Joho v Kilinju alias Everest Juma (Civil Appeal E108 of 2022)
[2023] KEHC 23462 (KLR) (25 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E108 OF 2022

DKN MAGARE, J

SEPTEMBER 25, 2023

BETWEEN

YUSUF ABUBAKAR ALI JOHO ..... APPELLANT

AND

EVEREST JUMA KILINJU ALIAS EVEREST JUMA ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Honourabe D. Sitati, Resident Magistrate delivered in Kilifi SPMCC No. E120 of 2020 on 17th October 2022)

JUDGMENT

1. The Appeal arises from the Judgment and Decree delivered on 17th October 2022 in Kilifi SPMCC no E120 of 2020 in favour of the Respondent as follows: -

    1. Liability 100%
    2. General Damages for pain and suffering ksh 650,000/-
    3. Future Medical Costs. ksh 36,000/-
    4. Special Damages ksh 2,100.

    Total ksh 688,100/= with costs of the suit and interest.

2. The Appellant being aggrieved by the judgment filed this Appeal and preferred 5 grounds in the Memorandum of Appeal. The appeal was argued by way of submissions. The matter was placed before me during the service week and I set it for judgment today.

3. I have perused the 5 paragraph Memorandum of Appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an Appeal is to file a concise Memorandum of Appeal without arguments, cavil or

evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule, 1 provides as doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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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."

4. The Court of Appeal had this to say in regard to Rule 86 (which is *pari materia* 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..."

5. Hitherto, 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."

6. The Appellant did not appeal against the liability, which the Court had found the Appellant to be 100% liable for the injuries sustained by the Respondent. The totality of the grounds in the Memorandum of Appeal raise only one issue, that is: -

    i. The Learned Magistrate erred in properly appraising the evidence and the law regarding the assessment of damages and so arrived and an erroneous and excessive award of damages.

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The other issue was the question whether the Magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court. It was not raised in pleadings or even as a preliminary issue.

Appellant's Submissions

8. The Appellant filed submissions in support of the Appeal contending that the award was inordinately excessive as the Trial Court failed to analyze the evidence. The Appellant opened by addressing the duty of the court as set out in Classicus case of *Selle and another v Associated Motor Board Company and Others* (1968] EA 123.

9. The Appellant relied on the case of *Hassan v Nathan Mwangi Kamau Transporters & 5 Others* C no 123 of 1985 to assert the position that inordinately high awards will lead to monstrously high premiums for insurance of all sorts and should be avoided.

10. He relied on the case of *Jabane v Olenja* case as cited in *Odinga Jacktone Ouma v Maureen Achieng Odera* (2016) eKLR to assert that Awards should not be inordinately excessive.

11. It was his submissions that the Trial Court disregarded the evidence by, PW1, Dr. Kiema that fracture would definitely re-unite and the Respondent would heal in 6 to 12 weeks.

12. The Appellant submitted for the award of ksh 150,000/- as reasonable and adequate compensation and cited and relied on the case of *Patrisia Adhiambo Omolo v Emily Mandala* (2020) eKLR where the High Court upheld an Award of ksh 180,000/= for a Plaintiff who had the following injuries:

    Fracture of the left arm

    Fracture of the left forearm

    Swollen deformed distal aspect of the left forearm

    Multiple bodily injuries

    Injuries on the left forearm

13. The Appellant further relies on *Christine Omanyo v Matilda Akumu Khaduli* (2014) eKLR where an Award of ksh 170,000/- was given to the Plaintiff who suffered fracture of the left ulna and radius, soft tissue injuries and broken tooth.

14. Further, it was submitted that in *Nickson Kazungu Karisa & Another v Edward Tsuma Mbaru* (2020) eKLR the Respondent suffered 8% permanent injury as in this case with compound fracture of the right ulna, deep cut wound, several lacerations on upper arm and foreign bodies in the right elbow and the High Court substitutes the Trial Court's award of ksh 800,000/= to ksh 450,000/.

Respondent's Submissions

15. The Respondent filed submissions on 15/9/2023 where they stated that the duty of the Court is to re-evaluate evidence. They stated that a degree of permanent disability is take into consideration. In this case it was 8%.

16. They rely on the case of *Timothy Maina Mwangi v Virginia Kuria and Another* (2020) eKLR where an award of ksh 1,000,000/= was made for comparable injuries.

17. They stated that where an expert witness testified and another produced a report, there is no basis to ignore the one who testified. They relied on the case of *Martin Kidake v Wilson Simiyu Slaumbi* (2014) eKLR.

18. It is their view that a fact that a party will not get an opportunity to cross examine a witness diminishes their value of their evidence.

19. In this they relied on the decision of *Theodore Otieno Kambogo v Norwegian People Aid* Nairobi Milimani HCCC 774 of 2000 and *Mohammed Musa and Another v Peter M. Maulayi & Another* Civil Appeal no 243 of 1998.

20. They prayed that I dismiss the Appeal.

21. The appeal was opposed.

Analysis

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

23. 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, 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."

24. An Appellate court will interfere with the quantum of damages awarded by a trial court unless the award is so inordinately high or low so as to represent a wholly erroneous estimate of the damages or the court was plainly wrong. 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 case of *Kenya Bus Services Limited v 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."

26. 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."

27. 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 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.'

We find the words of Lord Denning in the *West (H) & Son Ltd* (1964) A.C. 326 at page 341 on excessive awards on damages 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 the case of *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 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. It is my position that if the Award is inordinately high, then I will have to set it side. On the other hand, however, if the award 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.

32. I have evaluated the authorities relied upon by counsel for the Appellant. I note that except Nickson Kazungu Karisa & Another, the authorities cited by the Appellant do not present comparable injuries. The injuries suffered therein are not comparable and counsel was not candid.

33. In Nickson Kazungu Karisa & Another the injuries are comparable but this Court, like did the Trial Court, is alive to the inflation and cannot agree that the same award should hold about four years later.

34. I wish to restate the position in that case of *Easy Coach Limited v Emily Nyangasi* [2017] where Court opined that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (*Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others* [2004] eKLR).

35. Assessment of damages should have regard to the nature, severity and extent of the injuries suffered by the plaintiff. In this matter the medical report showed that there was fracture of the right radius borne which was estimated to re-unite within 6-12 months.

36. The Honourable Magistrate y relied on the case of *Peris Mwikali Mutua v Peter Munyao Kimata* (2008) eKLR where the Plaintiff had suffered fracture of the left ulna which left the Plaintiff with significant permanent disability and the Court award ksh 450,000/= in General Damages. Based on this, the court awardedksh 650,000/= as compensation in General Damages for the Respondent.

37. The court in relying on the decision took into consideration inflation and lapse of time from the time of the award.

38. In the case of *Philip Musyoka Mutua v Leonard Kyalo Mutisya* [2018] eKLR, the court awarded 300,000 for (i) Closed fracture radius bone,(ii) Bruises on the forehead and left hand and (iii) Cut wound on the face On 30/11/2028. This is 5 years ago.

39. In *H. Young & Company E. A Limited v Edward Yumatsi* (2013) eKLR the High Court on appeal upheld an award of ksh 500,000/- as general damages where the claimant sustained deep cut wound on the head and fracture of the right clavicle bone.

40. In the circumstances, and based on the evidence and authorities, I find that the award by the Trial Court of ksh 650,000/- for General Damages for pain and not inordinately high to be wholly erroneous estimate of damages. The proper award should be ksh 450,000/=.

41. The Appellant's submission of ksh 150,000/- is untenable I therefore set aside the award of ksh 650,000/= and in lieu thereof I award ksh 450,000/- as damages for pain and suffering. the upshot, I dismiss the Appeal.

42. The other awards remain as ordered. The award of damages did not have a significant change. I therefore direct that each party bears its own costs.

Determination.

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

    i. The appeal is allowed to the extent that the award of ksh 650,000/= is set aside. In lieu thereof, I award a sum of ksh 450,000/= as general damages for pain and suffering.

    ii. Each party to bear their own costs.

    iii. The other awards remain as ordered by the court below

DELIVERED, DATED AND SIGNED AT MALINDI, VIRTUALLY O THIS 25TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

IRB Mbuya & Company Advocates for the Respondent

Murimi Ndumia Mbago & Muchela Company advocate for the Appellant

Court Assistant - Brian