Ogeto v Otiato (Civil Appeal E093 of 2023)
[2025] KEHC 2983 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2983 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E093 OF 2023

DKN MAGARE, J

MARCH 5, 2025

BETWEEN

ROBERT NYARANGO OGETO ..... APPELLANT

AND

CALVINCE BONFACE OTIATO ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Ocharo (SPM), dated 9.8.2023, arising from Kisii CMCC No. 621 of 2021. The Appellant was the plaintiff in the suit that was dismissed with costs in limine.

2. The Appellant filed suit vide a plaint dated 6.5.2021 claimed damages arising from an accident on 12.12.2020. The accident involved the Appellant while riding motorcycle registration No. KMCW 975H along Ufanisi-Nyakongo road when the Defendant's motor vehicle Registration No. KCD 301Y hit the motorcycle, causing the accident.

3. The Appellant set forth particulars of negligence for the accident motor vehicle. He pleaded Ksh. 344,550/= as special damages and prayed for general damages. The injuries were pleaded as follows:

    i. Compound right tibia fracture (G3b)

    ii. Compound right fibula fracture (G3b)

    iii. Bruises on the right elbow

    iv. Bruises on the left elbow

    v. Blunt trauma to the back

4. The Respondent entered appearance and filed defence, denying the particulars of negligence and injuries pleaded in the plaint. They set up particulars of negligence of the Appellant.

5. The trial court heard the parties and rendered judgment dismissing the Appellant's case. The court indicated that had the Appellant been successful, a sum of Ksh 1,000,000/= would have been adequate compensation for the injuries. The court also indicated a sum of Ksh. 344,550/= as proved.

6. Aggrieved by the finding of the trial court, the Appellant lodged a Memorandum of Appeal, and set forth the following grounds:

    a. That the learned trial magistrate erred in law and fact in dismissing the Appellant's case against the weight of evidence tendered by the Appellant.

    b. That the learned trial magistrate erred in law and fact in failing to hold the Respondent 100% liable for the accident.

    c. That the learned trial magistrate erred in law and fact in failing to consider the appellant's evidence and submissions in his judgment as regards the issue of liability.

    d. That the learned trial magistrate erred in law and fact by solely relying on the Respondent's testimony while disregarding that of the Appellant.

    e. That the learned trial magistrate's decision on both liability and quantum albeit a discretionary one was plainly wrong.

7. The Memorandum of Appeal dated 14.8.2023 raised the following issues:

    a. Liability

    b. The quantum of general damages

Evidence

8. PW1, No. 85663, PC Kenneth Walumbe testified that he was attached to the Kisii Police Station Traffic Base. He produced an abstract for an accident involving motor vehicle registration numbers KCD 301Y, KAA 890B and motor cycle registration No. KMCW 975H.

9. He stated that KCD 301Y and motorcycle registration No. KMCW 975H were heading to Kisii town. The rider indicated to turn right, KAA 890B. The officer indicated that motor vehicle registration number KCD 301Y hit the motorcyclist, swerved right, and hit the motorcycle registration KMCW 975H. The Rider sustained injuries. That is; fractures whence he was taken to Christa Marian for medical attention.

10. KCD 301Y hit the Appellant when he was turning to the right. As KCD 301Y swerved to the right, it also hit KAA 890B, which was parked. In his view, KCD 301Y was to blame. On cross-examination, he reiterated the police abstract that KCD 301Y was to blame for the accident. He could not tell if the driver of KCD 301Y was charged since he had no police file.

11. PW2 was the Appellant. He was traveling to Kisii town on the material day. He was hit from the rare by a motor vehicle. He produced his bundle of documents in court. On cross-examination, it was his case that the motor vehicle registration No. KCD 301Y was following him from behind. He did not take any turn. The impact was on the left side of the road. He was admitted to Christa Hospital for 3 days. He suffered fracture(s). Metals were inserted. He said that the two vehicles were behind him.

12. PW3 was Dr. Morebu Peter Momanyi. He produced his medical report. The Appellant, according to him, sustained two fractures on the right leg. He suffered blunt injuries to the back, and soft tissue injuries. He examined the Appellant 2 weeks after the accident, and permanent disability was 40%. He was due for surgery, which would cost Ksh. 350,000/=, which never occurred.

13. The Respondent testified as DW1. He claimed to be the driver of the accident motor vehicle, which was traveling at 40 km/h. On cross-examination, he testified that the accident occurred after he swerved to the left side of the road. He had not produced the inspection report for the motor vehicle. The road was clear, and there was no traffic. He stated that he saw the Appellant on the road. He also confirmed that he hit a stationary vehicle.

14. The Respondent produced the second medical report without calling the author.

Submissions

15. The Appellant submitted that the Respondent was 100% liable for the accident. It was submitted that the Appellant was entitled to 100% liability and general damages of Ksh. 2,000,000/-. The authorities relied upon, however, presented injuries that were more serious. For example, in the case of Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Ltd (2020) eKLR, there was also a fracture of the right shoulder, which was incomparable to this case.

16. The other case referred to was Franklin Chilibasi Spii v Kirangi Liston (2017) eKLR which involved both compound and comminuted fracture of the right tibia and fibula. It can be said to be comparable but not similar injuries to this case that involved compound fracture of the tibia and fibula.

17. The Appellant also submitted that future medical expenses of Ksh. 350,000/= ought to have been awarded. According to the appellant, the special damages were pleaded and proved at Ksh. 344,550/= and ought to have been allowed as such.

18. They submitted that the award should not be inordinately high and should reflect the injuries suffered based on comparative cases. They relied inter alia on the case of Southern Engineering Company Ltd v Musinga Mutia (1985) KLR 730.

19. The Appellant submitted that in the circumstances, he was entitled to compensation of Ksh. 2,000,000/-. Reliance was placed on the cases of Triad Coaches Ltd v Mary Mutheu Kakemu (2020) eKLR, and Naomi Momanyi v G4s Security Services Ltd & Another (2018) eKLR.

20. The Respondent submitted that the Appellant did not prove liability against the Respondent. They submitted that Ksh. 350,000/= would be adequate compensation for damages. Parties should be candid; from its face value, the suggestion by the Respondent herein was far below the threshold of the award on the category of compound fractures the Appellant suffered. I do not follow such misleading submissions that Ksh. 350,000/- which is often awarded to soft tissue injuries, should be awarded to a party who suffered compound fractures. Even if it was for the purpose of the bargain, the bargain was too low as to be inapplicable, and I dismissed it.

Analysis

21. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

22. 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."

23. 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."

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

25. This court's powers were set out in the case of Peters vs Sunday Post Limited [1958] EA 424 , where 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..."

26. This court does not have the advantage of seeing and hearing the witnesses as did the lower court. It must however reconsider the evidence, evaluate it itself, and draw its own conclusions. The Appellant urged the court to find that the lower court erred in dismissing the suit. He proposed an award of Ksh. 1,000,000/= in general damages was inordinately low. On the other hand, the Respondent's general case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

27. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant failed to prove his case. 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 the case upon any party the burden of proving any particular fact he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

28. It follows that the initial burden of proof lies on the Appellants, 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."

29. 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."

30. 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....."

31. 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;-
>
> "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."

32. The Appellant herein was riding his motorcycle. It was not in dispute that the Appellant was riding on the left side of the road, and the accident also occurred on the left-hand side of the road. DW1's account was that the accident occurred after he swerved to the left side of the road. The account by PW1 was that he was hit from behind on the left-hand side of the road. PW1 reiterated what he wrote in his witness statement dated 6.5.2021. On the other hand, DW1's testimony was at variance with his undated witness statement filed on 2.3.2021. He wrote in the statement that the Appellant rode the motorcycle, making a U-turn towards where DW1 was coming from, and so DW1 swerved to the right to avoid a head-on collision. He testified to the contrary in court.

33. Had the testimony of DW1 been true, he could not have hit the Appellant on the left side of the road as he purported, if the Appellant was making a U-turn and DW1 swerved to the right-hand side of the road. In the circumstances of this case, the lower court was wrong in its conclusion because the investigating officer did not disprove the testimony of PW1.

34. The testimony of the police officer was merely on matters as reported to him, but PW2 and DW1 witnessed the accident, and their testimony and evidence had a higher probative value. The Appellant proved that it is the Respondent who was 100% to blame for the accident.

35. Where the Appellant proved their case to the required standard, it was the duty of the Respondents 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 Appellant is a matter of defence and it is an error to instruct the jury that the burden of proof is on the Appellant to show that the injury occurred without such negligence".

36. Therefore, I find no basis upon which the learned magistrate dismissed the Appellant's case on liability as the Appellant proved to the required standard that the Respondent was 100% liable for the accident. The Appellant proved the want of care on the part of the driver of the accident motor vehicle. I agree 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:
>
> ".....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 Appellant'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. Having changed his testimony, it is clear that the Respondent was the sole cause of the subject accident. I therefore set aside lability against the Appellant and replace it with an order. On quantum, the lower court proposed an award of Ksh. 1,000,000/- in general damages on the basis of George Karanja Mukundi v Mriera Francis & Another (2022) eKLR. The Appellant suffered the following injuries:

i. Compound right tibia fracture G3b

ii. Compound right fibula fracture G3b

iii. Bruises on the right elbow

iv. Bruises on the left elbow

v. Blunt trauma to the back

38. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Morebu Peter Momanyi dated 29.12.2020. The medical report by Dr. Adeku Willam KJ dated 10.12.2021 was not tested in cross examination. Also, the said medical report was not conclusive on the injuries suffered by the Appellant since it suggested a repeat leg radiograph for conclusive finding but which was not done. 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.

39. 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."

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. 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."

42. 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.

43. 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."

44. 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."

45. 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."

46. 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....."

47. With the above guide, if the award is inordinately high, then 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.

48. I proceed to determine similar fact cases in relation to damages as applicable to this Appeal. Therefore, I find the following cases to present a similar fact situation to the appeal herein.

49. In Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR the Appellant suffered the following injuries and was awarded Ksh. 700,000/= in general damages in 2018:

    a. Compound fracture of the right distal tibia/ fibula

    b. Cut wound on the scalp

    c. Cut wound on the chest

    d. Cut on the lower lip

50. In Daniel Oduor Shieuda v Christopher Wambugu [2021] eKLR the court observed that the courts have been awarding damages ranging between Ksh.450,000/= to Ksh.1,300,000/= for fractures of tibia and fibular bones depending on the specific case and other injuries suffered by the same claimant in the accident. The appellant therein was awarded Ksh 800,000/=.

51. In *Kimita v Travel Budget Express & another (Civil Appeal E042 of 2022)* [2024] KEHC 6435 (KLR) (4 June 2024) (Judgment) the High Court upheld an award of Ksh. 800,000/= for general damages to the Appellant who suffered the following injuries:

    a. Fracture distal end of the left tibia and fibula;

    b. Severe soft tissue injury of the left leg;

    c. Deep cut wound on the forehead leading to severe soft tissue injuries;

    d. Cut wound on the zygomatic area leading to severe soft tissue injuries;

    e. Deep cut wound on the left arm leading to soft tissue injuries;

    f. Fracture of the right tibia;

    g. Compound fracture of the left tibia;

    h. Deep cut wound on the chin.

52. All these authorities show that the Appellant's proposed award of Ksh. 2,000,000/= is inordinately high and not a fair estimate of general damages. The award of Ksh. 1,000,000/- proposed by the lower court was high. However, there was no appeal that it was inordinately high. Therefore, the award given by the court remains.

53. On future medical expenses, I note that the contention by the Appellant is that whereas the Appellant's medical doctor proposed Ksh. 350,000/- as the cost of removal of implants, the court awarded none.

This court finds that the lower court erred in not awarding the damages for future medical expenses. In the case of Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> " We understand that to mean that once the Appellant pleads that there would be need for further medication and hence future medical expenses will be necessary, the Appellant may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

54. Future medical expenses as special damages should be pleaded and proved. The Appellant pleaded and Dr. Morebu proved Ksh. 350,000/=. As was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but 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 one.

55. The medical report by the Respondent's medical doctor did not make any proposal or negate the proposal by the medical doctor by the Appellant that the Appellant would require Ksh. 350,000/= for what was described as surgery for the fractured bones to be corrected with metal implants for proper bone alignment and earlier mobilization. The fact that the correction had not been done does not make the award not awardable. It is a future expense. I uphold this medical opinion also bearing in mind that the Appellant suffered compound fractures.

56. With 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."

57. Special damages are thus very specific 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. 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.

58. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 344,550/= which the lower court adopted as proved.

59. 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.

60. 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.

61. 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.

62. In the circumstances, costs follow the event. The Appellant was successful, so they are entitled to costs in this court and the court below.

Determination

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

    a. The Judgment and decree of the lower court dismissing the suit is set aside and substituted thereof with an Order allowing liability of 100% against the Respondent.

    b. Judgment is entered for the Appellant for an award in general damages of Ksh. 1,000,000/=.

    c. Judgment is hereby entered for the Appellant for Ksh. 350,000/= in respect of future medical expenses.

    d. Judgment is entered for the Appellant for Ksh. 344,550/= being special damages.

    e. The Appellant shall have costs of the appeal assessed at Ksh. 105,000/=.

    f. The Appellant shall have costs in the lower court.

    g. Special damages to attract interest from the date of filing suit.

    h. 30 days stay of execution.

    i. Right of appeal 14 days.

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 the Appellant

Mr. Ondimu for the Respondent

Court Assistant – Michael

..