

(ii) General damages of Ksh. 200,000/=

(iii) The appellant shall have costs in the lower court

(b) The appellant shall have costs of Ksh. 75,000/= for the appeal.

(c) 14 days right of appeal.

(d) Stay of execution for 30 days.

(e) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **15th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Rita Kariuki for the Appellant

No Appearance for the Respondent

Court Assistant – Michael

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