Gachuhi & another v Gachanja (Civil Appeal E020 & E021 of 2023 (Consolidated)) [2024] KEHC 11896 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E020 & E021 OF 2023 (CONSOLIDATED)

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

DAVID NDUNGU GACHUHI ..... 1ST APPELLANT

DAVID WACHIRA KIRIRA ..... 2ND APPELLANT

AND

STEPHEN NDUGUYA GACHANJA ..... RESPONDENT

(Appeals Against the Judgment and decree of the lower court delivered on 13/3/2023 in Nyeri CMCC No. E060 of 2020 as consolidated with Nyeri CMCC No. E070 of 2020 by Hon. E.N. Angima, SRM.)

JUDGMENT

1. The appeals arise from the Judgment and decree of the lower court delivered on 13/3/2023 in Nyeri CMCC No. E060 of 2020 as consolidated with Nyeri CMCC No. E070 of 2020 by Hon. E.N. Angima, SRM.

2. The lower court awarded General damages of Kshs. 1,000,000/- and special damages of Kshs. 58,750/-, and Kshs. 1,500,000/- and Kshs. 335,157/- respectively for the Plaintiffs in Nyeri CMCC No. E060 of 2020 and Nyeri CMCC No. E070 of 2020. The court also allowed liability at 100% in favour of the plaintiffs.

3. The Appellant being aggrieved preferred 6 grounds in the Memorandum of Appeal. I have perused the 8-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 –

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. 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. 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."

6. The memorandum of appeal raises only two issues, that is: -

    a. Liability

b. Quantum

7. The rest of the grounds are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is 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.

8. In the plaint dated 8/10/2020 and amended on 17/5/2021, the Plaintiff in Nyeri CMCC No. E060 of 2020 sought general damages for pain and suffering and loss of amenities and special damages of Kshs. 58,750/-.

9. The claim arose from the accident that occurred on 2/6/2020 when the plaintiff was a pillion passenger on Motorcycle Registration No. KMDN 292C along Mukurweini- Gatitu road at Kagumo area when the 2nd defendant's motor vehicle Registration No. KAK 966C was negligently driven by the 2nd defendant that it collided with the motorcycle causing the plaintiff severe personal injuries.

10. The following injuries were pleaded: -

    a. Loss of consciousness.

    b. Multiple abrasions and lacerations on the face.

    c. Swollen and deformed right leg.

    d. Fracture of the right tibia and fibula bones.

    e. Fracture of the left distal radius.

11. Similarly, vide the amended plaint dated 25/4/2022, the plaintiffs in Nyeri CMCC No. E070 of 2020 sought for special damages of Kshs. 335,157/- and general damages for pain and suffering and loss of amenities arising from the same accident.

12. The injuries were pleaded as follows:

    a. Bruises on the head.

    b. Anterior dislocation of the right hip joint.

    c. Fracture of the midshaft of the right tibia and fibula bones.

13. The defendants entered appearance and filed a joint defence on 7/12/2020 denying the averments in the plaint and blaming the accident on the rider and the plaintiff.

Evidence

14. PW1 was the police officer, Antony Opiyo attached to Nyeri police station. He relied on the OB extract and the Police Abstract produced in court. It was his case that he was not the investigating officer. That the driver of the motor vehicle was to blame for the accident.

15. On cross examination, it was his case that he was not at the scene of the accident and was not aware whether the rider had a driving license.

16. PW2 was the plaintiff in Nyeri CMCC No. E060 of 2020. He adopted his witness statement and documents dated 8/10/2020 and 17/5/2021 and testified that he was a pillion passenger aboard motorcycle which collided with the said motor vehicle hence the accident.

17. It was his further stated case that both the motorcycle and the motor vehicle were coming from Gatitu direction and the motor vehicle tried to overtake the motorcycle as the motorcycle had indicated to the right as they were turning from the road, the motor vehicle knocked them down. It was at a junction and they were joining Mutathini road.

18. On cross examination, it was his case that the motorcycle was crossing the road horizontally and was hit from behind.

19. PW3 was one Geofrey Muriithi Maingi. It was his case that he was a pedestrian on the road and the motor vehicle was overtaking the motorcycle and then hit him on the left hand while he was off the road on the right side of the road. On cross examination, he stated that the motorcycle was knocked as it was turning right but had not yet turned.

20. PW4 was the Plaintiff in Nyeri CMCC No. E070 of 2020. He relied on his witness statement and bundle of documents filed in court. It was his case that he was the rider of the motorcycle. That he was joining Mutathini road to the right of the road and had indicated 100 meters away from the junction. That the motor vehicle hit them from behind.

21. On cross examination, it was his case that he had a valid driving license valid from 6/6/2020.

22. On the part of the Defendants, DW1 was David Wachira. He relied on his witness statement and bundle of documents dated 5/12/2020. He testified that the rider had no reflector jacket and number plate lights were not on.

23. On cross examination, he testified that the motorcycle was crossing the road horizontally and hit the motor vehicle on the left side of the road. That the motorcycle abruptly crossed the road and was hit on the right side.

Submissions

24. The Appellant submitted that the rider of the motorcycle was negligent. That the evidence by the witness of the Respondents were conflicting. That the motorcycle failed to give way before joining the road.

25. In totality, it was the submission of the Appellant that the Respondents had failed to prove their case on a balance of probabilities.

26. On quantum, it was submitted that Kshs. 500,000/- would have been adequate compensation had negligence been proved in Nyeri CMCC No. E060 of 2020 and Kshs. 800,000/- would have been adequate general damages for the plaintiff in Nyeri CMCC No. E070 of 2020 if negligence had been proved. Reliance was placed respectively on the cases of Gladys Lyaka Mwombe v Francis M. Namatasi & 2 Others (2019) eKLR and Civicon Limited v Richard Omwancha & 2 Other (2019)e KLR and Wilson Matu & another v Stanley Muriuki Wamugo [2021] eKLR.

27. The Respondents on their part filed submissions dated 4/6/2024 and submitted that the learned magistrate correctly evaluated the evidence by the parties. It was therefore the submission of the Respondents that they proved negligence to the required standard.

28. On damages, it was submitted that the awards in the cases were not inordinately high. Reliance was placed on Damaris Wamucii Kagechu v Joseph Kirui & Another (2019) eKLR where the plaintiff who suffered compound fracture of the tibia and fibula was awarded Kshs. 1,500,000 in general damages.

29. With respect to Nyeri CMCC No. E060 OF 2020, it was submitted that the award of Kshs. 1,000,000 was nor inordinately high. They relied on Njuguna v Mwabindo (2023) eKLR in which the plaintiff

who was submitted to have suffered fracture of the hip joint, fracture of the tibia and fibula and big toe as well as dislocation of the big toe and soft tissue injuries was awarded Kshs. 1,400,000/- in general damages.

Analysis

30. The issue is whether the learned magistrate erred in her finding on liability and damages.

31. 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.

32. 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."

33. On liability, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 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.

34. 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 cast 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."

35. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the defendant, depending on the circumstances of the case. Therefore, the burden is not on the plaintiff or the defendant. It is on the party who alleges.

36. 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 by either side."

37. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

38. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

39. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

40. The accident can therefore not be said to have occurred by magic or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01 to 49.99, there can be no better equal chance. I note that on cross examination, DW1 blamed the rider.

41. The Appellant alleged that the rider was to blame. The Respondents refuted the claim and alleged that it was the motor vehicle to blame.

42. . It was the duty of the Respondent to prove contributory negligence which in my view they failed. In the case of MacDrugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

43. In the comparative jurisprudence in the case of Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987 where Theobalds J enunciated as follows; -

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

44. This is the rule in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 in which the courts held inter alia; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odunga's Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

45. In my analysis, the plaintiff's witnesses proffered consistent evidence that the motorcycle was tuning to the right-hand side of the road into Mutathini road at the time of the accident. The version of evidence presented by the Appellant that the motorcycle was joining the road from the left side was farfetched.

46. Clearly, the point of impact was on the rear of the motorcycle. The Appellant's evidence was shaky. The Appellant was loud and clear that he passed on that road many times and was familiar with its orientation and that the motorcycle emerged from a stone crusher plant to the left of the road and joined the road horizontally without warning. However, he contradicted himself on cross examination that the motorcycle hit the motor vehicle on the right side but that the right-side mirror of the motor vehicle hit the motorcycle. If indeed the Appellant was telling the truth, it was inescapable inconsistency how he could have swerved to the right side of the road where the motorcycle was also heading, in order to avoid the accident. The clear evidence pointed to the truth that the motor vehicle was attempting to overtake the motorcycle while the motorcycle was taking a right turn into Mutathini road.

47. The evidence by the Appellant in attempt to find negligence on the part of the rider of the motorcycle herein was thus incredible and amounted to fabrication of the true picture of what transpired on the road on the material day, in the hope of apportioning partial or full fault to the Respondent. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of N vs. N [1991] KLR 685. The learned Judge lamented as follows:

> Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or

no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685, he expressed himself in the following terms:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

48. The Appellant consequently failed to prove contributory negligence on the part of the Respondents. The motor vehicle Registration No. KAK 966C could not have just caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that: -

> " Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

49. The above decision was also cited with approval by the Court of Appeal in Nairobi Civil Appeal No. 179 of 2003 - in Re Estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR where the Court of Appeal reiterated as doth: "Well driven motor vehicles do not just get involved in accidents...."

50. Therefore, I find no basis to disturb the finding of the learned Magistrate on liability and hold that the Appellant as driver of the motor vehicle did not disprove the allegation that he was negligent and failed to prove apportionment of liability or at all to the Respondents. I am in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> > " .....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

51. On quantum there was no appeal on special damages. I proceed to deal with general damages only.

52. In my analysis, the authorities cited by the Appellant in Nyeri CMCC No. E060 of 2020 presented far lesser injuries. For instance in Gladys Lyaka Mwombe (supra), the confirmed injuries per the medical report were head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. X-rays and CT scans were done, together with an operation to fix a plate on the tibia fracture.

53. Similarly, Civicon Limited case (supra) had distinguishable injuries. Therein, the 2nd Plaintiff, one Gladys Nyakerariao Omwancha suffered a fracture of the tibia and fibula and dislocation of the hip joint and was awarded Kshs. 1,000,000/- that was reduced to Kshs. 450,000/- on appeal. This court has to consider the effect of the injuries to a party. In Nyeri CMCC No. E070 of 2022, the Plaintiff was described to have developed chronic osteomyelitis (bone infection) on the right leg requiring long term orthopedic and plastic surgical follow-ups to control bone infection. This was not the case in in Civicon Limited case (supra).

54. On the other hand, the authorities cited by the Respondents proffered disproportionately graver injuries. For instance In Damaris Wamucii Kagechu v Joseph Kirui & another [2019] eKLR, the plaintiff sustained fractures on both legs which led to inconvenience in movement associated with pain. Mbogholi J awarded a sum of Kshs 1,500,000/= in general damages for pain, suffering and loss of amenities in 2019.

55. Similarly, in Kakuli v Ngase & another (Suing as the legal representatives of the Estate Stanley Alemba Chavasi - Deceased) (Civil Appeal E192 of 2021) [2022] KEHC 12132 (KLR) (Civ) (21 July 2022) (Judgment), the injuries were more severe involving fracture of the tibia and fibula on both limbs described as bilateral fractures of both tibia and fibulas.

56. In Nyeri CMCC No. E070 of 2020, the Appellant relied on Wilson Matu & another v Stanley Muriuki Wamugo [2021] eKLR and proposed an award of Kshs. 800,000/-. Therein, I note that Plaintiff sustained a fracture of the right midshaft femur and fracture of the right proximal tibia and fibula boxes. These are not comparable injuries to the Respondent herein whose femur bone was not fractured.

57. On the other hand, the Respondents relied on Gitonga v Kalunge (2022) eKLR. I note the injuries therein to be equally not similar to the case herein. Therein, the injuries were brain contusion, shoulder and acetabulum fracture with hip dislocation and the court enhanced the award from Kshs. 1,000,000/- to Kshs. 1,700,000/-

58. Similarly, in *Njuguna v Mwabindo (Civil Appeal 41 of 2021)* [2023] KEHC 24136 (KLR) (24 October 2023) (Judgment), the injuries were more severe than this case as they were noted as dislocation of the right hip with fracture of the acetabular margins and fracture of the greater tonchanter of the femur and the court upheld an award of Kshs. 1,400,000/- in general damages.

59. The lower court awarded general damages of Kshs. 1,000,000/- for the Plaintiffs in Nyeri CMCC No. E060 of 2020 and Kshs. 1,500,000/- in Nyeri CMCC No. E070 of 2020.

60. In Nyeri CMCC No. E060 of 2020, the following injuries were pleaded:

    f. Loss of consciousness.

    g. Multiple abrasions and lacerations on the face.

    h. Swollen and deformed right leg.

    i. Fracture of the right tibia and fibula bones.

    j. Fracture of the left distal radius.

61. In Nyeri CMCC No. E070 of 2020, the injuries were pleaded as follows:

    a. Bruises on the head.

    b. Anterior dislocation of the right hip joint.

c. Fracture of the midshaft of the right tibia and fibula bones.

62. The court notes the medical reports produced in evidence by the Respondents. In Nyeri CMCC No. E060 of 2020, Dr. F.W. Muleshe's medical report confirmed the injuries as pleaded in the amended plaint and stated that the Plaintiff therein sustained multiple fractures and other soft tissue injuries and risked posttraumatic osteoarthritis.

63. Similarly, in Nyeri CMCC No. E070 of 2020, Dr. F.W. Muleshe's medical reports dated 3/8/2020 and 26/5/2021 concluded that the Plaintiff sustained multiple skeletal injuries and the right leg fractures. Bones got infected with Osteomyelitis and he would need removal of the implants.

64. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

65. 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.

66. 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."

67. 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.

68. 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."

69. 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."

70. 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."

71. 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....."

72. 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.

73. The lower court did not cite the authorities that guided the finding on general damages. This was in error. Damages must be comparable to the injuries for consistency. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal.

74. In Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR the plaintiff had sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the tibia and fibula and had been awarded Kshs. 700,000/=.

75. In Nyeri CMCC No. E060 of 2022, the Plaintiff also had a fracture to the distal radius and cannot be categorized as having suffered fracture of tibia and fibula only. Thus, the award of Kshs. 1,000,000/- in general damages was not excessive considering the more severe injuries by the Plaintiff and the lapse of time.

76. In my view, the injuries suffered by the Respondents in the respective appeal herein were largely similar with differences being that the 1st Respondent also suffered fracture of the distal radius and the 2nd Respondent also suffered hip joint dislocation with osteomyelitis above the fractures of the tibia and fibula and the soft tissue injuries they both sustained.

77. In Kimathi Muturi Donald v Kevin Ochieng Aseso [2021] eKLR, the Plaintiff sustained a fracture of the upper right tibia and a fracture of the floor of the socket of the left hip joint (acetabulum). The High Court substituted the award of Kshs. 1,500,000/- with Kshs. 1,200,000/-. I note the injuries in that case were slightly more severe than the instant case as they involved fracture of the hip joint and not just dislocation. However, I have to consider the lapse of time now that that case was decided 3 years ago.

78. All factors considered, the award of Kshs. 1,500,000/- in general damages in Nyeri CMCC No. E070 of 2020 was inordinately high. An award of Kshs. 1,000,000/- was commensurate to the injuries that involved fracture of the tibia and fibula, dislocation of the hip joint and soft tissue injuries. I therefore set aside the award and consequently substitute as elaborated.

79. The net effect of the foregoing is that the appeal on liability fails and the award of Kshs. 1,000,000/- for general damages in Nyeri CMCC No. E060 of 2020 is upheld and the award of Kshs. 700,000/- for general damages in Nyeri CMCC No. E070 of 2020 is set aside and substituted with an award of Kshs. 1,000,000/-.

Determination

80. In the upshot, I make the following orders:

    a. The appeal on liability is dismissed both in Nyeri CMCC No. E060 of 2020 and Nyeri CMCC No. E070 of 2020.

b. Judgment of the lower court on general damages in Nyeri CMCC No. E060 of 2020 is set aside and substituted with an award of Kshs. 700,000/-.

c. Judgment of the lower court on general damages in Nyeri CMCC No. E070 of 2020 is set aside and substituted with an award of Kshs. 1,000,000/-

d. As the appeal partly succeeded, each party shall bear their own costs in the respective appeals.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellants

Mrs. Mwangi for the Respondents

Court Assistant – Jedidah