



REPUBLIC OF KENYA



**Mburu v Emoli & another (Civil Appeal E947 of 2023)
[2024] KEHC 8423 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E947 OF 2023
DKN MAGARE, J
JUNE 27, 2024**

BETWEEN

MARTIN MAINA MBURU APPELLANT

AND

WYCLIFFE INYANJE EMOLI 1ST RESPONDENT

BENEDICT KITHEKA NZIKALI 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. R. Liluma (SRM)
in Nairobi CMCC No. E1065 of 2021, delivered on 1st September, 2023)*

JUDGMENT

1. This is an appeal from the decision of the Hon. Rawlings Liluma SRM, given on 1/9/2023 in Milimani CMCC E1065 of 2021. The Appellant was the 1st Defendant in the lower court while the 1st Respondent was the Plaintiff in the lower court. The 2nd defendant is now the 2nd Respondent.
2. The Appellant filed a Memorandum of Appeal that set out argumentative and submission-like grounds that are repetitive, unseemly, prolixious and an eye sore. The proper grounds should be concise and targeted. Using authorities in grounds is not proper. The length of grounds do not have a correlation with merit. The grounds raise only 2 issues:-
 - a. Liability
 - b. Excessive general damages for pain and suffering.
3. Order 42 Rule 1 posits as follows:-

“ 1.



- (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.”
4. Where the advocates for the Appellant got an idea to file submissions christened as grounds of appeal is beyond me. Where the court ignores submissions, it cannot be a ground of appeal. I shall thus dismiss ground 8 in limine.
5. Order 42 Rule 1 of the [Civil Procedure Rules](#) provides are 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.
6. 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 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 appellants, 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. 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:

“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. 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.

9. In the case of *Mbogo and Another v. 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.”

10. 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.”

11. 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.

12. 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...”

13. 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.”

14. 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.
15. 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 as follows as 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.”

16. 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.
17. The court of Appeal, pronounced itself succinctly on these principles 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.

18. 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 Counsel, 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 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...”

19. 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.
20. So 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 erroneous assessment of damages.
 - c. The award is simply not justified from evidence.



21. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
22. 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 different.

23. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.
24. The appellant submitted that liability is not a scientific affair. They relied on the case of *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR, where the Court of Appeal held as doth: -

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

25. The third party had been joined by the defendants and as such the court misapplied principles of law as set out in the cases of *Hussein Omar Farah v Lento Agencies* [2006] eKLR, in which the court therein stated as follows:-

“The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.”

In *Baker V Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-



“Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them..... “

See also *Welch V Standard Bank Ltd* [1970] EA 115 at 117 and *Simon V Carlo* [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame.....”

26. They stated that the court was wrong on liability. They relied on the case of *Multiple Hauliers (E.A) Ltd v ustus Mutua Malundu & 2 others* [2017] eKLR, where Justice Otieno stated as follows: -

“ 20. The equitable doctrine that first in time is stronger in law is indeed applicable in the Highway code and traffic regulation. It is therefore repeatedly told to driving lesson students that

‘move forward only when the road is clear’

In driving schools it is also a rudimentary lesson that a driver is supposed to leave enough room in front of his car to stop when the car in front stops suddenly.

21. The logic of this rudimentary yet vary critical and cardinal traffic rules is not difficult to discern. Cars are driven towards the front and not back words on the highway and that may explain why the drivers take the foremost front seat and have a wider front windshield compared to smaller rear windshields and rearview minors. Where visibility in impaired by darkness or band whether, like is alleged by the bus driver in this matter, extra caution is always advised. There is always a presumption that he who hits another from behind is at fault.”

27. Reliance was placed on *Embu Public Road Service Ltd. v Riimi* (1968) E A 22, on the aspect of emergency brakes.

28. On quantum he indicated that there were differences on the experts and as such the court should be guided by the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor*[2020] eKLR, where the court stated as follows: -

“ 67. The doctor assessed incapacitation at 50 %. However, he never mentioned the basis upon which a person who had a fracture which had healed well at the time of examination about six months after the accident, had suffered 50% incapacitation. There was no evidence of mal-union of the fractured site or evidence of progressive chronic osteomyelitis of the fractured bones or loss of bone tissue or necessity for bone grafting due to infection as was the case in *Kornelius Kweya Ebichet V C&P Shoe Industries Ltd & Another* relied on by the Respondent in the lower court and which complications informed the court in the said case to award Kshs. 1 million general damages for pain and suffering and loss of amenities. In my humble view, this percentage of



incapacity attributed to the Respondent in this case was not supported and I reject it.”

29. He stated that an award of Ksh 350,000/= will have been adequate compensation. The relied on 2020 and 2019 cases.

Pleadings

30. The 1st Respondent filed suit vide a plaint dated 1/2/2021, claiming for injuries arising out of an accident on 27/10/2020 while he was a passenger in motor vehicle Registration No. KBW 923K along Thika Road. The Appellant was sued as the owner of motor vehicle Registration KAC 671K.
31. The 1st Respondent pleaded the following injuries:-
- a. Fracture – right humerus (upper arm)
 - b. Bruises – right knee
 - c. Blunt injury – anterior chest wall
32. The matter proceeded for hearing and the court found the Appellant liable on 100% basis. There was only one defendant in the judgment. The Appellant entered appearance as the sole defendant and filed defence on 26/3/2021. They blamed motor vehicle registration No. KBW 923K. There is no negligence pleaded against the plaintiff.
33. I note that the Record of Appeal consists of documents never put in evidence. I am yet to understand how Benedict Kitheka Nzikali was joined to this appeal. The judgment was strictly between the plaintiff and the defendant.

Analysis

34. It appears that a third party notice was issued against Benedict Kitheka Nzikali. There is no provision for requesting for judgment against a third party. What is required is for directions to be issued.
35. The respondent Martin Maina Mburu had a duty to prove injuries and lay basis for negligence. Section 107-109 of the Evidence Act provides as follows:-
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.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 3. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
36. The Appellants are said to have filed an application dated 9/9/2021 which was allowed on 27/9/2021. This allowed filing of a third party Notice dated 29/9/2021. They were served through P. O. Box 1062-90200 Kitui. Whoever the 2nd defendant is, is not known.
37. The police abstract indicates that the owner of the vehicle is Kelvin Kinyua. The third party Notice does not indicate particulars of negligence. I do not know what the Appellant expected the court to do with such a Third Party Notice. To make matters worse, there were no directions given on third party notice and the lack of particulars of negligence.



Evidence

38. On 18/4/2023 Dr. George testified and produced his medical report. He stated that the report gave 15% disability. On cross examination he indicated that the Respondent's left leg was weak.
39. PW2 – PC. Jessie Mwololo based at Pangani, produced a police abstract. On cross examination he stated that investigations were incomplete.
40. PW3 Wycliffe Inyanje Emoli lives in Dodoma and was a Mechanic. He produced his documents and adopted the statement as evidence in chief. On cross examination he stated that he was in the bus, KBW 923K and seated in seat No. 3. He stated that the bus was hit from behind on a corner. He was treated and stated he could no longer work as he used to work. The case was closed.
41. PC Susan produced an abstract for the accident. She stated that motor vehicle registration No. KBW 923K was blamed. She produced a police abstract. She stated that she was not aware of another abstract.
42. DW2 testified. He was an insurance investigator. He produced the report. He stated that he had not graduated with a certificate in insurance. The matter was adjourned to call the driver. He testified on 25/5/2024. He stated that the abstract blamed the motor vehicle Reg. No. KBW 923K. He stated that his vehicle. He stated that KBW 923K hit his vehicle KAC 671K from behind.

Analysis

43. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.
44. The court analyzed the evidence and found the Appellant liable. The court found DW1 was not a credible witness as he had a degree in Economics and Sociology. He was not an expert.
45. The court found and rightly so that DW2 was not an expert. Indeed from the testimony, DW2 was a fraud who lied on oath that he was an expert, only to succumb that he was studying nor such evidence was provided. The witness DW2 was just a collector of summons and hyperbole and prepared a report on the basis of summonses and conjecture. He singularly lacks the learning, experience and expertise to testify as an expert. His evidence was useless and wrongly admitted.
46. The court found that there were conflicting accounts. They made it hard for the court to determine who was to blame. However, it was noted that the inspection report was in the possession of the Appellant. He chose not to produce the same. What does this mean?
47. It means that the court must make an adverse inference. The court then went through several authorities and arrived at the conclusion the way it did. In the case of *Nesco Services Limited v CM Construction [EA] Limited* [2021] eKLR, Justice G v Odunga as then he was stated as doth:

“In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in *Ephantus Mwangi and Another v. Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:

“Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document).”

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon.



In *Kenya Akiba Micro Financing Limited v. Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

“Section 112 of the [Evidence Act](#) Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho – v- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

48. It was stated that no evidence was adduced. The court therefore found both the defendant and third party jointly and severally liable.
49. The Appellant wants that this was wrong. He stated that the court ought to have found the third party fully liable. I agree. There is no evidence that directions were taken. Consequently, there were no third party proceedings. The Appellant had a right to seek for directions.
50. Further under Order 1 Rule 22, the Appellant has to pay the decretal amount, and then seek indemnity. There were no prayers to apportion liability. It is not the duty of the court to apportion liability where the same has not been prayed. I do not find merit on the appeal on liability.
51. On quantum, the court awarded Kshs. 3,550/= as special damages and Kshs. 800,000/= as general damages. The court considered the 65% disability and previous authorities. The award is relatively high. However the test is not that the award is high but inordinately high.
52. In the case of [Alphonza Wothaya Warutu & another v Joseph Muema](#) [2017] eKLR, the Plaintiff sustained injuries of deep cut wound on the forehead, compound fracture on the midshaft of the right Humerus, compound fracture of the right tibia and deep cut wound on the right lower leg and the court upheld an award of Kshs. 800,000 as general damages.
53. In the case of [Philip Mwago v Lilian Njeri Thuo](#) [2019] eKLR, the High Court sitting on appeal upheld an award of Kshs. 500,000/= general damages for a claimant who had suffered a broken humerus with 8% residual functional disability.
54. Further, in the case of the respondent suffered a fracture of the right humerus arm bone (mid 1/3), a deep cut on the right eye, abrasion on the head and a blunt injury to the right shoulder and chest. The trial court awarded general damages of Kshs. 450,000/- which was upheld on Appeal to this Court.
55. In the circumstances, there is no merit in the appeal. The same is accordingly dismissed with costs of Kshs. 95,000/=.

Determination

56. In the circumstances I make the following orders:-
 - a. The Appeal lacks merit and is accordingly dismissed with costs of Kshs. 95,000/=.
 - b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.



KIZITO MAGARE

JUDGE

In the presence of:

Mrs. Ngala for the Appellant

Kipkani for the Respondent

Court Assistant – Jedidah

