Dete v Mirieri (Civil Appeal E079 of 2023) [2025] KEHC 3337 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E079 OF 2023

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

PASKAL OOKO DETE ..... APPELLANT

AND

KEBU VINCENT MIRIERI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 11.07.2023 in Kisii CMCC No. 483 of 2019 by Hon. C. Ocharo (SPM). The lower court heard the matter and made the following findings:

    a. Liability against the Appellant – 50:50

    b. General damages of Ksh. 150,000/=

    Less 50% Ksh. 75,000/=

    c. Special damages – Ksh. 11,920/=

    d. Costs to the Respondent

2. The Appellant, being aggrieved, preferred 10 paragraph Memorandum of Appeal. I have perused the 10-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. 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.

3. The Court of Appeal had this to say in regard to Rule 86 [now 88] of the Court of Appeal Rules(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:
>
> "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..."

4. A memorandum of appeal raising repetitive grounds of appeal clouds the key issues for determination and is unwarranted. 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."

5. The Memorandum of Appeal raises only two issues as follows:

   a. Liability

   b. Quantum

6. The Respondent filed suit vide a Plaint dated 27.06.2019, seeking general damages for an accident of 17.11.2018. The Respondent was a pedestrian within Kisii township when he was involved in an

accident with motor vehicle registration number KAW 235R. He blamed the Appellant as the owner of the said motor vehicle. He set out particulars of negligence extensively. The following injuries were pleaded:

a. Chest contusion

b. Bruises on the face

c. Bruises on the right hand

d. Bruises on the left hand

e. Bruises on the right knee

f. Bruises on the left knee

7. Grounds 1-3 are irrelevant and are consequently dismissed. On the aspect of submissions, the same is a nonstarter in view of the position of submissions. Submissions do not constitute evidence at all. Many cases were decided without hearing submissions but based only on evidence on record. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another [2014] eKLR as thus:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

8. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru v. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 it was stated:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

9. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another v. Owiti & Another [2008] 1KLR (EP) 749, where the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are

not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

10. The Appellant entered appearance and filed a defence dated 19.08.2019. He set particulars of negligence against the Respondent including relying on the doctrine of volenti non fit injuria. Issues were joined.

Evidence

11. PW1 was the Respondent who indicated that he was a tout. He stated that the subject vehicle was moving slowly. He stated that he looks for passengers and takes them to vehicles. He stated that the accident occurred when the vehicle was at the stage. He stated that he was hit by the front side of the vehicle. He enumerated the injuries he suffered. He blamed the Appellant. He them closed the case.

12. DW1, Peter Morara Ondogo testified that he was a driver of the subject motor vehicle with 20 years driving experience. He stated that the vehicle was stationary. The Respondent hit the same and fell. He stated that he had not called the conductor who was inside the said vehicle. He stated that the Respondent hit the driver's door.

13. DW2 was Cpl. Paul Mulatia. He stated that an accident occurred on 17/11/2018 near the stage between a motor vehicle registration number KAW 325R Toyota matatu and a pedestrian. The vehicle had arrived and was about to stop when two people rushed there, one of whom hit the vehicle and fell. He produced the police abstract. On cross-examination, he stated that the vehicle was in motion and about to stop.

Submissions

14. The Appellant filed submissions dated 7.1.2025. It was submitted that the lower court erred in finding that the Appellant liable on a balance of probabilities for the accident. Reliance was placed on Patrick Mutie Kamau & Another v Judy Wambui Ndurumo (1997) eKLR.

15. It was further submitted that the Respondent failed to prove any negligence on the part of the Appellant and so did not discharge the burden of proof. Reliance was also placed on Eunice Wayua Munyao v Mutilu Beatrice & 3 Others (2017) eKLR based on which it was submitted that there cannot be liability without fault.

16. On quantum, the Appellant proposed an award of Ksh. 100,000/- as adequate compensation on the strength of the case of HB (Minor suing though mother- DKM) v Jasper Nchinga Magari & Another (2021) eKLR. It was further submitted that the Respondent suffered but minor soft tissue injuries hence this proposal.

17. The Respondent, on the other hand, filed submissions by which it was submitted that the findings of the lower court on quantum and liability were accurate and should not be disturbed. Reliance was placed inter alia on the case of Kansa v Solanki (1969) EA 318. On the basis of the said case, he submitted that there was a presumption which was proved in evidence that the driver of the accident motor vehicle was negligent.

18. On quantum it was submitted that the award of Ksh. 150,000/= for general damages was proper. The Respondent cited inter alia Anthony Nyamwaya v Jackline Moraa Nyandemo (2022) eKLR and Poa Link Services Ltd & Another v Sindani Boaz Bonzemo (2021) eKLR.

Analysis

19. 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 firsthand. In the case of Mbogo and Another v. 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 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."

20. The Court must remember that it has 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 that of the lower court, as parties cannot read into those documents matters extrinsic to them.

21. 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..."

22. The said duty was explained in the case of Selle & Another v. Associated Motor Board Company Ltd. [1968] EA 123, where 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."

23. The burden of proof is on whoever alleges. This is succinctly set out in Sections 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya as hereunder:

> " 107.
>
> (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."

24. The burden of proof was also addressed by the Court of Appeal in the locus classicus case of Anne Wambui Ndiritu –v- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the said court 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 case 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."

25. The burden of proof is neither on the Plaintiff nor the Defendant but on the party that alleges specific matters. It is on the party who alleges. In Evans Nyakwana –v- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general proposition, 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 fi no evidence at all were given as either side."

26. A party who persuades the court more than the other of the likelihood of the events in controversy will carry the day. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –v- 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 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."

27. The balance of probability standard means that a court is satisfied an event occurred as stated by Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 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 even 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....."

28. The position is also that the evidence must carry a reasonable degree of probability, but not so high as is required in a criminal case. In Palace Investment Ltd –v- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –v- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "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.
>
> 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 lose because the requisite standard will not have been attained."

29. The accident cannot be said to have occurred by magic, or unidentified flying object. In a courtroom situation, we deal with empirical evidence on what is more probable than the other. The court can get it wrong, but if better still 50.01:49.99, there can be no better equal chance.

30. The Appellant submitted that the Respondent, pedestrian was to blame fully. Respondent refuted the claim and alleged that the motor vehicle was to blame. The Respondent produced evidence of injury. He did not call a police officer with the record of how the accident occurred. The Appellant, despite bearing no burden of proof at that stage, called a police officer who blamed the Respondent.

31. The Respondent knew the circumstances of the case, he failed to tender police evidence on the occurrence of the accident. They had prior knowledge on how the accident occurred, who reported and the content of the police file. They failed to produce this. Section 112 of the *Evidence Act* provides for proof of special knowledge in civil proceedings. The same provides as follows:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

32. Indeed, the failure by the plaintiff to call a police officer who recorded the accident must and should be construed against and a negative inference be made. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:

> " No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

33. However, Odunga, J as he then was, in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR, brought out the question of controverting evidence that I fully agree with, as follows:

53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

34. The Respondent knew that the cause of the accident was highly contentious but chose not to have the evidence of occurrence produced. The sketch plan will have to go through the issue of negligence. 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 v. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

"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 –v- 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."

35. In this matter, the court could not know who caused the accident. However, he applied the test where two people were to blame, but the court could not know the extent of the blame. In the appeal at hand, the Appellant was able to show that the Respondent was to blame for knocking himself on the side of the vehicle. There was no evidence rebutting the defense case.

36. In such a case, the inference is not to blame, but negligence was neither proved nor disproved; in that connection, Section 3(4) of the *Evidence Act* provides a solution to such an imbroglio. It provides as doth: -

A fact is not proved when it is neither proved nor disproved. When the court finds that none of the witnesses proved how the accident occurred, section 3(4) of the *Evidence Act* must be invoked. This is in line with section 3(2) of the *evidence act*, which provides as follows:

(2) A fact is proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

37. The court cited the famous decision of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258, where the Court of Appeal, reiterating the foregoing, stated that:

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

38. It must be understood that not all accidents are caused by all the parties. Each case must turn on its peculiar facts. Drivers cannot be presumed to be all mad and, ipso facto, cause of accidents. A court must never proceed as someone has picked up a tub. Sometimes, the court must let chips fall where they may or better still, must. In Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] eKLR, the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley v Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant

> in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ....
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

39. Common sense may not be common, but at all times, the court must keep close to the same as possible. What will be the most plausible explanation for the accident? The Respondent was under a duty to prove negligence. It was the duty of the Respondent to prove contributory negligence. In Pauline Wangare Mburu v Benedict Raymond Kutondo & another [2005] KEHC 2370 (KLR), the court observed as follows;

> The defendant did not deem it necessary to issue a third-party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances, therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.

40. However, in this case, they proved that the Respondent was wholly to blame. The Respondent failed to prove negligence on the part of the Appellant. I am equally aware that apportionment of liability should be according to the degree of fault. In Kenya Power & Lighting Company Ltd v JWK (Suing as father and next-friend of JKW) & another (Civil Appeal E012 of 2021) [2023] KEHC 1642 (KLR) (28 February 2023) (Judgment), LN Mugambi J posited as follows:

In apportionment of liability, I am guided by the case of Khambi and Another v. Mahithi and Another [1968] EA 70, where it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

41. However, the court acted without evidence. After finding no fault and disbelieving all witnesses, it ought to have dismissed the suit. It is true that the Respondent was lying. He was unable to say how the Appellant was negligent. The court cannot hold parties liable in the absence of evidence. In the circumstances, the holding of the parties to be 50:50% liable was without evidence. It is accordingly set aside.

42. The evidence irresistibly pointed to one end only, the failure by the Respondent to prove his case. The Respondent failed to prove his case and failed miserably. The circumstances of the case show that the motor vehicle was almost stopping at a stage. It did not cause the accident. There is no explanation as to why the point of impact was on the driver's door other than that given by PW2. The finding on liability is therefore set aside, and in lieu thereof, I substitute with an order dismissing the suit in the court below.

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

44. The first instance assesses damages even if it finds that liability has not been established. In the same vein, the first appellate court must decide on damages, even where the suit is dismissed. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assesses damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address the issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

45. It must be recalled that no two cases are precisely the same, and it is inevitable that there will be a disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. v. Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR. However, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

46. The principle on the award of damages is settled. In Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another [2017] eKLR where 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 for similar injuries are mere guidelines; each case should be treated on its own facts.

4) Previous awards to be taken into account to maintain the stability of awards, but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

47. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were laid out in the case of Kenya Bus Services Limited v. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

48. 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.

49. 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."

50. 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."

51. 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....."

52. According to the above guide, if the award is inordinately high, 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. I proceed to determine similar fact cases in relation to damages as applicable to this appeal.

53. The court must consider similar injuries. In the case of Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, Justice Nyakundi found a sum of Ksh 140,000/= sufficient for a claimant who suffered; a cut on the head, a blunt injury to the right knee, multiple bruises on the upper limbs, and bruises on the right knee. The award given in this matter was thus proper.

54. The net effect of the foregoing is that the appeal on quantum fails. The appeal on liability succeeds. The judgment of the lower court is set aside. In lieu thereof, I find Respondents 100% liable for the accident. The suit in the lower court is therefore dismissed.

55. The next question is 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 per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

56. 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.

57. 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.

58. In the circumstances, I allow the appeal on liability and dismiss the appeal on quantum. The Appellant shall have costs of Ksh 45,000/=.

Determination

59. In the upshot, I make the following orders:-

    a. The appeal on liability is allowed. The finding of 50:50 is set aside. In lieu thereof, the Respondent's suit is dismissed.

    b. The appeal on quantum lacks merit and is dismissed.

    c. The Appellant shall have costs of Ksh. 45,000/=.

    d. The Appellant shall have costs in the subordinate court.

    e. 30 days stay of execution.

    f. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Munji for the Appellant

Mr. Were for the Respondent

Court Assistant – Michael