Nyangau & 2 others v Obiero (Civil Appeal E065 of 2023)
[2023] KEHC 22537 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E065 OF 2023

DKN MAGARE, J

SEPTEMBER 19, 2023

BETWEEN

VICTOR NYANGAU ..... 1ST APPELLANT

MOSES OBWANGA ..... 2ND APPELLANT

KELVIL MAGOTSI ..... 3RD APPELLANT

AND

JUSTIN KIMONI OBIERO ..... RESPONDENT

JUDGMENT

1. This is an appeal that arises from the Judgment of N. A. Akee delivered on 9/3/2023 in Mombasa CMCC NO. 352 of 2020. The Appellant were the defendants in the matters. The Court entered Judgment for the Respondent as follows: -

    a. Liability by consent 75:25 in favour of the Respondent.

    b. General damages 500,000/=

    c. Special damages 50,425/=

2. Since liability was entered by consent the appeal herein is on quantum. The appellants set 4 grounds of appeal in the memorandum of appeal dated 17/3/2023. All the grounds are on quantum. It is actually one ground split into 4.

3. The Civil Procedure Rules require that such a Memorandum of Appeal be concise and not verbose as this one is. Order 42 Rule 1 provides are doth: -

    " 1. Form of appeal –

(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."

4. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira 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:
>
> > "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..."

5. Further 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:
>
> > "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."

6. The Memorandum of Appeal raises only one issue, that is,

> " The court erred in making an award that was inordinately high as to amount to erroneously estimate of damages."

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Plaintiff's claim

8. The Respondent filed suit on 11/3/2020 claiming damages against the Registered and beneficial owner of motor vehicle registration number KBM 043 M.

9. The injuries pleaded were as following: -

   i. Injury to the left elbow resulting in neurovascular bundle and tendon injury.

   ii. Septic haematoma on the left forearm

   iii. Laceration on the lower leg lower

Duty of the appellate court

10. 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.

11. This was aptly stated in the cases of Peters vs Sunday Post Limited [1958] EA 424 where in the latter case, 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..."

12. The above this principle was enunciated well by the Court of Appeal in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the stated: -

> " ...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..."

13. This Appeal being on quantum only, the principles guiding this court, as the first appellate court have crystalized. This is in recognition that award of damages is discretionally.

14. The court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows:-

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

15. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages :-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

16. The words of Lord Denning in the West (H) & Son Ltd (supra) 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 damage of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national Health Service. But the health authorities cannot stand huge sums without impending their service to the community.
>
> The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than a fair compensation."

17. In the case of Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, the court stated as doth; -

> "It was noted in a comparative jurisdiction in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows::
>
> > "The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time 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.

18. In the case of Mbogo and Another vs. Shah [1968] EA 93 where 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."

19. I therefore need to look at the recent decisions related to similar cases. 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.

Appellant's Submissions

20. The Appellant filed submissions making reliance on section 78 of the *civil procedure act*. The said section provides as doth; -

> " Powers of appellate court
>
> (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
>
> (a) to determine a case finally;
>
> (b) to remand a case;
>
> (c) to frame issues and refer them for trial;
>
> (d) to take additional evidence or to require the evidence to be taken;
> (e) to order a new trial.
>
> (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

21. The Appellant stated that it is the duty of the first appellate court. They relied on the case of Peter M. Kariuki v Attorney General [2014] eKLR, where the court stated as doth; -

> " We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui V Republic, (1984) KLR 729 and Susan Munyi V Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."

22. On damages reliance was placed on the case of Agnes Kamene Mulyali v Harvest Limited [2017] eKLR, where the court of Appeal, Waki, Karanja & Kiage, JJ.A., stated as doth: -

> " Appellate courts are slow to interfere with the same and will do so only in well-known circumstances. In Kenya Bus Services & Anor Vs. Mayende [1992] 2 EA 232 at 235, this Court put it thus;
>
> > "The principles on which an appellate court will interfere with a trial court?s assessment of damages are now settled in Kenya. Kneller JA, a he then was, put it thus in KITAVI vs. COASTAL BOTTLES LIMITED [1984] LLR 213 (CAK);
> >
> > > "The Court of Appeal in Kenya then should, as its forerunners did, only disturb an award of damages, when the trial Judge has taken into account a factor he ought not to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.
>
> Singh vs. Singh and another [1955] 22 EACR at 129; Butt vs. Khan [1977] LLR 2 (CAK)."

23. Flowing from the foregoing, the Appellants conclude that by relying on the case of Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR, the court deviated from its own finding that these were soft tissue injuries. The court therefore erred in not using similar awards for similar injuries.

24. According to the Appellant, by applying dissimilar cases for different authorities the Court violated the principle that similar awards should attract similar awards. This was said to have been addressed in the case of Alphonce Odero Augo v Sinohydro Corporation Limited [2017] eKLR, where the court, sitting in Kisumu, held as f=hereunder: -

> " 6. This appeal concerns the award of general damages. 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 of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed by the Court of Appeal in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:
>
> Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

25. Further there was re- assessment which the Respondent did not undertaken.

26. The court found that these were severe soft tissue injuries. Reliance was placed on the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), where justice John Mativo (as then he was) stated as doth: -

> " 49. The giving of reasons is a normal incident of the judicial process.[53] The obligation to explain how, and why, a particular decision has been reached

stems from the common law. This duty has a constitutional dimension as well.[54] This is consistent with the dictates of *the Constitution*.

51. The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the court decision.[55] Thus, the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Second, the giving of reasons furthers judicial accountability. As Professor Shapiro said:

> "... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."

Third, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases.[57] Hence, the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future. The next question is what are adequate or sufficient reasons? Regrettably, this question does not admit of a simple answer. It is always a matter of degree. Judges, acting reasonably, may have quite different views on this subject. What seems to be clear is that there must be some process of reasoning set out which enables the path by which the conclusion was reached. This path of reasoning is missing from the judgment showing how the damages were arrived at.

54. If it is not possible to understand from the judgment how the final orders were arrived at, then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion. The legal principles applied should be evident from the judgment.

55. If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which the decision can be upheld. The duty to give reasons is, of course, an integral part of any courts task in deciding a case. I would add that it is also an important part of any courts task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point.[21]The absence of reasons is a serious omission which renders the award on damages arbitrary and undefendable in law."

27. They state that by failure to assign reasons the court is entitled to interfere with the award of damages. This is because the said that award which has no reasons is thus arbitrary. This is said to have been placed on the case of Agnes Kamene Mulyali v Harvest Limited [supra] eKLR, where the court of Appeal, WAKI, KARANJA & KIAGE, JJ.A., stated as doth: -

28. What is more, the damages awarded therein were not preceded by a careful or any analysis and comparison with other decided cases, which means the award of Kshs. 100,000 that was made therein begs questions as to how it was arrived at and therefore weakens its persuasive sway.

> "We think that the learned Judge ought to have given a more careful consideration of the cases cited by the appellant's counsel and in particular this Court's decisions of Samuel Gikuru Ndungu Vs. Coast Bus Co. Ltd (Civil Appeal No. 177 of 1999) and George Kingoina Maranga & Sammy Kinyanjui v Lucy Nyokabi Ndambuki [2006] eKLR which were binding upon her. She ought to have followed them or, if good reason existed for doing so, distinguished them. She did not do so and so erred. The injuries therein were comparable to those suffered herein and the awards were Kshs. 300,000 and Kshs. 420,000, respectively.
>
> The process of comparison is key to the proper assessment of general damages because, as was stated by Lord Morris of Borthy-Guest in the English case of West (H) & Son Ltd Vs. Sheph [1964] A.C. 326 at 345;
>
> > "... 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 an 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 for as possible comparable injuries should be compensated by comparable awards ...."

29. After laying basis for setting aside the award of damages, the Appellant proceeded and relied on several decisions as a basis for a n award of Ksh 100,000/=. However during oral submissions they suggested a figure of Ksh 200,000/=.

30. The first decision relied on is that of Lilian Anyango Otieno v Philip Mugoya Ogila [2022] eKLR, where Justice Fred A. Ochieng, as then he was, awarded and substituted the same with an award of Ksh 150,000/= for only minor soft tissue injury, but also suffered a concussion for a few minutes coupled with a head injury on 28/3/2022.

31. The second one is John Muchiri Nderitu & another v Grace Njoki Njuguna [2021] eKLR, the court, CHARLES KARIUKI, held as doth: -

> Dr. Kiamba has stated that the injuries suffered to be:Soft tissue injuries of the left shoulder jointSoft tissue injuries of the chestSoft tissue injuries of the backSoft tissue injuries of the right wrist jointSoft tissue injuries of the left knee jointHematoma on the right thighBruises on the left leg
>
> The appeal is allowed on general damages partially that the award is reduced to Kshs.150,000, on 16/12/2021.

32. The Appellant also relied on the case of Nyota Tissue Products v Lawrence Lawi Kuboka & 4 others [2020] eKLR, where the court 70,000/= for minor soft tissue injuries.

Respondent's submissions

33. The Respondent filed submissions setting out antecedent fact. On assessment of damages they rely on the cases of Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR to state that the Appellant did not produce evidence contrary to he respondent. They allude to

a second medical report that was not produced. The court of Appeal in this matter, Makhandia, Ouko & M'inoti, JJ.A.stated: -

> " While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.
>
> The *Evidence Act* is clear enough upon whom the burden of proof lies. Section 107 provides as follows:
>
> "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 facts, it is said that the burden of proof lies on that person."
>
> Section 109 of the same Act further provides:
>
> "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 law that the proof of that fact lie on any particular person."

34. They submitted that the injuries were proved by the respondent. The authorities submitted by the Appellant were said not to represent the injuries suffered by the plaintiff. They relied on 5 decisions to posit that the award is commensurate with the injuries awarded.

35. In Nispan Construction Company Limited v Imanuel Mukera Temesi [2020] eKLR, the Employment and Labour Relation Court, stated as doth on 24/1/2020: -

> " The appellant further argued that an assessment of Kshs. 400,000 for nerve injury was excessive in the circumstances, as the respondent suffered soft tissue injury, albeit to the nerve, which would take longer to heal than ordinary soft tissue injury. The court however notes that at the time of hearing in June 2014 the respondent's injuries had not healed. This means that those were permanent injuries that were unlikely to heal, having not healed from February 2008 when he was injured a period of more than 6 years."

36. In the case of Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR, Justice R E Aaburilli stated as doth: -

> " 27. Re-evaluating the material and evidence placed before the trial court, in his plaint filed on the 5.2.2020, the respondent pleaded that he suffered the following injuries:
>
> a) Head injury with loss of consciousness
>
> b) Fracture of the right zygoma (facial bone)
>
> c) Multiple facial lacerations
>
> d) Blunt injury to the shoulders
>
> e) Blunt injury and bruises to both lower limbs."

37. In the case of Roseline Violet Akinyi v Celestine Opiyo Wagwau [2017] eKLR, Justice JA Makau stated as doth: -

> " injuries as per P3 form dated 22nd October 2010 are recorded as follows:-
>
> a. Head and neck:
>
> - Cervical spondylitis with dislocation on neck support.
>
> - Septic wound (sharp) on Lt side of neck.
>
> - Tenderness on Lt side of neck.
>
> b. Thorax and Abdomen: Extreme tenderness frontal chest.
>
> c. Upper Limbs: Multiple septic wounds on left upper arm including elbow.
>
> d. Lower Limbs: - Tenderness lower back and both hips.
>
> - Swollen knees with wounds.
>
> - Swollen left leg with slight - wound.
>
> - One toe nail uprooted (right foot).....
>
> 19. Having considered the nature of injuries sustained by the Respondent and the authorities relied upon by the Appellant, thus Mary Nyazdua Ngale V Sheikh Omar Bin Dahman (supra) and John Kamoche Muiruri V Hezron Kiranga Njaga (supra), I find the injuries sustained by the Plaintiffs in those cases to be similar to the ones sustained by the Respondent, in this appeal, though the injuries sustained by the Respondent, were less serious than those sustained by the Plaintiffs in those cases, and upon taking into account of the high rates of inflation since then, I would reduce the amount awarded to the Respondent from Kshs.800,000/= to Kshs.500,000/ = ..."

38. In the case of Elizabeth Wangui Njiru v David Mwangi Ngugi & another [2020] eKLR, justice E C Mwita held as doth: -

> " 37. Dr. Kahuthu for the respondents saw the appellant on 16th May 2018 and agreed with the appellant's doctor (Dr. Kevin Odhiambo) whose medical report on the appellant is dated 23rd August 2017, that the appellant had suffered permanent incapacity. According to Dr. Kahuthu, whereas Dr. Odhiambo put permanent incapacity at 80% for the left hand and 20% for the right hand, she felt this was "grossly exaggerated as the left hand had normal functions." She opined that the appellant's right hand had some good degree of functionality and the appellant still worked as a secretary. She assessed permanent incapacity at 30%. Without saying whether it was for the right or left hand.
>
> 38. I have perused the Medical Report by Dr. Odhiambo dated 23rd August 2017. He concluded that the appellant had lost function of the right hand 60% and left hand 20%. The appellant experience on and off numbness due to nerve involvement. She had healed with scarring.

44. With those principles in mind, and after considering the authorities cited by parties and having regard to the injuries the appellant sustained, as well as the level of incapacity, it is my considered view, that an award of Kshs. 500,000 is fair compensation in the circumstances of this appeal."

39. Finally, the Respondent relied on the authority of Gianchore Tea Factory Co. Ltd v Peter Ogamba Otao [2021] eKLR, where Justice E. N. Maina, held as doth: -

> " The genesis of the respondent's claim was an accident which occurred on 6th June 2017 when his motor cycle Registration KMDX 541M and the appellant's motor vehicle Registration No. KBJ 395E collided and he sustained injuries. The injuries are not disputed and they were: -
>
> (a) Deep cut wounds on the upper limbs.
>
> (b) Blunt trauma to the right knee.
>
> (c) Traumatic arthrotomy.
>
> (d) Right femur fracture.
>
> (e) Degloving injury on the right knee with open knee joint exposed patella tendon.
>
> (f) Lacerations on the right knee....
>
> After considering the medical reports and the authorities cited by Counsel the trial court assessed and awarded the respondent general damages in the sum of Kshs. 650,000/= and special damages in the sum of Kshs. 7,050/=....
>
> In the premises I see no good reason to interfere with the awards. This appeal is not merited and it is dismissed with costs to the respondent. It is so ordered."

40. The Respondent urged me to dismiss the Appeal with costs.

Evidence

41. The doctor indicated that there were no fractures. There was septic haematoma which was drained. As at 23/12/2018 the Respondent was still undergoing physiotherapy. The left upper limb had 8 cm long irregular scar, above the elbow, on the anterior aspect. There is reduced sensation along the 1st 2nd and 3rd fingers. He was unable to flex the elbow due to tendon and nerve weakness.

42. There was also noted a 3 x 4cm dark traumatic scar on the lower shin. The doctor was to determine permanent disability after the physiotherapy. This was never to be.

43. With these kind of injuries the court awarded 500,000/=. She also awarded. In so awarding the court was guided by three decisions. In the case of Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR, justice D. O. Chepkwony, awarded 600,000/= for fracture of tibia and fubula, bruise on the leg and dislocation of the right ankle. The court describes this as similar injuries. They are more serious.

44. The other decision was Boniface Waiti & another v Michael Kariuki Kamau [2007] eKLR, which laid down what guides award of damages: -

> " Having established liability the court proceeds to deal with the issue of quantum. On the evidence on record it is this courts view that had the learned trial magistrate addressed himself correctly to it he should have found liability in favour of the plaintiffs and then gone ahead to assess quantum. Having established liability the court proceeds to assess quantum. In doing so it has to bear in mind the following principles.
>
> i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
>
> ii. The award should be commensurate to the injuries suffered.
>
> iii. Awards in decided cases are mere guides and each case should be treated on its ad facts and merit.
>
> iv. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.
>
> v. Awards should not be inordinately too high or too low.

45. The third decision was Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR, where the high court, John M. Mativo, as then he was, sitting in Nyeri state as follows: -

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called. While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[11] Four consequences flow from this."

46. In the case of Sosphinaf Company Limited -v- James Gatiku Ndolo NRB C.A No. 315/2001 where the Court of Appeal stated that –

> " The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the Judge is guided by such factors as the previous awards and principles developed by the court, ultimately what is reasonable award is an exercise of discretion by the trial Judge and will invariably depend on the particuliar facts of each case."

47. The court therefore did not deal with injuries that were commensurate with the injuries suffered by the plaintiff. I agree that the plaintiff suffered serious injuries. However, the medical report was not

concussive on the degree of disability. It is however clear that though the injuries were serous due to the effect on the nerves and tendon, the was not flexing, these were not fractures.

48. The injuries were actually very serious. Though soft tissue, the tendon injuries were not very severe. They are beyond just severe soft tissue injuries. They are however, never, equal to fractures. The decision relied by the respondent of In Nispan Construction Company Limited v Imanuel Mukera Temesi [2020] eKLR, the Employment and Labour Relation Court, stated as doth on 24/1/2020. Appears closer to this case. The difference, however, is that the Respondent herein did not have the degree of permanent disability.

49. Without the establishment of permanent disability, it is not the same as the cases above there was 30% disability. The doctor agreed there was permanent disability. The extent was not established.

50. The authorizes herein show that an award of between 350,000/= and 400,000 is sufficient for the injuries suffered. In the circumstances I set aside the award of 500,000/= and substitute the same with Ksh 400,000/=.

51. Regarding special damages, the court awarded KSh. Special damages 50,425/=. The respondent however had pleaded a sum of Ksh. 45,225/=m Special damages 50,425/=made up as hereunder:-

    a. Search 1,000/=

    b. Medical Report 3,000/=

    c. Police Abstract 200

    d. Medical Expenses 41,225/=

52. The police abstract is indicated to be free. The amount for the abstract were not proved. The attendance fees was not pleaded hence cannot be awarded. I set aside the award for Ksh 50, 225 and substitute the same The total proved was Ksh 45,025. I accordingly award the same. Special damages are not subject to apportionment

53. In total the respondent is awarded as follows: -

    a. General Damages Ksh. 400,000/-

    b. Less 25% Ksh 100,000

    c. Subtotal Ksh. 300,000/=

    d. Special Damages Ksh. 45,025/=

    e. Total Ksh. 345,025/=

Determination

54. The Appeal herein is partly allowed and the award is given as hereunder: -

    a. Liability as agreed at 75: 25

    b. The respondent is awarded as follows: -

        i. General Damages Ksh. 400,000/-

        ii. Less 25% Ksh 100,000

        iii. Subtotal Ksh. 300,000/=

iv. Special Damages Ksh. 45,025/=

Total Ksh. 345,025/=

55. Given that the change awarded is practically not significant, each party will bear their costs.

56. The respondent will have costs in the court below.

57. 30 days stay.

58. This file is closed.

59. The original file be returned and a copy of this judgment be send on the court below.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Mwangi for the Appellant

No appearance for the Respondent

Court Assistant - Brian