Ndei v Wachuga (Civil Appeal 61 of 2022)
[2024] KEHC 12609 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12609 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 61 OF 2022

DKN MAGARE, J

OCTOBER 15, 2024

BETWEEN

JOHN WACHIRA NDEI ..... APPELLANT

AND

BEATRICE WANJIRU WACHUGA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. E. Kanyiri given on 17/10/2022 in Karatina CMCC No. 15 of 2021. The Appellant, who was the sole defendant was aggrieved and preferred an appeal vide a 10-ground Memorandum of Appeal filed in this court on 15/11/2022.

2. I have perused the 10-paragraph memorandum of appeal. It is unnecessary to repeat the grounds herein. The memorandum of appeal is 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.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

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

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

Pleadings

5. The Appellant was sued as the registered owner of vehicle registration number KBV 512X. It was stated that the said vehicle was driven carelessly, negligently and/or recklessly and was involved in an accident at Kiamachimbi road. Several particulars of negligence were pleaded.

6. The Respondent pleaded the following particulars of injuries: -

   a. Fractures in the lumbar spine involving vertebral bodies number 2, 3, 4 and 5.

   b. Swelling in the back and thigh regions.

   c. Multiple soft tissue injuries on the head, back, hip and lower leg areas.

7. The following particulars of special damages were pleaded: -

a. Medical expenses.....186,819/=

b. Medical report ..... 7,000/=

c. Police abstract .....500/=

d. Motor vehicle records. .....500/=

Total .....194, 819/=

Evidence

8. The Respondent testified on 6/4/2022 stating that she was involved in an accident as recorded in her statement dated 22/2/2021. She stated that she was on medication on daily basis as a result of the accident. It was her case that she was off the road when the accident occurred when the Appellant's vehicle came from behind and hit her and as a result she suffered injuries as pleaded.

9. She testified that the vehicle hit her off the tarmac, where she was lawfully walking together with another, who was a plaintiff in Karatina CMCC E016 of 2021. Part of the proceedings in the foregoing case were adopted as evidence in this matter. The Record of Appeal did not have these proceedings, which I called for leading to an unfortunate adjournment of the judgment.

10. On cross examination, she stated that she could not do any work after the accident as a result, and had to walk on walking frame after some time. The court noted she was on a walking frame and was thus walking with support.

11. PW2 in Karatina CMCC E016 of 2021 was a police officer, PC Linus Kimenyi. He stated that an accident occurred on 3/5/2020, involving motor vehicle Registration No. KBV 512X Nissan XTrail which was driven by the Appellant. The said accident involved the Appellant and another person.

12. It was his testimony that he filled the P3 form. The driver was charged with careless driving in Traffic Case E095 of 2020, and pleaded guilty. He also produced a P3 form. On cross examination he stated that the vehicle was inspected by NTSA.

13. Mary Njeri testified that she witnessed the accident. She was in the vicinity of the accident. She stated that the vehicle was at high speed. Her evidence was that there were no bumps until the area at the accident scene. The Respondents closed their case.

14. In his defence in Karatina CMCC E016 of 2021, the Appellant adopted his witness statement where he blamed the Respondent. He stated that there were unusually high number of people on the road. He stated that he applied brakes but due to long distance the accident occurred.

Analysis

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

16. This court is not bound to follow the trial court if it appears that the trial court takes account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally as held in Selle and another v Associated Motor Board Company and Others [1968]EA 123, 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-trial and the Court of Appeal is not bound to follow the trial 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."

17. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has obseved 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 the case of Peters v Sunday Post Limited [1958] EA 424, 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. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial court. In that connection courts should ensure that comparable injuries would as far as possible be compensated by comparable awards while recalling that no two cases are exactly similar as held in the case of Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others [2019] eKLR, 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."

Issues

19. The issues raised in this appeal are three: -

    a. Whether the court erred in its finding on liability.

    b. Whether quantum of general damages were so excessive as to amount to erroneous estimate of damages.

    c. Whether special damages were proved.

20. The test for liability is based on the balance of probability. 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 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."

21. 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....."

22. 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;-
>
> "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 loose because the requisite standard will not have been attained."

23. The burden of proof is set out in Sections 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya, which provides as follows: -

> " 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."

24. The burden of proof of any particular fact is on any party who desires the court to believe in its existence. In Anne Wambui Ndiritu v 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."

25. It follows that the initial burden of proof lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case. Therefore, the burden is not on the plaintiff, or the defendant, it is on the party who alleges. If one party alleges and lays evidence to that effect, then the other party stands to lose, if they tender no evidence. In Evans Nyakwana v 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 fi no evidence at all were given as either side."

26. In the case of Kiema Muthuku v Kenya Cargo Handling Services Ltd [1991] 2 KAR 258, the court of appeal posited as doth:

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.

> 27. In this matter, the Respondent testified that she was off the road and was swept off the same from behind. This piece of evidence was unrebutted both in cross examination and defence evidence. The defence cannot therefore expect the court to use the case of *Margaret Waithera Maina v. Michael K. Kimaru Civil appeal No. 16 of 2015* (UR) and observed that the courts are moving away from that rigid position and have stated as follows:-
>
> "It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not

challenged and is produced in court without any objection, its contents cannot be later denied." See Joel Muga Opija v East African Sea Food Limited [2013] eKLR; Superform Ltd & Anor. v Gladys Nchororo Mbero [2014] eKLR; and Wellington Nganga Muthiora v Akamba Public Road Services & Anor. [2010] eKLR.

i. Turning to proof by a passenger, we stated as follows in the Margaret Waithera Maina case (supra):

ii. "The notion that only documentary evidence would be acceptable for strict proof of all facts has been decried before by this Court and we echo the case of Jacob Ayiga Maruja & Another v. Simeon Obayo Civil Appeal No. 167/02 (UR), thus:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

28. The court below was right in finding the Appellant 100% liable. There was no basis for contributory negligence. In the case of *Cadama Builders Limited v Mutamba ((Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal E093 of 2021*) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment), Kasango J stated as follows: -

"No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant's pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent's pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of Charterhouse Bank Limited (under statutory management) v Frank Kamau [2016] eKLR, as follows:-"We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in KARUGI & ANOTHER V. KABIYA & 3 OTHERS (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the

quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

29. In this case, there was no dispute as to the occurrence of the accident and that the evidence pointed to the negligence of the Appellant. The Appellant was convicted on his own plea of guilty for careless driving. Section 47A of the *Evidence Act* reads:

47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

30. The Appellant was convicted on his own plea of guilty. He did not lead credible evidence on why he could not stop when he saw a crowd. Why would he be unable to brake if he was on a slow speed? He was too reckless to plough into the crowd.

31. The Respondent maintained that the Appellant was negligent for the accident as he knocked the Respondent from behind while she was walking off the tarmac road on the right side of the road. The Appellant on the other hand maintained that it is the Respondent who suddenly moved in the path of the motor vehicle hence the accident.

32. The evidence tendered by the Respondent was more probable as to liability than the evidence tendered by the Appellant. The Appellant had to prove contributory negligence. The Appellant was unable challenge evidence of the Respondent that she was walking off the tarmac road to the right side of the road and the Appellant veered off the road towards the right side of the road and knocked her. This evidence was established by PW1's other witnesses. The motor vehicle could not have just caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

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

33. 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. It is my finding that the court below was right in finding that the Appellant was 100% liable for the accident. There is no basis to disturb the finding of the learned Magistrate on liability.

35. In deciding whether to disturb quantum given by the lower court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively in circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages. This was well enunciated by the court of appeal in Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another 1957 KLR 27 as follows: -

The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

36. Therefore, for me 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. So my duty as the appellate court is threefold regarding quantum of damages: -

a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

c. The award is simply not justified from evidence.

37. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. The Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 enunciated circumstances under which an appellate court can interfere with an award of damages as doth:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

38. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. v Musingi Mutia [1985] KLR 730 where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought.
>
> In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and

> of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

39. On quantum, the lower court awarded Kshs. 2,000,000/- in general damages for injuries stated as follows: fracture of the lumbar spine involving vertebral bodies number 2, 3, 4 and 5, swelling in the back and thigh region and multiple soft tissue injuries to the head, back, hip and lower leg. In the case of William Kitoto Andere v Easy Coach Limited 2019) eKLR, Fred Ochieng, J (as he then was) awarded general damages of Kshs. 2,000,000/- to the Plaintiff who had suffered vertebrae spine fracture with spinal cord compression with lower limb weaknesses and urine incontinence.

40. In Abdi Haji Gulleid v. Auto Selection (K) Ltd & Another [2015] eKLR the Plaintiff sustained grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture at the back of L1 spine. The permanent incapacity was assessed at 25% by Justice Nyamweya. General damages were assessed and awarded at Kshs. 925,757/=.

41. The injuries suffered by the Plaintiff in William Kitoto Andere(supra) in my view present similar injuries to this case. The injuries were less severe involving wedge compression fracture at the back of L1 spine and the decision was given in 2015 meaning inflation has to be taken into consideration. The injuries suffered by the Plaintiff herein involved fracture of the lumbar spine involving vertebral bodies number 2, 3, 4 and 5. Therefore, the award of Kshs. 2,000,000/- cannot be said to be inordinately high. The award was an adequate estimate of damages.

42. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency. In Jane Chelagat Bor v Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

43. In the circumstances, I dismiss the appeal. On costs this court has discretion as per 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.

13. 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.

44. The question herein is whether an award of Kshs. 2,000,000/= is so high as to amount to an erroneous estimate of damages. In this case the court finds that the award is not inordinately high.

45. The Appeal lacks merit and is dismissed with costs of Kshs. 85,000/- to the Respondent.

Determination

46. The end result is that I make the following orders:

a. The Appeal lacks merit and is dismissed.

b. The Respondent shall have costs of the appeal assessed at Kshs. 85,000/=.

c. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njenda for Ms. Obondo for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah