Mwangi & another v GKM (Minor Suing through his Father and Next Friend AMM) (Civil Appeal 133 of 2023) [2025] KEHC 2624 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2624 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 133 OF 2023

DKN MAGARE, J

FEBRUARY 27, 2025

BETWEEN

MARGARET WANGARI MWANGI ..... 1ST APPELLANT

GEORGE OMBIRO OBARE ..... 2ND APPELLANT

AND

GKM ..... RESPONDENT

MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND AMM

(Being an appeal from the Judgment and decree of Hon. B. O. Omwansa (SPM) given on 31.10.2023 in Kisii CMCC No. E502 of 2021)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. B.O. Omwansa (SPM) given on 31.10.2023 in Kisii CMCC No. E502 of 2021. The Appellants were the Defendants in the lower court. The court heard the matter and delivered judgment as follows:
    a. Liability 100% in favour of the Respondent against the Appellants.
    b. General damages Ksh. 250,000/=
    c. Special damages Ksh. 4,500/=
    d. Costs of the suit
2. The Appellants were aggrieved and filed a humongous 13-paragraph memorandum of appeal on quantum. Some grounds were utterly irrelevant, covering matters not in dispute, like Section 8 of the *Traffic Act*, which they indicated to be Cap 405. The last time I checked, it used to be Cap 403. The

memorandum of appeal is contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides the following: -

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (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 (now Rule 88) 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 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..."

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 issue is only one, that is, whether the damages awarded were so inordinately high as to amount to an erroneous estimate of damages. The rest of the issues are ancillary, repetitive, prolixious and a waste

of judicial time. It behooves counsel to have a precise and concise memorandum of appeal that is not unseemly to see. Some issues are out of this world and run-of-the-mill standardized memorandum that does not arise from the pleadings. For example, the provisions of the Insurance (Motor Vehicle Third Party Risk) Amendment Act 2013, wrongly referred to as Cap 405, are irrelevant and obnoxious.

Pleadings

10. Being an appeal on quantum, going to the pleadings related to liability is unnecessary. The Respondent pleaded that he suffered the following injuries:

    i. Injury to the lips with cut wounds.

    ii. Injury to the chest

    iii. Injury to the back with bruises

    iv. Injury to the right and left hand(s) with bruises.

    v. Injury to the right and left leg(s) with bruises.

    vi. Injury to the right and left knee(s) with bruises.

Evidence

6. Prof. Okombo, a senior retired Deputy Director of Medical Services and a former lecturer, testified that he examined the Respondent minor on 18.9.2020 for an accident of 15.8.2020. The minor suffered injuries to the chest, bruises on the back, and both hands and legs. He produced the report and receipt as exhibit 9(a) and (b). On cross-examination, he stated that these were soft tissue injuries and could have healed by then.

7. PW2 Alfred Komen confirmed that the minor was rushed to Tabaka Mission Hospital. PW3 was the Respondent minor's father, who produced several exhibits. Another PW3 (should be PW4), Lawrence Oreki Manyura, was the treating clinician. He stated that the minor had blunt injuries and could not move his back freely.

8. PW5 (indicated as PW4 was Robert Ouko from Ram Hospital. He was stood down. Another PW5 indicated as PW4 (making a record 3 PW4s) was sworn in and produced a treatment card. He stated, on cross-examination, that the minor was expected to have fully healed. The defence did not tender any evidence.

Submissions

9. The Appellant relied on the cases of the Appellant and submitted that an award of Ksh.120, 000/= would suffice. They relied on the case of HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [2021] eKLR, where the court declined to set aside the award of Ksh 60,000/- for the claimant who sustained blunt object injury to the head and neck, thorax, abdomen and limbs. The court found those injuries to be superficial.

10. The Appellant also relied on the case of Eva Karemi & 5 others v Koskei Kieng & another [2020] eKLR where the High Court upheld the trial court's assessment of quantum on general damages where the 1st Appellant was awarded Kshs. 70,000/-.

11. The Respondent relied on the case of Francis Njunge Karanu v Rose Ndinda Kitema [2021] eKLR, where A.K. Ndung'u awarded Ksh. 450,000/= for a claimant who suffered deep cut wounds on the face, blunt trauma to the right shoulder, blunt trauma to the left shoulder, blunt trauma to the lower

back, blunt trauma to the abdomen, blunt trauma to the pelvis, vaginal bleeding with incomplete abortion, bruises on the right leg; and bruises on the left leg.

12. They also relied on National Industrial Credit Ltd & 2 others v MNO (Minor Suing Thro' Next of Friend and Mother FNM) (Civil Appeal E035 of 2023) [2024] KEHC 3824 (KLR) (18 April 2024) (Judgment) where the court stated that the case law showed that claimants who suffered soft tissue injuries similar to the injuries suffered by the Respondent got awards ranging from Kshs 250,000/= to 300,000/=. The claimant, in that case, had suffered chest contusion, cut wounds on the left knee, blunt trauma to the scalp, and blunt trauma to the neck. She was awarded general damages of Kshs. 300,000/=. This later case is closer to the injuries at hand.

13. Respondent stated that the injuries were severe. Consequently, they prayed that the lower court decision should not to be disturbed.

Issues

14. There is only one issue for determination, that is, whether the award of Kshs. 250,000/= was inordinately excessive as to amount to an erroneous estimate of damages.

Analysis

15. This being a first appeal, this court must evaluate and assess the evidence and make its own conclusions. It must, however, remember 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 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."

16. 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 Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, 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."

17. The Court is to bear in 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, the 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.

18. In the case of Peters vs 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..."

19. In Nyambati Nyaswabu Erick Vs 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."

20. The first appellate court is under duty to have regard to award in similar cases and not foreign awards. In the case of Butler Vs Butler Civil Appeal No. 43 of 1983 (1984) KLR Keller JA, stated as follows in regard to award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
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> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
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> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

21. In HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [supra], the court stated:

> In cases of this kind, as the one being challenged by the appellant, what would be the general expectations of the trial court? There is obviously a relationship between the award and the nature of injuries suffered. The burden upon the claimant is in justifying the compensation on the threshold outlined in Cornilliac v St. Louis [1965] 7 WIR 491. This is simply for the trial court to take into account:
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> (a) The nature and extent of the injuries sustained.
>
> (b) The nature and gravity of the resulting physical disability.
>
> (c) The pain and suffering which had to be endured.
>
> (d) The loss of amenities suffered; and

(e) The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

22. A claimant to the accident might get well and restore to his or her original health status prior to the accident. Sometimes that is not the case in most instances, as stated in the case of Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470).

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

23. 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.

24. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR in a decision of 28.10.2021, the court stated that a sum of Kshs. 180,000/= will be sufficient for far more serious soft tissue injuries.

25. In Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, on the 2nd day of December 2019, the court found an award of Kshs. 300,000/= excessive and reduced it to 175,000/= for lesser soft tissue injuries.

26. The decision of HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [supra], referred to by the Respondent was more apt and in all fours with the injuries suffered by the minor herein. In the circumstances, the award of Ksh 250,000/= was proper. It was not excessive for the injuries proved to have been suffered. The court is aware that the Court of Appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs. Meru Express Service Vs. 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.

27. In the case of Ufrah *Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021*) [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment), this court confirmed an award of Ksh 220,000/- for the following soft tissue injuries: right shoulder joint, soft tissue injuries of the chest, soft tissue injuries of the back, deep lacerations on the right-hand arm, forearm and hand, soft tissue injuries of the knee joints and soft tissue injuries of the right hip joint.

28. In Michael Okello v Priscilla Atieno [2021] eKLR, R.E. Aburili J reduced damages from 500,000/= involving injury to the right shoulder, injury to the chest, injury to the back and injury to the left leg with haematoma, in 2011.

29. Noting the inflation, passage of time and the nature of the injuries, the award of Kshs. 250,000/= is not inordinately high. All the circumstances considered, the award was not so erroneous as to amount to an erroneous estimate of damages. It is not enough that the award is high. It must be inordinately high, which is not the case herein. I do not find merit in the appeal. It is consequently dismissed.

30. The Appellant was unsuccessful. The consequence is that they must bear the costs for the appeal.

Costs

31. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

32. 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 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– those 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.

33. In the end, I award the Respondent costs of Ksh. 55,000/- for the appeal. The file is closed.

Determination

34. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is dismissed with costs of Kshs. 55,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellants

Mr. Okumu for the Respondent

Court Assistant – Michael