



REPUBLIC OF KENYA



**Bosibori v Matongo (Civil Appeal E020 of 2023)
[2025] KEHC 3799 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E020 OF 2023
DKN MAGARE, J
MARCH 10, 2025**

BETWEEN

JANET BOSIBORI APPELLANT

AND

ERICK MIGIRO MATONGO RESPONDENT

JUDGMENT

1. This is an appeal from the judgment delivered by Hon. W. Kugwa (RM) on the 15th February, 2023 in Kisii CMCC No. 606 of 2021. The Appellant was a defendant in the lower court.
2. The appeal concerns quantum of damages only. The parties recorded consent on liability at 70:30 in favour of the Respondent. The matter involved motorcycle registration number KMEG 668D and motor vehicle registration number KCP 368C in an accident on 8.4.2021 along Kisii-Nyamira road at Miwa area.
3. The court awarded Ksh. 900,000/= as general damages and Ksh. 20, 050/= as special damages. The Appellant filed a Memorandum of Appeal against the whole of the said judgment and decree and set forth 7 grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering, which was inordinately high.
 - b. The learned trial magistrate erred in fact and law by failing to apply the correct principles in awarding general damages for injuries suffered, which sum was inordinately high and not commensurate to the injuries sustained.



- c. The learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and judicial authorities on quantum, thereby arriving at an erroneous figure on quantum.
 - d. The learned trial magistrate erred in law and in fact by failing to take into account pertinent issues raised in the appellants' submissions.
 - e. The learned trial magistrate erred in law and in fact in failing to pay regard to decisions relied upon in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
 - f. That the learned trial magistrate erred in law and fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 900,000/= that was over in excess in the circumstances of the case.
 - g. That the learned trial magistrate's judgment consequently occasioned a miscarriage of justice.
4. All the grounds raise only one issue in the appeal; that is quantum. Raising seven grounds repetitively is neither edifying nor advisable. It is contrary to Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -
- 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.
5. The Court of Appeal had this to say about compliance with Rule 86 now [Rule 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...”



6. The courts abhor repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that : -

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

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

7. The Respondent set forth particulars of negligence against the Appellant. He pleaded general damages and special damages. He set out the following injuries:
- i. Bruises on the lateral/parietal region of the head
 - ii. Chest contusion
 - iii. Fracture of multiple ribs on the left side
 - iv. Multiple cut wounds on the upper limbs bilaterally
 - v. Dislocation of the left hip joint
 - vi. Fracture of the left tibia/fibula bones
 - vii. Multiple cut wounds with bruises on the lower limbs bilaterally
8. He was attended to and treated at Kisii Teaching and Referral Hospital, where management was done according to the treatment documents available with analgesics, antibiotics, Tetanus toxoid, Reduction, and P.O.P applied. He was dressed daily.
9. Only the Respondent testified and produced the exhibits including Dr. Morebu’s medical report. He stated the left leg and ribs were still giving him substantial problems. The number of ribs fractured were not given.
10. The court delivered its judgment on 15.2.2023 as follows:
- a. Liability 70:30 as per the consent
 - b. General damages Ksh. 900,000/=
 - c. Special damages Ksh. 20,050/=
- Total Ksh. 920,050/=
- Less 30% Ksh. 279,015/=
- Net award Ksh. 644,035/=
11. No authorities were referred to in the award of damages by the court below.



Analysis

12. This being a first appeal, this court must reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand. In the case of *Peters v 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...”

13. Court is not bound necessarily to accept the findings of fact by the court below as stated in the locus classicus case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where this principle was enunciated thus:

“...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”

14. The Court of Appeal pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Service v. A.M Lubia & Another* 1957 KLR 27 as follows: -

The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

15. The foregoing statement had been ably elucidated by the case of *Butler v Butler* Civil Appeal No. 43 of 1983 [1984] KLR, where Keller JA stated the following regarding 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).
16. Therefore, for the appellate court to interfere with the award, it is not enough to show that the award is high or that if I had handled the case in the subordinate court, I would have awarded a different figure. However, where damages are at large, they must be commensurate with similar injuries.
 17. The amount awarded was Ksh. 900,000/= for the injuries. Parties used authorities that were far removed from the current injuries. The Respondent suffered a fracture of multiple ribs on the left side, multiple cut wounds on the upper limbs bilaterally, dislocation of the left hip joint and fracture of the left tibia/fibula bones. These are among other injuries that included: bruises on the lateral/parietal region of the head, chest contusion and multiple cut wounds with bruises on the lower limbs bilaterally.
 18. The court in this case awarded a sum of Ksh. 900,000/=. In assessing injuries arising from a road traffic accident, consistency in awarding damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards."
 19. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v 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.
 20. In *Kiama v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment), Sewe J, reduced an amount from Kshs. 700,000/= to Kshs. 400,000/= for a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries. A subsequent medical report, showed that the injuries had fully healed without and disability.
 21. In the case of *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR a claimant was awarded a sum of Kshs. 450,000/= in general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. The authority was for more serious injuries and was a bit outdated.
 22. In the circumstances the award of Ksh. 900,000/= is inordinately high. I set the same aside. In lieu thereof, I substitute with a sum of Ksh. 550,000/= subject to liability.
 23. The next question will be who will pay for the costs. 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 percent per annum, and such interest shall be added to the costs and shall be recoverable as such.
24. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:
- It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
25. 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.
26. In the circumstances, the appeal is partly allowed. Given the dismissed grounds, each party will bear their own costs.

Determination

27. The upshot of the foregoing is that I make the following orders: -
- a. The appeal is allowed, and the award of Ksh. 900,000/= is set aside. In lieu thereof I award a sum of Ksh. 550,000/=.
 - b. Each party to bear its costs in the appeal.
 - c. 30 days stay of execution.



d. 14 days right of appeal.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mulaku for the Appellant

No appearance for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.

