Abdul v Mokua (Civil Appeal E077 of 2023) [2025] KEHC 4105 (KLR) (1 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4105 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E077 OF 2023

DKN MAGARE, J

APRIL 1, 2025

BETWEEN

HUWAIDAI AHMED ABDUL ..... APPELLANT

AND

ZEBEDEE MICHAEL MOKUA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 19.07.2023 in Kisii CMCC No. 379 of 2010 by Hon. C. Ocharo (SPM). The lower court heard the matter and made the following findings:

    a. Liability against the Appellant – 70:30

    b. General damages of Ksh. 350,000/=

    less 30 % Ksh. 105,000/=

    subtotal Ksh. 245,000/=

    c. Special damages Ksh. 29,870/=

    Total Ksh 274,870/=

    d. Costs to the Respondent

2. The Appellant, being aggrieved, filed a 10-paragraph memorandum of appeal, which I have painstakingly perused and found to be prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise memorandum of appeal without arguments, cavil, or evidence. The rest

of the King's language should be left to submissions and academia. this is in line with Order 42 Rule 1, which provides as doth:

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

3. The Court of Appeal had this to say in regard to Rule 86 [now 88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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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. A memorandum of appeal raising repetitive grounds of appeal clouds the key issues for determination and is unwarranted. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that:-

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross v Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

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

   a. Liability

b. Quantum

6. Grounds 1, 2, 3, 9, and 10 are hyperbolic and rhetorical, meaning nothing and not arising from pleadings. Further, the grounds dealing with submissions are not serious. The law relating to submissions is now settled as Mwera J., posited in the case of Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 it was stated:

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

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

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

8. The Respondent filed suit vide a Plaint dated 17.05.2019, seeking general damages for an accident on 11.02.2019. The appellant was the owner of motor vehicle registration number KAZ 082 L Toyota Hiace. The Respondent was a rider of motorcycle registration number KMEH 515A along Kisii-Migori road at Ramasagara. The Respondent pleaded that the Appellant controlled the said motor vehicle so slovenly that he allowed it to hit the Respondent from behind, resulting in loss and damages.

9. The Respondent blamed the Appellant as the owner of the said motor vehicle. He set out particulars of negligence extensively as follows:

a. Blunt trauma to the right periorbital region

b. Traumatic conjunctivitis to the right eye

c. Brain concussion

d. Cut wound to the right cheek area

e. Lacerations to the lumbo-sacral region

f. Contusion to the chest

g. Lacerations to the left heel.

10. The Respondent pleaded the following special damages:

a. Medical Report Ksh. 6,500.00

b. Search Ksh.550.00

c. Treatment Expenses Ksh. 22,820.00

Total Ksh.29,870.00

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

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

12. The Appellant entered appearance and filed a defence dated 19.08.2019. He filed a list of documents, which included the police file, medical report upon Re-examination, and driver's statement. None of the documents were attached. In the list of witnesses, he listed three witnesses, none of whom had a witness statement. The third witness was not named.

13. In his defence, the Appellant denied the occurrence of the accident. In a somewhat evasive manner, the Appellant blamed the Respondent for the accident. He set particulars of negligence against the Respondent. in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, Akiwumi, J. A., addressed the question of general denials, evasive, inconsistent, and contradictory alternative general traverse as follows:

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved to the appellant, which was, moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence.

14. It is essential to plead with exactitude what constitutes a proper defence to a plaintiff's case. it does not cut skirt around the case with a rather winded and convoluted defence.

Evidence

15. PW1 testified and adopted his statement dated 17.05.2019. he recalled the accident of 11.2.2019, where he lost consciousness for 3 days. he was treated at Nyangena Hospital. He stated that the driver of motor vehicle registration number KAZ 082 L Toyota Hiace, on reaching Ramasagara, lost control and hit his motorcycle registration number KMEH 515A along Kisii- Migori road. He blamed the driver for hitting him from behind. On cross-examination, he stated that he was hit from behind. he stated that he was not to blame. He stated he was going to renew the license and insurance.

16. PW2 was PC Moses Kasera of Kisii Traffic Base, who was however, stood down. However, parties produced exhibits, 7,8, and 9 by consent. A new PW2 was called, that is, Dr Morebu Peter. he stated

that he examined the Respondent for the accident of 11/2/2019, where he suffered blunt injuries to the right eye, left leg, and chest. He attended Nyangena and KTRH.

17. The Respondent could not see properly. He relied on the P3 clinic card and received Ksh. 6,500/=. He stated, on cross-examination, that he examined the Respondent on 26.1.2021, two years later. It was his evidence that the Respondent suffered a fracture of the tibia and fibula. He stated that he did not indicate blurred vision, but it was possible. He changed his mind and stated that the plaintiff had blurred vision.

18. PW3. Cpc Inter Soake Sahonka stated that he was attached to the Gesonso traffic base. He stated that the accident was reported. He stated that Samuel anymore, the driver of the motor vehicle, was driving from Migori to Kisii when he reached Ramasagara, and the vehicle hit the plaintiff's motorcycle. The vehicle is said to have hit the motorcycle head-on. He stated he did not have a police field and, as such, could not tell how the motorcycle was hit.

19. At the close of the plaintiff's case, the appellant sought to file a witness statement and a medical report.

20. DW1, Samuel Moseti Nyaore, testified that he was the driver of the subject motor vehicle. He stated that he recorded a statement [which is not in the court file]. He stated that a motorcycle suddenly appeared in front and, on seeing the subject vehicle, fell on its own. he applied emergency brakes. Another matatu took the rider to the hospital.

21. On cross-examination, he stated that an accident occurred on the said date. The vehicle tire was damaged due to the emergency brakes. He left the vehicle at the scene and went to report the incident.

22. 22. PW3 was now recalled as DW1. He stated that the vehicle hit the motorcycle head-on and damaged the bumper as the rider was crossing to the petrol station. He stated that it was not indicated which side the rider was crossing. On cross-examination, he stated that the OB indicated, a head-on collision, but it was the vehicle that hit the motorcycle. He said it was a lie that the vehicle did not hit the motorcycle.

23. Dr. Steve Ochieng testified on behalf of Dr. Kahotho and produced a report prepared on 10/2/2020. He stated that the plaintiff was re-examined in 2020 and found to have suffered soft tissue injuries. He testified that there was no mention of an eye. On cross-examination, he said that the Respondent had a cut wound on the face and left leg other than the soft tissue injuries

Submissions

24. The Appellant filed submissions dated 8.1.2025. It was submitted that Ksh. 90,000 would be adequate compensation for the injuries suffered. Reliance was placed inter alia on Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 Others [2019] eKLR.

25. On liability, it was submitted that the finding of 70:30 liability for the Respondent was in error and against the weight of evidence. Reliance was placed inter alia on Anne Wambui Ndiriu v Joseph Kiprono Ropkoi & Another [2015] eKLR.

26. The Respondent, on the other hand, filed submissions dated 17.1.2024. This should mean 17.1.2025. It was submitted on quantum that the award of Ksh. 350,000 for general damages was not inordinately high and should not be disturbed. The Respondent relied on the case of Catherine Wanjiru Kingori v Gibson Theuri Gichobi (2005) eKLR. Based on this, it was submitted that the lower court correctly assessed the damages based on the injuries supported by the medical evidence, and the appeal should be dismissed.

27. On liability, it was submitted that the evidence tendered by the Respondent supported the finding of the lower court of 70:30 liability in favour of the Respondent, and the appeal on the same should be dismissed.

Analysis

28. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another v Shah [1968] EA 93, the court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

29. The Court must remember that it has neither seen nor heard the witnesses. The trial court has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read the matters extrinsic to them into those documents. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:

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

30. The appellate court is not bound necessarily to accept the findings of fact by the court below as held in the case of Selle & Another v Associated Motor Board Company Ltd. [1968] EA 123, where the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

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

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

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

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

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

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

34. A party who persuades the court more than the other of the likelihood of the events in controversy will carry the day. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526 stated that:

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

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

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent

is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

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

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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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."

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

38. The Appellant submitted that the Respondent was fully to blame. The Respondent refuted the claim and alleged that the motor vehicle was to blame. The appellant did not file a witness statement; he adopted one in vacuo. he then proceeded to give an incredulous story that insult the intelligence of the courts. he stated that he stopped and went to report inside of his vehicle not being involved in an accident. the Police evidence was that the accident occurred. the Appellant's driver was thus lying.in the case of Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR, Odunga Jas he then was posited as follows, when addressing evidence akin to the one tendered by the Appellant's driver:

> " Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N v N [1991] KLR 685 he expressed himself in the following terms:
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> "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."
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> 5. In the South African case of Matatiele Municipality & Others v President of the Republic of South Africa & others (1) (CCT73/05) [2006] ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that
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> "in my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

39. The Respondent tendered evidence showing negligence on the part of the Appellant. the evidence was virtually uncontroverted. a lying witness is not worthy, to listen to except to marvel how deep his lies can go. in the case of MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment), Mativo J stated as follows regarding majot contradictions in evidence:

Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.5The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria6 that:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.7 It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.

40. The discrepancies in defence evidence were unbelievable, so the court ought to have dismissed it. There was no basis for finding the Respondent contributorily liable for negligence. Luckily for the Appellant, there is no cross-appeal. The award on liability was thus more than generous. The appeal on liability is consequently dismissed for being untenable.

41. The Appellant knew the circumstances of the case, but he failed to provide cogent evidence on the occurrence of the accident. he opted to engage in shenanigans, lies, and subterfuge instead of tendering evidence. he had prior knowledge of how the accident occurred but gave contradictory evidence that was so strained that it was not plausible. Section 112 of the *Evidence Act* provides for proof of special knowledge in civil proceedings. The same provides as follows:

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

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

53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the

Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

43. The court could have only one consistent set of evidence, that of the Respondent. The accident was caused by the Appellant; there was no evidence to the contrary. The court cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258, where the Court of Appeal, reiterating the foregoing, stated that:

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

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

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

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

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

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

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

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

47. The appeal on liability is dismissed as there was no evidence of the error of the court. In finding the Appellant liable. The error is in finding the Respondent partly to blame. However, without a cross-appeal, it is advisable to let sleeping dogs lie.

48. On quantum, there was no appeal on special damages. though indicated obliquely in Ground 5, it does not touch on special damages. Special Damages must be both pleaded and proved before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

49. Further, that special damages must be pleaded and strictly proved as stated in the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

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

50. There is no error on special damages. I shall not disturb the same as they were particularized and specifically proved.

51. Regarding general damages, the first appellate court must decide on damages, even where the suit is dismissed. In Lei Masaku v Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

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

of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

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

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

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

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

    3) Previous awards for similar injuries are mere guidelines; each case should be treated on its own facts.

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

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

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

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

55. 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.

56. 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."

57. 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....."

58. According to the above guide, if the award is inordinately high, I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high, or had I handled the case in the subordinate court, I would have awarded a different figure. I proceed to determine similar fact cases in relation to damages as applicable to this appeal.

59. It must be recalled that no two cases are exactly the same. this was well postulated by the Court of Appeal in the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR as follows:

> "The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".

60. With the above guide, the Respondent suffered the following injuries:

    a. Blunt trauma to the right periorbital region

    b. Traumatic conjunctivitis to the right eye

    c. Brain concussion

    d. Cut wound to the right cheek area

    e. Lacerations to the lumbo-sacral region

    f. Contusion to the chest

    g. Lacerations to the left heel.

61. I proceed to determine similar fact cases in relation to damages as applicable this Appeal. In Francis Ochieng & Another v Alice Kajimba (2015) eKLR, the Plaintiff also sustained head injuries and multiple soft tissue injuries and was awarded Ksh. 350,000/- in 2015.

62. Similarly, in the case of H. Young Construction Company Ltd vs Richard Kyule Ndolo [2014] eKLR the court awarded a sum of Kshs. 250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint in 2014.

63. In the case of Francis Ndung'u Wambui & 2 others v Purity Wangui Gichobo (2019) e KRL where the court of appeal reduced an award of Kes 450,00/= to Kes 250,000/= for injuries involving deep laceration on the medial side of the left leg and degloving injury on the left thumb.

64. In the case of Duncan Mwendwa & 2 Others v Silas Kinyua Kithela (2018), eKLR, the Plaintiff suffered injuries of blunt head injury with intracerebral hematoma, damage to tendon of left finger and soft tissues and was awarded Kshs. 350,000/- in General Damages

65. Consequently, I find no basis for disturbing the finding of the lower court on quantum and liability. The net effect of the foregoing is that the appeal on quantum fails. The appeal on liability equally fails the entire appeal is therefore dismissed.

66. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

67. 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.

68. 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."

69. In the circumstances, the appeal lacks merit and is accordingly dismissed on both liability and quantum. The Appellant shall have costs of Ksh 85,000/=.

Determination

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

a. The appeal is dismissed with costs of Ksh. 85,000/=.

b. 30 days stay of execution.

c. 14 days right of Appeal.

d. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 1ST DAY OF APRIL, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ms Nyandoro for the Respondent

Court Assistant Brian Mkala

M. D. KIZITO, J.