Kerande & another v Xavier (Civil Appeal 85 of 2023)
[2025] KEHC 18 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 18 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 85 OF 2023

DKN MAGARE, J

JANUARY 10, 2025

BETWEEN

PETER KERANDE ..... 1ST APPELLANT

AYAN AUTOMOBILE LIMITED ..... 2ND APPELLANT

AND

RICHARD OTOTI XAVIER ..... RESPONDENT

JUDGMENT

1. This is an appeal against the judgment of Hon. S N Abuya, Chief Magistrate given in Kisii CMCC No. 926 of 2019 dated and delivered on 26.07.2023. The Respondent filed suit on 9.12.2019 seeking damages for an accident that occurred on 21.8.2019.

2. The Respondent pleaded that he was lawfully cycling motor cycle registration number KMDG 345H, Yamaha along Kisii- Kilgoris road when motor vehicle registration Number KCS 286 Q was carelessly driven and violently collided with motor cycle registration number KMDG 345H and as a result the deceased lost life, which caused the estate loss and damages.

3. The Respondent suffered the following injuries, according to the plaint:

    a. Right wrist dislocation

    b. Left radius fracture.

    c. Left ulna fracture

    d. Bruises on the face

    e. Deep cut wounds on the chest.

4. Special damages of Ksh. 27,670/= were pleaded and awarded by the court.

Evidence

5. PW1, the Respondent, testified about the injuries he sustained and the occurrence of the accident. There was no dispute during cross-examination regarding the injuries. The injuries healed, leaving a permanent injury to the ulna and radius.

6. PW2 CPL, Paul Mulatia, testified on that an accident occurred on 21.8.2019 involving the Respondent, Dr. Morebu testified that he relied on X ray forms. There were 2 fractures in the left forearm, that is the fracture of the Radius bone and left ulna bone. He relied on the X-Ray films, discharge summary, and treatment notes. He was cross examined on whether he attached the Xray films.

7. The defence did not produce any document nor tender any evidence only produced. After hearing the parties, the court entered judgment on 26.7.2023 for the Respondent against the Appellant as follows:

    a. Liability 100%

    b. General damages Ksh. 800,000/=

    c. Special Damages Ksh 27,670 /=

    d. Costs and interest.

8. The Appellant was aggrieved by the judgment and filed this Appeal on 3.8.2023 and set forth the following grounds of appeal:

    a. That the learned magistrate erred in law and misdirected himself when he failed to consider the appellant's submissions on both points of law and facts.

    b. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    c. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in The insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 CAP 405.

    d. That the learned trial magistrate erred in law and fact in finding the Defendants/Appellants 100% liable in view of the evidence produced before the trial Court and in particular following;

        a. That the plaintiff/Respondent failed to prove his case on case on liability against the Defendants.

    e. That the learned trial magistrate erred in law and fact allowing the Respondent's claim which was not proved on the balance of probability required by law.

    f. That the learned trial magistrate misdirected himself and based his findings on wrong considerations.

    g. That the learned magistrate erred in law and fact in failing to dismiss the Respondent's suit with costs.

    h. That learned Magistrate erred in law and fact in awarding General damages of Ksh. 827,670/ = an amount that was excessive and unjust in the circumstances considering the evidence adduced before court and principles of law.

i. That the learned trial magistrate erred in law and in fact in failing to appreciate and understand the provisions of Section 8 of the *Traffic Act*, Cap 405 Laws of Kenya.

j. That the learned trial Magistrate erred in law and fact in over relying on the Respondent's evidence and submissions.

k. That the learned trial magistrate erred in venturing to have issues as core issues for determination of the case.

l. That the learned trial magistrate erred in law and fact allowing the Respondents claim which was not proved on the balance of probability required by law.

m. That the learned trial magistrate erred in law and in fact in ignoring the defendant/Appellant.

n. That the learned trial magistrate's decision albeit a discretionary, one was plainly wrong.

9. The record of Appeal was filed on 24.1.2024. The appeal was admitted on 6.6.2024 and directions given on the same day. The matter was listed before me on 7.1.2025. the parties filed detailed submissions which they highlighted before me, mainly on quantum.

Analysis

10. The Appeal raises only one issue, that is, the quantum of damages. The other issues are ancillary, repetitive, prolixious, and a waste of judicial time. The appeal places on the court, the task of deciding whether the learned magistrate erred in exercising discretion while assessing damages. The Appellant abandoned the Appeal on liability.

11. What stands out, however, is that the memorandum of appeal filed is unseemly and improper. Some of the matters raised do not arise from the pleadings. The proper procedure is to comply with Order 42, Rule 1 of the Civil Procedure Rules, which states:

> " 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.

12. The Court of Appeal had this to say about compliance with Rule 86 now [88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules

of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "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 any way 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..."

13. The court of appeal has from time to time lamented on rhetoric repetitive and not verbose grounds of appeal. Conciseness is key in filing Appeals. 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."

14. The parties limited their submissions to the issue of quantum. Liability was raised in ground 4 but abandoned in court. In any case, only two issues arose from the suit in the court below, as seen in grounds 4 and 8. The rest of the issues are superfluous. Indeed, the final prayer is for the re-assessment of damages.

15. 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. In the case of Mbogo and Another vs. 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 is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

16. The duty of the first appellate court was stated by Clement De Lestang, VP, Duffus, and Law JJA, in the locus classicus case of Selle and Another vs Associated Motor Board Company and Others [1968] EA 123, to be as follows:

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow

the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

17. The Court is to bear in 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. In the case of Peters vs 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..."

18. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

19. 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. The foregoing was settled in the case of Butler Vs Butler Civil Appeal No. 43 of 1983 (1984) KLR where the Keller JA, held stated the following in regard to award of damages.

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

20. The duty of this court as the first 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 erroneously assessment of damages.

c. The award is simply not justified from evidence, that is the lower court was plainly wrong.

21. The test is however, disjunctive, that is to say, it is enough to consider one or two grounds. The trial court must consider similar injuries, take into consideration inflation and other comparable awards. 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 it, the first Appellate court, handled the case in the subordinate court, it would have awarded a different figure.

22. The Appellant rightly conceded liability, in not many words. The defence did not rebut the Respondent's case. The duty on the Respondent was to proof his case on a balance of probability. This is set out in section 107 of the *Evidence Act* 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.

108. 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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

23. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "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 than 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."

24. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party

bearing the burden of proof will lose, because the requisite standard will not have been attained."

25. There were two persons who were present when the accident occurred, that is the Respondent and the Appellant's driver. They had a duty to testify on what happened on that day. Both parties owed the court an explanation as to why both the vehicle and the motor cycle, if they were well maintained driven or ridden, they were involved in an accident. In the case of Daniel Kaluu Kieti v Mutuvi Ali Nyalo & another [2016] eKLR, R.E. ABURILI, posited as follows:

In Kenya Bus Services Ltd V Dina Kawira Humphrey *CA 295/2000* 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."
>
> The above decision was also cited with approval in Nyeri Court of Appeal Civil Appeal No. 22 of 2005. Similarly in Nairobi *CA 179 of 2003* Rahab Micere Murage estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR the Court of Appeal reiterated that:
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> > "Well driven motor vehicles do not just get involved in accidents....."

26. The Respondent provided cogent evidence on how the accident occurred, which was not challenged. The Appellant did not testify or rebut the Respondent's evidence. In these circumstances, the court is entitled to infer that, had the driver testified, his evidence could have been adverse to the interests of the Appellant. The finding on liability at 100% was thus proper.

27. The same principle applies to the medical evidence. The record indicates that there was a second medical report, but it was not produced. The court is equally entitled to make a negative inference. 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:

> 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 vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> > "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 –vs- 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."

28. A sum of Ksh 27,670 was allowed as special damages. This amount was specifically pleaded and proved. Special damages must be both pleaded and proved before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by

the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

29. An appeal on special damages is thus untenable. The amounts sought were pleaded and properly proved under each of the items as pleaded. The appeal in that respect is dismissed.

30. As regards the fracture of the radius and ulna, the first aspect is to confirm whether the fractures were proved. The P3 indicated that the nature of the injuries was grievous harm. It also showed that the doctor ordered an X-ray, analgesics, antibiotics, and reduction with injured section. The evidence tendered in proof of special damages show that one of the items purchased was a crepe bandage. Dr. Morebu concluded that there was a fracture of the left radius, an ulna fracture, right wrist dislocation, and multiple severe injuries. He further stated that the dislocation could complicate post-traumatic osteoarthritis. Closed reduction is, ipso facto, proof of a fracture. A crepe bandage cannot be applied to soft tissue injuries. Crepe bandages are used to prevent unnecessary movement of a fractured or sprained area. They help ensure immobilization, reduce swelling, and alleviate pain.

31. In the circumstances, the injuries pleaded were proved. The court cannot rely on documents that are not in the record of proceedings. Parties should not expect oral testimony to alter the written documents that have been tendered in evidence. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

32. Parole evidence cannot be used to contradict, vary or alter the terms of the any written instrument. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005, the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

33. The appeal in respect of lack of proof of the injuries is not tenable. The Respondent proved the injuries to the required standards. I therefore dismiss the first limb of the question of injuries.

34. The next question is whether to disturb the award of damages. The principles for an appellate court interfering with an award of a trial court were set out in the case of Kemfro Africa Limited t/a "Meru

Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR , where the Court of Appeal [Kneller, Nyarangi Jja & Chesoni AG JA] posited as doth:

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. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

35. The injuries suffered were proved. They were well elucidated by the court in its judgment. This court has to consider similar injuries in deciding on the question of quantum. In P N Mashru Limited v Omar Mwakoro Makenge [2018] eKLR, the court, posited as doth:

> 25. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.
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> 26. In the case of Cecilia W Mwangi & Another vs Ruth Mwangi [1977] eKLR where the court cited with approval the case of Tayab vs Kinanu (1982-88) 1KAR 90 where the court therein stated that: -
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> > "I state this so as to remove the misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.

36. The Court of Appeal in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 held that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

37. In the case of *Wainaina v Wagacha (Civil Appeal 16 of 2019)* [2023] KEHC 26226 (KLR) (9 November 2023) (Judgment). GL Nzioka J, made an order setting aside the award of General damages in the sum of Ksh. 700,000 and substituting with an award of Ksh. 500,000. as general damages. She stated as follows:

> However, the legal principles that govern the award of quantum are settled by the court. In that regard, in the Court of Appeal's decision in Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja [1986] eKLR, Kneller, JA (as he then was) stated as follows: - "The reported

decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

1. Each case depends on its own facts;

2. Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);

3. Comparable injuries should attract comparable awards.

4. Inflation should be taken into account; and

5. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."

38. The Respondent suffered the following injuries, the right wrist dislocation, left radius fracture, left ulna fracture, bruises on the face and deep cut wounds on the chest. While considering similar injuries, the court, Muigai J, in *Stejes Agencies Limited v Paul (Civil Appeal E067 of 2021)* [2023] KEHC 19523 (KLR) (30 June 2023) (Judgment), J, reduced an award from 800,000/= to 600,000/= for fractured distal radius bone, fractures distal ulna bone, cut wound on the right knee, deep cut wound on the left Leg. Segmented fractures left tibia bone among others.

39. Further, in the case of Kamaliki v Paul *(Civil Appeal E004 of 2021)* [2023] KEHC 2540 (KLR) (29 March 2023) (Judgment), R. LAGAT-KORIR J the plaintiff was award of Ksh. 650,000 for Left radius fracture, Left ulna fracture and Deep cut wound on the chin.

40. Having looked at the authorities relied by the parties, and the nature of the injuries, I find that an award of Ksh 800,000/= for a fracture of the radius and ulna is an overkill. The amounts of Ksh. 300,000/= proposed is equally on the lower side. A sum of Ksh 650,000/= will suffice as general damages.

41. The award of Ksh 800,000/= is thus set aside and in lieu thereof substituted with an award of a sum of Ksh 650,000/= as general damages.

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

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

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

43. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

"(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if

> this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

44. Costs are discretionary. The Appellant largely lost the Appeal, having abandoned liability, which, as I have stated above was untenable. The order that commends itself is that each party bear their own costs.

Determination

45. The upshot of the foregoing is that the appeal succeeds partly in the following terms: -

    a. Appeal on liability is hereby dismissed

    b. Appeal on special damages is hereby dismissed

    c. The award of Ksh 800,000/= is set aside and in lieu thereof substituted with a sum of Ksh 650,000/= as general damages

    d. There be 30 days stay of execution.

    e. Each party to bear its own costs for the appeal.

    f. This file is closed

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 10TH DAY OF JANUARY 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

M/s Kimondo Gachoka for the Appellant

M/s Ong'uti for the Respondent

Court Assistant- Kiptum