Getembe Prime Distributors v Timi (Civil Appeal E036 of 2024)
[2025] KEHC 2849 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E036 OF 2024

DKN MAGARE, J

MARCH 3, 2025

BETWEEN

GETEMBE PRIME DISTRIBUTORS ..... APPELLANT

AND

MAURICE ONDIEKI TIMI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. P.K Mutai (PM), given on 19.2.2024 in Kisii CMCC No. E596 of 2021. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:

    a. Liability 100%

    b. General damages Ksh. 500,000/=

    c. Special damages Ksh. 22,750/=

    d. Costs of the suit

2. The appeal is against liability and the award of damages. However, the Appellant filed a 7-paragraph Memorandum of Appeal. It is certainly not edifying for advocates to present 7 argumentative grounds of appeal, and end up arguing only two issues. This is anathema to the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which posits as doth: -

    > " 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 about compliance with Rule 86 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:
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> > "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. The same issue was addressed succinctly by court of appeal in the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR as follows:

> " 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 grounds are thus ancillary, repetitive, prolixious and a waste of judicial time. This court will have to deal with whether the magistrate erred in finding the Appellant liable and in the award of the damages.

Pleadings

6. The plaint dated 4.6.2021 claimed damages arising from injuries caused through an accident that occurred on 3.4.2021 involving the Respondent who was a passenger in motor vehicle registration number KCJ 845R that occurred along Kisii-Migori road at Kerina when the Appellant's motor vehicle Registration No. KCC 306L is said to have violently collided with the motor vehicle in which the Respondent was travelling. The Respondent pleaded particulars of negligence on the part of the Appellant and also that he suffered the following injuries:

    i. Facial contusion with edema and abrasions

    ii. Abdominal and pelvic contusion

    iii. Fractures of the left radius and ulna

    iv. Dislocation of the right knee patella bone

    v. Bruising to both hands knuckles and fingers

Evidence

7. PW1 was Daniel Nyameino, Senior Clinical Officer from Kisii Teaching and Referral Hospital. He relied on the P3 form and medical report also produced in evidence. On cross examination, it was his case that he examined the Respondent 11 days after the accident. The soft tissue injuries were in the process of healing. He also suffered fracture of the left radius and ulna bone. He was out on plaster of Paris. The injuries were expected to heal.

8. PW2 was the Respondent. He relied on his witness statement and produced the bundle of documents filed in court. They are dated 4.6.2021. On cross examination, he testified that he was admitted for 1 month. He suffered injuries as pleaded.

9. The Appellant closed its case without calling witnesses.

Submissions

10. On its part, the Appellant filed submissions dated 3.12.2024. It was submitted that the Respondent did not prove liability and the lower court so awarded 100% liability in favour of the Respondent in error. They relied on Section 107 of the *Evidence Act*.

11. On damages, it was submitted that an award of Ksh. 350,000/= would be sufficient damages. Reliance was placed inter alia on Daniel Otieno Owino & Another v Elizabeth Atieno Owuor (2020) eKLR.

12. The Respondent also filed submissions dated 26.12.2024. His general submission was that the court properly evaluated evidence and authorities and arrived at the correct conclusion. Reliance was inter alia placed on Kisii HCCA 125 of 2021 BM Security Co v James Olungomot.

Analysis

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

14. The jurisdiction for this court to review the evidence in the lower court should thus be done but with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

15. The duty of this court is thus to 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..."

16. On liability, the Appellant did not call any evidence. The driver of the accident motor vehicle did not testify or give evidence. As such, the evidence of the Respondent was 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 held 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."

17. The defence filed by the Appellant in the lower court on liability thus contains 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 his 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."

18. 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."

19. 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....."

20. 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."

21. The Respondent was a passenger in motor vehicle registration number KCJ 845R and there is nothing he could have done to prevent the accident. The Appellant did not blame the driver of motor vehicle registration number KCJ 845R and its case is not before this court. Where the Respondent proved his case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view he failed. 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, which 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."

22. Even without an eye witness, negligence could be inferred from the general factors surrounding the case. As was held in the case of EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR:

> A case cannot collapse merely on the basis that there were no eye witnesses. The court can, on the basis of circumstantial evidence or evidence adduced by the Defendant that tends to prove his involvement in the alleged act infer culpability on the part of the Defendant.

23. In a court room situation, we deal with empirical evidence on what is more probable than the other. In the case of Embu Road Services V Riimi (1968) EA 22, the court held inter alia as doth; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

24. The Respondent proved the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused as against the Appellant. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."
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> In Caparo case (supra) the Court stated:
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> > "What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

25. 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 or not, so as to assess the degree of their respective responsibility and blame-worthiness, and apportion liability

between or among them accordingly. The Appellant 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."

26. The Appellant filed a defence but did not call the driver of the accident motor vehicle at the hearing. The evidence of the Respondent as to the occurrence of the accident was largely uncontroverted. Therefore, the defence filed by the Appellant in the lower court 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."

27. Where the Respondents proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view 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".

28. The motor vehicle Registration No. KCC 306L 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."

29. 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....."

30. Therefore, I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the driver of KCC 306L. 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."

31. The court finds no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on this head.

32. On quantum, the court of appeal pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. 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.

33. 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. 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 vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs 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..."

34. Therefore, where damages are proved to be at large, they must be commensurate with similar injuries. The injuries that the Respondent suffered were as follows:

i. Facial contusion with edema and abrasions

ii. Abdominal and pelvic contusion

iii. Fractures of the left radius and ulna

iv. Dislocation of the right knee patella bone

v. Bruising to both hands knuckles and fingers

35. There is the medical report dated 12.4.2021 and produced by Daniel Omaiyo Nyameino for the Respondent. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. Expert reports are not necessarily binding and this court is not bound to accept them. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

36. The evidence in the expert report and testimony should be considered alongside other evidence to enable the court make a finding whether or not it believes in such evidence. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

37. The medical doctor testified as PW1 and conformed that the Respondent suffered multiple soft tissue injuries. This finding was not controverted and the Appellant did not tender any medical evidence. The report by PW1 demonstrated specific injuries that the Respondent sustained as pleaded and I have no reason to doubt it. The Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

38. The Appellant contended that the assessment of damages was excessive and not commensurate with the injuries. The lower court awarded damages as follows:

a. General damages Ksh. 500,000/=.

b. Special damages Ksh. 22,750/=

39. The lower court awarded Ksh. 500,000/—in general damages. I have to analyze whether this award was inordinately high in the circumstances of this case. The damages must be commensurate to the injuries for consistency in the judicial awards. 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."

40. 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.

41. In the case of George Raini Atungu vs. Moffat Onsare Aunga [2021] eKLR (Ougo, J), Kshs. 650,000/= was awarded for a fracture of the right tibia and fibula bones, a fracture of the left radius and ulna, and contusions to the chest and the pelvis.

42. In Martin Ireri Namu & another v Alicalinda Igoki Kiringa [2019] KEHC 1773 (KLR), the respondent suffered a dislocation of the left shoulder and fractures on the right tibia, fibula and left radius ulna. He was awarded Kshs 800,000/=.

43. Looking at the comparable injuries, the appeal on quantum is not merited and is accordingly dismissed.

44. On special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find 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."

45. Special damages are thus particular and constitute a 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. The Appellant did not submit the manner in which the court erred in awarding special damages. The pleadings and evidence, in the form of receipts produced by the Respondent, confirm the award, and I do not see any basis to interfere with the lower court's finding.

46. I uphold the lower court's finding on both liability and quantum and dismiss the appeal.

Costs

47. 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.

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

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

49. The best order is for the Respondent to have costs of Ksh. 95,000/=.

Determination

50. The upshot of the foregoing is that I make the following orders: -

    a. The appeal lacks merit and is dismissed.

    b. The Respondent shall have costs of Kshs. 95,000/=.

    c. 30 days stay of execution.

    d. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kipyegon for the Appellant

No appearance for the Respondent

Court Assistant – Michael