Migwi & another v RH (Suing through his mother Julia Wairimu Kimani) (Civil Appeal 013 of 2023) [2024] KEHC 6129 (KLR) (Civ) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 013 OF 2023

DKN MAGARE, J

MAY 24, 2024

BETWEEN

MOSES MBUTHIA MIGWI ..... 1ST APPELLANT

MARIMO CONSTRUCTION LIMITED ..... 2ND APPELLANT

AND

RH (SUING THROUGH HIS MOTHER JULIA WAIRIMU KIMANI) ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 9th December 2022 by Hon. Hon. Paul K. Rotich, Senior Principal Magistrate in Milimani CMCC No. 4804 of 2016. The Court Awarded Damages as follows:

   1. Liability 90:10.

   2. General Damages Kshs. 800,000/-

   4. Special Damages Kshs. 59,650/-.

   Less 10% contribution Kshs. 85,965

   TOTAL Kshs. 777,685 /-.

   with costs of the suit and interest.

2. Aggrieved, the Appellant filed this Appeal lodged the Memorandum of Appeal.

3. The Memorandum of Appeal, however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolitixious 7 - paragraph argumentative Memorandum of Appeal. The grounds are argumentative, unseemly and do not please the eye to read.

4. Order 42 Rule 1 that requires that the memorandum of Appeal be concise. The same provides as doth: -

> " 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."

5. 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..."

6. 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."

7. The Memorandum of Appeal raises only one issue, that is: - The quantum of damages.

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

Pleadings

9. The Plaint dated 22nd July 2015 claimed damages for an accident that occurred on 6th November 2014 involving Motor Vehicle Registration Number KBL 104D driven by the 1st Appellant and owned by the 2nd Appellant. The Respondent, a minor then aged 5 years while a pedestrian crossing the Southern Bypass Highway was knocked down by the 1st Appellant. He pleaded special damages of Kshs. 59,650/-, general damages and stated injuries as follows:

   Fracture of the lower C/3 of the left tibia

   Swelling of the left ankle.

10. The Appellant filed Defence and denied liability while also blaming the accident on the rider of the Respondent.

Evidence

11. On 5th September 2022, the parties entered consent on liability at 90:10 in favour of the Plaintiff. The witness statements and bundle of documents filed in court by both parties were also adopted in evidence. The parties then agreed to file submissions on the quantum of damages.

12. The learned magistrate considered the matter and delivered the Judgement from which this Appeal arises.

Submissions

13. The Appellant filed submissions on 13th March 2024. It was submitted that the award of general damages was inordinately high and negated the established principles.

14. The Appellant submitted that the award of Ksh. 800,000/= in general damages did not correspond with the injuries suffered and was excessive.

15. They submitted that the range if Kshs. 250,000-400,000/- in award for damages would have been appropriate and adequate compensation. They relied among others on the case of Gladys Lwaka Mwombe V Francis Namatsi & 2 Others (2019) eKLR, Daniel Otieno Owino & Another v Elizabeth Atieno Owour (2020) eKLR.

16. It was also submitted that the award of special damages was not proper because the special damages pleaded were not substantiated in evidence.

17. On the part of the Respondent, it was submitted that the Court correctly applied the applicable law and principles and arrived at an award of damages that was not inordinately high.

18. They relied on Pestony Limited & Another v Samuel Itonye Kagoko (2022) eKLR to support the submissions on general damages.

19. I was urged to dismiss the Appeal.

Analysis

20. 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.

21. Except, however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

22. 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."

23. 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."

24. 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.

25. The Court of Appeal 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.

26. 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 follows 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.'

27. The words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages are 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."

28. 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."

29. 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."

30. It is thus 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....."

31. 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.

    1. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
>
> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

33. Further, in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

34. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition 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 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

35. The Respondent suffered compound fracture of the left right tibia and fibula, deep cut on the sole of the left foot and bruises to the right lower leg. I understand the Appellant to submit that the injuries were not proved. I have reevaluated the evidence produced by the Respondent. I note that the injuries are what was stated in the Respondent's Doctor's Medical Report dated 3rd November 2016. The medical report of Dr. Waithaka for the Appellants also confirmed compound fracture.

36. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

37. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

38. The Learned Magistrate awarded Kshs. 800,000/-. The Appellants' contest is that the award was inordinately high. I have analyzed the cases relied upon by the lower court. I understand no single case is typically identical to the other. in Penina Waithira Kaburu v LP [2019] eKLR, the Court stated thus on the issue of award of general damages –

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

39. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.

40. Further, in the case Thomas Mwendo Kimilu Vs. Annne Maina & 2 others [2008] eKLR and Jacinta Wanjiku Vs. Samson Mwangi [2006] eKLR of the Court awarded Kshs. 700,000/= for the Plaintiff who sustained fracture of the right tibia and fibula, fracture of the humerus and amputation of the finger in 2006.

41. Furthermore, in David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Kss. 630,0000/- in 2017.

42. Therefore, the award in the bracket of Kshs. 250,000-400,000/- as proposed by the Appellants in my view inordinately low and does not amount to adequate compensation in respect of commensurate injuries. Om the other hand, the award by the learned magistrate of Kshs. 800,000/- is not inordinately high as to amount to an erroneous estimate of general damages. Therefore, I find that the court did not err in the award of general damages.

43. The Appellant also appealed against the award of Special Damages. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find

their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

44. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the lower court failed to award special damages that were pleaded and proved.

45. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of

trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."

46. The court awarded special damages that were pleaded and I have perused the receipts and noted that the award on special damages of Kshs. 59,650 was proved. I dismiss the appeal on special damages.

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

    i. The Appeal lacks merit and is dismissed in limine.

    ii. The Respondent shall have the costs of the Appeal which I assess at Kshs. 75,000/=.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 24TH DAY OF MAY, 2024. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

No appearance for parties

Court clerk: Brian