Gladice Orisa Onchera (Suing as the Legal Representatives of the Estate of the Late William Moranga Obaga) v Makori & another (Civil Appeal E089 of 2022) [2025] KEHC 2330 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E089 OF 2022

DKN MAGARE, J

MARCH 5, 2025

BETWEEN

GLADICE ORISA ONCHERA [SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE WILLIAM MORANGA OBAGA] ..... APPELLANT

AND

EZEKIEL OCHOGO MAKORI ..... 1ST RESPONDENT

CAR & GENERAL TRADING CO. LIMITED ..... 2ND RESPONDENT

(Appeal from the Judgment and decree of Hon. D.O. Mac'Andere (SRM) dated 30.9.2022 arising from Kisii CMCC No. 364 of 2019.)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.O. Mac'Andere (SRM) dated 30.9.2022 arising from Kisii CMCC No. 364 of 2019. The Memorandum of Appeal dated 29.10.2022 raised the following grounds of appeal:

    a. That the learned trial magistrate's decision on liability is defective in law and principle;

    b. That the learned trial magistrate's decision on liability is neither based on evidence nor on fact;

    c. That the learned trial magistrate erred in law and fact in failing to accord any and thus due probative weight to the evidence tendered in support of the Appellant's case;(sic).

    d. That the learned trial magistrate erred in law and fact by failing to hold the 1st Respondent 100% liable for the accident despite the preponderant weight and probative value of evidence tendered by the Appellant clearly indicating so;

e. That the learned magistrate misapprehended the nature and seriousness of the deceased's injuries in substantial material respects and as a result awarded general damages that are not only inordinately low and non-commensurate with the nature of injuries sustained by the Respondent but also inconsistent with precedent awards made in similar cases.

f. That the learned magistrate misapprehended in substantial material respects the evidence that was tendered in proof of special damages and as a result made an erroneous award that is not-reflective of special damages as were pleaded and proved.

2. The appeal thus raised three issues:

i. The lower court erred in making an erroneous finding on liability not supported by evidence.

ii. The lower court erred in awarding general damages that were inordinately high and excessive.

iii. The lower court erred in awarding special damages.

Pleadings

3. The complaint dated 13.5.2019 claimed damages for an accident that occurred on 8.3.2019. The deceased was a pillion passenger on motorcycle registration No. KMCX 817H along Igare-Amariba road at Matumwa area. The 1st Respondent, his driver or agent, negligently and dangerously drove motor vehicle Registration No. KCS 279B, causing it to violently hit the motorcycle, hence the accident.

4. The Appellant set forth particulars of negligence on the part of the 1st Respondent and also pleaded injuries as follows:

a. Right radius fracture

b. Right ulna fracture

c. Right tibia fracture

d. Compound right femur fracture

e. Chest contusion

f. Cut wound on the right knee

g. Bruises on the posterior trunk

h. Bruises on the anterior trunk

5. The Appellant pleaded the following special damages:

a. Medical report – Ksh. 6,500/=

b. Treatment expenses - Ksh. 132,428/=

c. Search – Ksh. 550/=

Total – Ksh 139,478/=

6. The 1st Respondent filed a defence dated 19.6.2019 denying the averments in the plaint. The 1st Respondent also set up a third-party defence against the 2nd Respondent. The 2nd Respondent, as a Third Party, filed a defence dated 25.9.2019, also denying the averments in the plaint. They stated that

they are not bound to indemnify the defendant as they were not registered actual or beneficial owners of motorcycle registration No. KMCX 817H and blamed the accident on the Appellant's negligence.

7. The lower court heard the parties and proceeded to render the impugned judgment in which the court determined as follows:

    a. Liability 50:50

    b. General damages Ksh. 1,200,000/-

    c. Special damages Ksh. 49,850/-

8. Aggrieved by the lower court's finding, the Appellant lodged the appeal herein. It is not indicated against whom the court found the other 50% since liability was blamed on the rider, who was not a party to the suit. The 2nd Respondent was also found not to be the owner of motorcycle registration No. KMCX 817H.

Evidence

9. During the hearing, PW1 was Dr. Morebu Peter Momanyi. He relied on his medical report to reiterate the injuries pleaded in the plaint. He also testified on cross-examination that he only examined the patient and could not tell who caused the accident or owned the motor vehicle.

10. PW2 was Gladice Orisa Onchera, the Appellant, who said the deceased was her husband. He suffered fractures, as pleaded in the plaint. She produced receipts to support the claim for special damages. She also made other documents in the bundle of documents. On cross-examination, she testified that she did not know who was riding the motorcycle on which the deceased was a passenger.

11. PW3 was No. 88300 PC Moses Kasera. He produced the police abstract. The accident occurred on 8.3.2019 at 1600 hours. The 1st Respondent was coming from Igare. He collided with the oncoming motorcycle. The deceased was a pillion passenger. On cross-examination, he stated that he was the investigating officer but he had no sketch map or map. The rider of the motorcycle died.

12. PW4 was Jackson Murauni the Clinical Officer. He confirmed the injuries suffered by the deceased; a fracture of the right femur bone. He was unable to use his right limb. He produced his authored treatment notes.

13. The Respondents closed their respective cases without calling witnesses.

Submissions

14. The Appellant filed submissions dated 4.10.2024. It was submitted that the award of Kshs. 1,200,000/= on general damages was inordinately low. The injuries involved four major fractures, one being a compound fracture. According to the Appellant, Kshs. 3,000,000/= would have been adequate compensation. She relied on Dorcas Wangithi Wanderi v Samuel Kiburu Mwaura (2015) eKLR, Alex Njagua v Gathuthi Tea Factory & Another (2010) eKLR, among others.

15. On liability, it was submitted that the deceased was not to blame for the accident. According to the Appellant, the overwhelming evidence was that the 1st Respondent was wholly to blame for the accident.

16. On the part of the 1st Respondent, it was submitted that Ksh. 1,200,000/= was adequate compensation. Reliance was placed on Third Engineering Bureau City Construction Group v Evelyne Kerubo Rangi (2020) eKLR.

17. On liability, it was submitted that it was proper to blame the Appellant partly for the accident. The case against the 2nd Respondent was dismissed.

Analysis

18. There must be a rider in this case. Though the claim is made by an administrator of the deceased's estate, it is not a fatal claim. The deceased filed suit while alive but, due to the vagaries of life, died before the case was concluded. The administrator took over and concluded the matter. An amended plaint was filed on 7.6. 2021.

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 subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

20. 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. 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 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."

21. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held 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-subordinate and the Court of Appeal is not bound to follow the subordinate 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."

22. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate 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.

23. This court's jurisdiction to review the evidence should be exercised with caution. 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..."

24. The court is to bear in mind that it does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own

conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, 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..."

25. The Appellant urged the court to find that the lower court erred in finding 50% liability against the deceased. The award of Ksh. 1,200,000/= in general damages was inordinately low. On the other hand, the Respondent's general case is that the lower court's judgment was correct on both quantum and liability and should not be disturbed.

26. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant was 50% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is 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."

27. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

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

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

29. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the 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....."

30. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of appeal held that:

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

31. The 1st and 2nd Respondents both filed a defence but did not call the driver of the accident motor vehicle at the hearing. The Respondents' evidence of the accident's occurrence was largely uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* it was stated that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
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> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

32. Therefore, the Respondents' defences in the lower court thus contained mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove her case on the balance of probabilities. The Court of Appeal's position

in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

33. The deceased herein was a pillion passenger and there is nothing he could have done to prevent the accident. The Respondents did not blame the rider of the motorcycle and his case is not before this court. Where the Appellant proved their case to the required standard, it was the duty of the Respondent to prove contributory negligence, which, he failed. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

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

34. The motor vehicle Registration No. KCS 279B could not have just caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

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

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

36. Therefore, I find no basis to disturb the finding of the learned Magistrate on liability and hold that the Appellant proved want of care on the part of the driver of KCS 279B. I am in consonance with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

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

against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

37. The Appellant was a pillion passenger. He cannot be blamed as he was not in control of the motorcycle. None parties cannot be blamed as well as parties who have nothing to do with the tort of negligence pleaded. In Mbiti v Maingi & another (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), I noted as follows:

> In David Mwangi Kamunyu v Rachael Njambi Ruguru [2022] eKLR, the court, Justice Rtd, Mary Kasango stated as doth: -"Having failed to join the motor cycle rider as a third party and because no negligence can be attributed to the respondent who was a passenger and because the respondent adduced eye witness evidence the appellants ground on the finding of liability must and does fail. This indeed is in accordance of the jurisprudence espoused in the case Stella Muthoni v Japhet Mutegi [2016] eKLR where the court held:-
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> > "In Ntulele Estate Tranporters Ltd & another v Patrick Omutanyi Mukolwe [2014] eKLR the court faced with a similar situation held:-'Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings. In the case of Benson Charles Ochieng & Anor v Patricia Otieno HCCA 69 OF 2010 (UR) the court held:-
> >
> > 38. The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings.
> >
> > 39. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party in the proceedings. In the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to the contribution of negligence fails.

38. Therefore, without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that caused the damage was caused by the negligent acts of different persons so as to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly. The Respondent failed in this duty. The lower court was correct in its finding on liability and the same is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent

conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

39. In Kilet v E-Coach Company Limited & 2 others (Civil Appeal E007 of 2020) [2023] KEHC 17950 (KLR) (18 May 2023) (Judgment), Limo J, posited as doth:

The Position taken by the trial court was in error for the following reasons.

i. The evidence placed before the trial court including the Police Abstract Prima facie showed that an accident occurred and the appellant testified and squarely blamed the Respondents for over speeding. The Respondent did not call the driver of the subject motor vehicle or any witness to rebut the same,

ii. Secondly, one does not necessarily need to see a speedometer of a motor vehicle to tell that it is moving fast.

iii. Thirdly, in his pleadings, the Appellant had pleaded the doctrine of res ipsa loquitor. The doctrine of Res ipsa loquitor (latin for the thing explains itself) operated in favour of a party who presents facts from which a Court can draw inference from the surrounding circumstances to conclude that negligence has been proved even if there is no evidence to directly point to the same.

The appellant by establishing that he was a fare-paying passenger and that an accident occurred in a situation where the control of the motor vehicle was in the hands of the driver. Those facts in my view in conjunction with the doctrine was sufficient to establish a prima facie case against the Respondents it required a rebuttal to persuade the trial to make a finding that negligence had not been proved to the required standard in law.

40. In the case of Nadwa v Kenya Kazi Ltd (1988) eKLR, the Court of Appeal posited as follows:

> "In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."

41. The 1st Responded chose not to testify. This court finds that the Appellant herein was a pillion passenger and was not to blame. The rider of the motorcycle was not a party to this case. The issues of carrying excess passengers were not pleaded and even though the 1st Respondent made attempt to raise them in submissions, I do not consider such issues as part of this case. I am in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> > ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want

> of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

42. A mere passenger ought not to have been blamed. The lower court erred in blaming the Appellant. In Janerose Auma Ochumba v John Nyangi & another [2021] eKLR, J.R. Karanjah, J posited as doth:

> This court's view in that regard would be that the respondents were fully liable for the accident as the deceased being a mere passenger had no form of control of the vehicle. His presence in the vehicle was permitted and authorized by its driver who, as it were, was the controller and manager of the vehicle. There was no evidence that the deceased was a fare paying passenger. It cannot therefore be said that he disregarded his own safety as a fare paying passenger by boarding and travelling in unauthorized m/vehicle.

43. I agree, with nothing useful to add, to the sentiments of my sister, R. Lagat-Korir J, as captured in the case of Highland Creamers & Food Ltd v Ngetich (Civil Appeal 040 of 2023) [2024] KEHC 11128 (KLR) (25 September 2024) (Judgment) as doth:

> In any event, the Respondent bore no liability as he was a pillion passenger and had no control of the motorcycle. I agree with Gitari J. in *Ndatho vs Chebet (Civil Appeal 8 of 2020)* [2022] KEHC 346 (KLR) (16 March 2022) (Judgment) where she held:
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> ".....As pillion passenger, the respondent had no control of the motorcycle and could not have done anything to cause or avoid the accident....."
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> 37. Similarly, in West Kenya Sugar Co Limited vs Lilian Auma Saya (2020) eKLR, Njagi J. held:-
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> > "The respondent was only a passenger on the motor cycle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident....."

44. The net effect is that the court erred in holding the Appellant, a pillion passenger liable. The case against the rider was not in court. The court thus erred in apportioning liability to the Appellant at 50:50. The same is set aside in toto. In lieu thereof, I substitute with an order finding the 1st Respondent to100% liable. The Appellant's case against the 2nd Respondent was dismissed and remains so.

45. On quantum, the lower court awarded Kshs. 1,200,000/- in general damages. The deceased suffered the following injuries:

a. Right radius fracture

b. Right ulna fracture

c. Right tibia fracture

d. Compound right femur fracture

e. Chest contusion

f. Cut wound on the right knee.

g. Bruises on the posterior trunk

h. Bruises on the anterior trunk

46. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Morebu Peter Mommanyi dated 15.4.2019 and the treatment notes produced in the lower court. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved on evidence.

47. Therefore, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. 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"

48. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

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

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

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

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

50. 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.

51. 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.'

52. 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."

53. 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."

54. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

55. 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....."

56. With the above guide, if the award is inordinately low as to amount to an erroneous estimate of damages, then I will have to set it aside. If, however, it is just low but not inordinately low, I will not do so. For the Appellate Court to interfere with the award, it is not enough to show that the award is low or had I handled the case in the subordinate court I would have awarded a different figure.

57. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal. On quantum, the Plaintiff submitted Kshs 1200,000/= was inordinately low. In David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR, the Respondent suffered fragmental fracture mid-shaft femur and intertrochanteric fracture femur. The High Court upheld Kshs. 630,000/= in general damages awarded by the lower court. The injuries herein also involve the distal radius fracture and are thus more severe.

58. In Reuben Mongare Keba v L.P.N [2016] eKLR the court set aside the award of Kshs 1,200,000/= and substituted with an award of Kshs 800,000/= where the respondent therein had sustained the following injuries; Fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg.

59. In the case of James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another (2015) eKLR, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. Ougo J assessed damages at Ksh 1,500,000/=.

60. With the above guide, I have also studied the seven authorities that the Plaintiffs relied on. They are seven in number. Keenly observed, the authorities as cited involved more severe injuries affecting both the right and left upper and lower limbs, while in the instant case, only the right upper and right lower limbs were affected. The award of Kshs. 1,200,000/= in general damages was, therefore, not inordinately low, and I uphold it.

61. The Appellant lamented that the award of special damages of Ksh. 49,850/= was inadequate. The Appellant pleaded Ksh. 139,478/=. No submission was filed on the manner the lower court erred in its award. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are

awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

62. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."

63. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage, and the circumstances under

which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

64. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 139,478/=. The Appellant produced the following:

a. A receipt for a medical report for Ksh. 6,500/=

b. Receipts for Ksh 42,000/= dated 25.3.2019

c. A receipt for Ksh 40,000/= dated 19.3.2019

d. Receipt for Ksh. 2,000/= dated 24.3.2019

e. Ksh 800/= paid on 4.4.2019

f. An exit slip indicating an unpaid balance of Ksh. 89,628/=

g. Receipt of the search for Ksh 550/=

Total to Ksh. 91,850/=

65. These receipts were not challenged. I cannot tell the origin of Ksh 49,850/=. However, in evidence, a sum of Ksh 47,628/= cannot be traced in the list of documents or the bundle produced in evidence. Though some receipts have faded, the original copies filed also reflect the said sum of Ksh. 91,850/=. The duty of a party claiming special damages was set out in the case of David Bagine Vs Martin Bundi [1997] eKLR; the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

66. Further, 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."

67. In the circumstances, I set aside the award of and substitute with Ksh 91,850/= as special damages.

68. 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.

69. 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.

70. In the circumstances the Appellant shall have costs herein of Ksh 105,000/=.

Determination

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

a. The lower court's Judgment on liability is set aside and substituted with 100% against the 1st Respondent.

b. The appeal on general damages is dismissed.

c. The appeal on special damages is allowed. The sum of Ksh. 49,850/= is set aside. In lieu thereof, I enter judgment for special damages for Ksh.91,850/=.

d. The Appellant shall have costs of Kshs. 105,000/-.

e. 30 days stay of execution.

f. Right of appeal 14 days.

g. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael