



REPUBLIC OF KENYA



KENYA LAW
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**Otachi v Otondi (Civil Appeal E135 of 2023)
[2025] KEHC 3242 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E135 OF 2023
DKN MAGARE, J
FEBRUARY 13, 2025**

BETWEEN

KENNEDY ASUMA OTACHI APPELLANT

AND

ISABELLA KWAMBOKA OTONDI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. K. Mutai (PM) given on 11.8.2023 in Kisii CMCC No. 358 of 2020)

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. P.K. Mutai (PM) given on 11.8.2023 in Kisii CMCC No. E358 of 2020. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:
 - a. Liability 80:20 in favour of the Respondent against the Appellant
 - b. General damages Ksh. 350,000/=
 - c. Special Damages Ksh. 7,050/=
 - d. Costs of the suit.
2. The Appellant was aggrieved and filed a humongous memorandum of appeal. The appeal was initially on liability and quantum. However, during the hearing, the Appellant opted to proceed on quantum only. They proposed that an award of Kshs. 80,000/= will suffice. It was distressing that the record of appeal was filed on recycled paper, with details of other cases and private communication.
3. It is not edifying to file such humongous grounds of appeal only to argue only one part. This is not in compliance with Order 42 Rule 1 of the Civil Procedure Rules which provides as follows:



- (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)
 - (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 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 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. Repeating grounds of appeal, tends to cloud the key issue in dispute for determination by the Court as held in the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, where the court of appeal observed that : -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”



6. There is only one issue for determination: whether the award of Ksh 350,000/= was inordinately excessive as to amount to an erroneous estimate of damages.

Pleadings

7. Being an appeal on quantum, going to the pleadings related to liability is unnecessary. The Respondent filed suit on 5.08.2020, claiming damages from an accident on 20.2.2020 along Kisii-township road at Makaburini. The Appellant owned motor vehicle registration number KBN 348S M Bus Matatu. The Respondent was a pedestrian. The Respondent pleaded that he suffered the following injuries:
 - i. Chest contusion
 - ii. Blunt trauma to the neck
 - iii. Blunt trauma to the back
 - iv. Left ankle dislocation
 - v. Blunt trauma to the left forearm
 - vi. Blunt trauma to the right forearm
 - vii. Laceration to the left knee
 - viii. Blunt trauma to the left hip
 - ix. Blunt trauma to the right ankle

Evidence and submission

8. Dr. Morebu examined the respondent just 5 days after the alleged accident. He listed the injuries together with another - left ankle dislocation. He stated that the Respondent suffered a left ankle dislocation with severe bodily injuries. The disputation was thus on the existence or otherwise of the dislocation.
9. The court found that there was no proof of dislocation. Nevertheless, the parties had marked differences in quantum. The court found that the question of dislocation was neither proved nor disproved. The court proceeded to say that it was not proved. This must have been based on Section 3(4) of the [Evidence Act](#), which provides that:
 - (4) A fact is not proved when it is neither proved nor disproved.
10. The court awarded Ksh 350,000/= for severe soft tissue injuries. The Respondent did not cross-appeal on the aspect of dislocation. It is, therefore, futile to have a discourse on what injuries were suffered, particularly whether there was a left dislocation. The court below settled that issue and is not open to a determination in this appeal. The remaining question is whether the injuries suffered, excluding the dislocation, merited the award by the court below.

Analysis

11. This being a first appeal, this court must assess the evidence afresh and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing



the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

12. The duty of the first appellate Court was postulated by Sir 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, 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.”

13. The Court must remember that it has neither seen nor heard the witnesses. The trial court has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read the matters extrinsic to them into those documents. 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.

14. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the 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...”

15. On the other hand, general damages are damages at large, and the Court does its best to reach a decision depending on the nature and gravity of the injuries. 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.”

16. The main difference between the parties is not whether the award was too high for the pleaded injuries. The reality was that the question was whether the court erred in awarding damages with regard to the



dislocation of the left ankle. The left ankle dislocation was pleaded in this case, and the court below found otherwise. There was no cross-appeal on that finding. The court only found severe soft tissue injuries. In *Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

- “ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] *Current Legal Problems* at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well



feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

17. In respect to the essence of pleadings, the Supreme Court of Kenya, in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...

18. The court below was the finder of facts. The fact established was that there was no dislocation of the ankle. That fact cannot be interfered with unless there is an appeal to that effect. For the other injuries, recovery was expected to take a very long time. These are some of the factors to consider before setting aside an award on quantum. The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum were enunciated 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 [Neller, Nyarangi Jja & Chesoni Ag JA] stated:

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.

19. They also relied on an authority of no relevancy, which I shall not mention for the economy of space. The last decision the Appellant relied on was the case of *SBI International Holdings (AG) Kenya v William Ambuga Ongeru* [2018] eKLR. The injuries are different from the ones suffered by the Respondent herein.
20. In awarding damages, the court is guided by local circumstances and not foreign decisions. This is in line with the decision in *Butler vs. Butler* Civil Appeal No. 43 of 1983 (1984) KLR, where Keller JA stated the following in regard to the 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.

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.

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).

21. The duty of the trial court in arriving at damages is to consider the state of the Kenya economy and the people generally. The welfare of the insured and insured public must be at the back of the mind of the trial Court. Finally, in deciding whether to disturb the quantum given by the lower court, the Court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously having regard to all circumstances. This ensures that the award is not too high or too low as to be an erroneous estimate of damages.
22. Therefore, for me to interfere with the award, it is not enough to show that the award is high. Neither should it be that had I handled the case in the subordinate court, I would have awarded a different figure. The duty of the first appellate court is threefold regarding the quantum of damages: -
 - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
 - c. The award is not justified from evidence.
23. To be able to do this, I need to consider similar injuries and 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 if I had handled the case in the subordinate court, I would have awarded a different figure. In the English Court in the case of *West (H) & Son Ltd v Shephard* [1964] AC 345 it was stated as follows:

“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.”



24. The award should not be a punishment for the defendant. In the case of Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR the court posited as follows:
- “There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”
25. The injuries were of the nature of severe soft tissue injuries for which the court awarded a sum Ksh. 350,000/=. This is after ruling out the left ankle dislocation. Whether, the court was right on this aspect, it is not before the court. To contextualize the award. The court will look at cases having similar injuries.
26. In Wahinya v Lucheveleli (Civil Appeal E046 OF 2021) [2022] KEHC 13762, the respondent sustained injury to the left lateral chest wall, blunt injury to the right upper limb, blunt injury to the right upper limb, blunt injury to the right thigh and left leg and the court upheld the trial court’s award of Kshs. 200,000/=.
27. In Pitalis Opiyo Ager v Daniel Otieno Owino & Another [2020] eKLR the trial court upheld the trial court’s award of Kshs. 200,000/= in respect of soft tissue injuries.
28. In Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa [2020] eKLR, R Nyakundi, the court awarded Kshs. 150,000/= for blunt object injuries to the lower lip, chest, and left wrist.
29. In the case of *Ogembo & another v Arika (Civil Appeal 29 of 2021)* [2022] KEHC 12219 (KLR) (28 July 2022) (Judgment), a claimant who suffered chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee was awarded Kshs. 150,000/= in lieu of Ksh. 500,000/=.
30. Given the severity of soft tissue injuries, an award of Ksh 350,000/= is excessive in the circumstances. An award of Kshs. 80,000/= is a gross underassessment of damages. A sum of Kshs. 200,000/= will be adequate compensation. The upshot of the above is that the instant appeal succeeds on the award of general damages, and the lower court’s award of general damages in the sum of Kshs. 350,000/= is hereby set aside and substituted with the award of Kshs. 200,000/=.

Costs

31. Award of costs in this court is governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has 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– those 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.

32. In the circumstances, the Appellant was the tortfeasor. He appealed on both quantum and liability. The appeal on liability was abandoned last minute. This means that the success was divided, in the circumstances, the order commending itself is that each party shall bear its own costs.

Determination

33. The upshot of the foregoing is that I make the following orders: -
- a. Liability was abandoned.
 - b. The award of general damages is set aside. In lieu thereof, the court awards a sum of Kshs. 200,000/= as general damages. Interest shall be from the date of judgment in the lower court.
 - c. Special damages are not affected.
 - d. Each party to bear its costs.
 - e. 30 days stay of execution.
 - f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF FEBRUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

Ms. Munji for the Appellant

Migiro for the Respondent

Court Assistant – Muriuki

