



**Telkom Kenya Limited v Moiro (Civil Appeal E077 of 2024)
[2025] KEHC 2731 (KLR) (3 March 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E077 OF 2024
DKN MAGARE, J
MARCH 3, 2025**

BETWEEN

TELKOM KENYA LIMITED APPELLANT

AND

WILKISTER BONARERI MOIRO RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the subordinate court delivered by Hon. B.O. Omwansa SRM) on 26.3.2024 in Kisii CMCC No. 353 of 2021. The Appellant was the defendant in the lower court. They lodged the Memorandum of Appeal dated 25.4.2024, raising the following grounds of appeal:
 - a. The learned magistrate erred in law and fact in finding that the pole that allegedly fell on the Respondent belonged to the Appellant.
 - b. The learned magistrate erred in law and fact in relying on evidence of PW3 who was not an expert in pole identification.
 - c. The learned magistrate erred in law and fact in finding the Appellant 100% liable.
 - d. The learned magistrate erred in law and fact in awarding excessive general damages of Ksh. 285,000/=.
 - e. The learned magistrate erred in law and fact in failing to consider the Appellant's submissions.

Pleadings

2. In the plaint dated 4.3.2021, the Respondent claimed damages for an accident pleaded to have occurred on 23.10.2019, when the pole belonging to the Appellant suddenly fell on the Respondent while she



was engaged in her business selling second-hand clothes at the Priority Plaza. The Respondent set forth particulars of negligence and injuries and pleaded special damages. The injuries were pleaded as follows:

- i. Blunt trauma to the lower back
 - ii. Bruises to the lower back
 - iii. Bruises to the knees
 - iv. Bruises to the arms
3. The Appellant filed its defence dated 25.5.2021. It denied the particulars of negligence as pleaded by the Respondent and blamed the Respondent for the accident. The lower court considered the matter and awarded reliefs as follows:
- i. Liability at 100% against the Appellant.
 - ii. Special damages Ksh. 11,670/=
 - iii. General damages Ksh. 285,000/=

Evidence

4. PW1 was the Respondent. She relied on her witness statement and the bundle of documents filed in court and produced the documents in the list. She testified that on 23.10.2019, she was selling clothes when the pole fell on her, hence the injuries. On cross-examination, it was her case that the pole was behind her. It was Telkom poles and wires. She stated that Safaricom and Kenya Power had poles, too. She was not fully healed.
5. PW2 was Dr. Morebu Peter Momanyi. He relied on his medical report produced in evidence. He testified on cross-examination that the Respondent suffered bruises. They were soft tissue injuries.
6. PW3 was Thompson Kerongo who relied on his witness statement dated 3.7.2023. He testified that the pole belonged to the Appellant. In cross examination, it was his case that he had not worked with Telkom Kenya. He did not know the number identifying the pole that fell on the Respondent.
7. DW1 was Alphonse Nyabochwa Ondiki, who works for the Appellant. He maintains equipment and internet for the Appellant. He produced his job card. On cross-examination, he stated that the pole could fall when left for a long time. He had seen the pole within the court precincts, which allegedly fell on the Respondent. It belonged to the Appellant, though the badge was not used. Nowadays, they used underground cables. He stated that the Appellant moved from using poles in 2010.
8. The court has perused and considered the submissions that the parties relied on. It is not for their lack of value or appreciation on the part of the court that I have not duplicated them herein verbatim.

Submissions

9. The Appellant argued orally that the pole did not belong to the Appellant. They also argue that the damages were excessive and ought not to have been assessed. The last part regarding not assessing is otiose and is rejected for being contrary to established principles, which place the duty to assess on the court of first instance. In *Lei Masaku vs Kalpama Builders Ltd* [2014] eKLR, the court noted as follows: -

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the



part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

10. The Respondent filed submissions supporting the judgment in toto. She stated that the Appellant's sole witness conceded that the pole belonged to the Appellant. They stated that the Respondent did not prove contributory negligence. They relied on the case of *Mac Drugall App V Central Railroad Co.* Rbr 63 Cal 431.
11. On quantum it was submitted that the award was low as a sum of Ksh. 350,000/= could have sufficed. They relied on the cases at page 8 of the lower court judgment. They prayed that the appeal be dismissed.

Analysis

12. 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.
13. 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 it 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.”

14. 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.”

15. The Court is to bear 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. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the



document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

16. In *Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

17. 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...”

18. Though this court did not have the advantage of seeing and hearing the witnesses as did the lower court, it 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...”

19. The Appellant urged the court to find that the lower court erred in finding 100% liability against the Respondent. The Appellant’s case is also that the pole did not belong to the Appellant. It proposed that the judgment of the lower court be set aside. On the other hand, the Respondents’ case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

20. The court is asked to establish whether the lower court erred in its finding, on a balance of probabilities that the Appellant was 100% 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.”



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

22. 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 than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

23. 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 event 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....”

24. 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.”

25. Respondent’s evidence was that the pole belonged to the Appellant. DW1’s evidence was that the same did not belong to the Appellant. PW3 testified that the pole belonged to the Appellant. Upon identifying a pole within the court’s precincts, he confirmed that, indeed, the pole belonged to the Appellant. This thus removes the question whether such poles can be found within Kisii town.

26. Of cardinal importance is that the Appellant’s defence did not specifically deny the ownership of the pole. Such a denial cannot be the kind to be generalized as a mere denial. The Appellant had to plead that the pole belonged to someone other than the Appellant. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

27. The defence did not specifically deny that the Appellant had poles in Kisii town. Further, the ownership of the poles was not raised as a defence. Alluding at defence hearing that Kenya Power and Lighting and Safaricom have poles is not a defence. It is a mere denial.

28. Thus, I do not doubt that the pole that fell on the Respondent belonged to the Appellant. Having found that the Respondent proved to the required standard that the Appellant was the pole owner that fell on the Respondent, the Appellant also failed to offer a plausible explanation to prove contributory negligence. The pole could not have just fallen when well maintained and managed. Like a motor vehicle, a well-maintained pole would not just plunge into other objects or uproot itself and fall. 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. In a courtroom 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 courts 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).

30. The Respondent proved that the Appellant had a duty of care, a breach of that duty, a causal connection between the breach and the damage, and foreseeability of the particular type of damage caused against the Respondent. 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.”

In *Caparo* case (*supra*) the Court stated:

“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.”

31. The evidence that the pole was meant to have been removed as they were now using an underground cable is not a serious defense. Leaving the pole since before 2010 without use is negligence. It was bound to fall and likely to injure. The event was foreseeable. Lord Hope of Craighead in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 distinguished foreseeability of damages under contract and under tort as follows:

Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable. It is important to bear in mind that, as Lord Reid pointed out in *The Heron II* [1969] 1 AC 350, 385, the rule that applies in tort is quite different and imposes a much wider liability than that which applies in contract. The defendant in tort will be liable for any type of loss and damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable. Reasonable foreseeability is the criterion by which the extent of that liability is to be judged, and it may result in his having to pay for



something that, although reasonably foreseeable, was very unusual, not likely to occur, and much greater in amount than he could have anticipated...

Without proper defence of contributory negligence, the court could not determine 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. 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.”

32. Where the Respondents proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence. This was not pleaded. It is, therefore vain to determine contributory negligence. In the case of *Mac Drugall App V Central Railroad Co. Rbr* (supra) 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”.

33. 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 Appellant. 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:

“.....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.”

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

35. On quantum, the lower court awarded Ksh. 285,000/- in general damages but without citing any supporting authority. The amount is of such exactitude that it raised its consonance with the decision in the case of Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, where Justice D.S. Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

36. In this case, the only medical report produced was one by Dr. Peter Morebu and which confirmed the injuries sustained by the Respondent herein as follows:

- i. Blunt trauma to the lower back
- ii. Bruises to the lower back
- iii. Bruises to the knees
- iv. Bruises to the arms

37. The court has to assess the effect of the injuries on the Appellant. I have no reason to doubt the evidence of the medical doctor obtained in the medical report dated 10.3.2020. 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. The injuries were soft tissue injuries.

38. 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”

39. 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.

40. 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.”

41. 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.

42. 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 *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 impeding 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.”



43. 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.”
44. Further, in the case of *Kilda Osbourne v George Banned 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.”
45. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry and 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....”
46. 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.
47. Courts have given various amounts for comparable injuries. In *Elizabeth Wamboi Gichoni v Benard Ouma Owuor* [2019] eKLR, on the 2nd day of December 2019, the court found an award of Ksh 300,000/= excessive and reduced it to 175,000/= for less soft tissue injuries.
48. In the case of *Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next of friend)* VAA [2019] eKLR, the court awarded 180,000/= for more severe soft tissue injuries.
49. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, Justice Nyakundi found a sum of Ksh 140,000/= sufficient for the following injuries: a cut on the head, a blunt injury to the right knee, multiple bruises on the upper limbs, and bruises on the right knee.



50. In the circumstances, the injuries suffered by the Respondent in the appeal herein are largely similar to the above cases involving soft tissue injuries. Therefore, an award of Kshs. 285,000/- granted by the lower court was inordinately high. The proper amount is Ksh. 150,000/=.
51. The next question will be who will pay for the costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.
52. 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.

53. Given the mixed results, each party should bear their costs.

Determination

54. In the upshot, I make the following orders:
- a. The appeal on liability lacks merit and is dismissed.
 - b. The appeal on quantum is allowed. The amount of Kshs. 285,000/= is set aside. In lieu thereof, I award a sum of Kshs. 150,000/=.
 - c. Special damages are not affected.
 - d. Each party to bear their costs.



- e. 30 days stay of execution.
- f. Right of appeal 14 days.
- g. 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. Mwangi for the Appellant

No appearance for the Respondent

Court Assistant – Michael

