REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E070 OF 2024

BERNARD NYAEGA MOGOI……

APPELLANT

VERSUS

MOSES KENYANYA REUBEN……

RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. B.O. Omwansa (SPM) dated 19.3.2024 arising from Kisii CMCC No. 26 of 2022. The appellant was the defendant in the court below.

2. The Memorandum of Appeal dated 11.4.2024, however, is a classic study on how not to write a memorandum of appeal. The Appellant filed a prolixious 8 - paragraph argumentative memorandum of appeal that challenged only the award of general damages. The grounds are argumentative, unseemly and do not please the eye. Order 42 Rule 1 that requires the memorandum of appeal be concise. The same 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 in regard to Rule 86 [now Rule 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:

> 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. The court abhors the repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. The duplication of grounds in the memorandum of appeal serves no useful purpose and only leads to wastage of judicial time. As was aptly stated in **Kenya Ports Authority v Threeways Shipping Services (K) Limited** [2019] KECA 472 (KLR), prolixious and repetitive grounds of appeal obscure the real questions for determination and impede the efficient administration of justice. The court of appeal observed that :

> 3. 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 appeal is therefore on quantum only. The Memorandum of Appeal dated 18.1.2022 raised the following sole ground: the learned magistrate erred in law and fact in making an award of general damages that was inordinately high. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

6. The Plaint dated 18.1.2022 claimed damages arising from an accident that occurred on 20.12.2021. The accident involved the Respondent while a passenger in motor vehicle Registration No. KCQ 784H along Kisii–Kilgoris road when the Appellant's motor vehicle lost control and overturned hence the accident.

7. The Respondent set forth particulars of negligence for the accident motor vehicle. The Respondent also pleaded Ksh. 7,770/= as special damages and pleaded general damages. The injuries were pleaded as follows:
    (i) Scalp contusion
    (ii) Left facial crush wound
    (iii) Left mandibular region contusion
    (iv) Lower mouth lip contusion
    (v) Right arm lacerations
    (vi) Right knee joint contusion and bruising

8. The Appellant entered appearance and filed defence dated 15.3.2022 denying the particulars of negligence and injuries pleaded in the plaint.

9. The trial court heard the parties and proceeded to render judgment awarding liability at 100% against the Appellant and general damages of Ksh. 250,000/=. The court also awarded special damages of Ksh. 6,500/=. Aggrieved by the finding of the trial court, the Appellant lodged a memorandum of appeal hence this appeal.

Evidence

10. During the hearing, PW1 was Daniel Nyameino, a clinical officer. He testified and produced his medical report. It was his case that he relied on the treatment notes to prepare the medical report dated 23.3.2021. On cross examination, he

testified that the injuries were soft tissue with progressive healing.

11. PW2 was the Respondent. He relied on his witness statement and produced his bundle of documents filed in court. He stated that he suffered injuries on the forehead, right forearm, right knee joint, left mandibular region and scalp. On cross examination he stated that he had fully healed.

12. PW2 was No. 88300 PC Moses Kasera of Kisii Police Station and produced a police abstract. The Appellant closed case without calling a witness.

Submissions

13. The Appellant filed submissions dated 4.9.2025. It was submitted that Ksh. 60,000/= would be proper award for general damages. Reliance was placed *inter alia* on **HB (Minor thro' DKM mother) v Jasper Nchonga Magari & Another** (2021) eKLR in which it was submitted that the Respondent who suffered blunt object injury to the head and neck, thorax, abdomen and limbs was awarded Ksh. 60,000/=.

14. The Appellant also cited **LNK (Minor thor' father and next friend CNK) & 2 Others v Simon Gatuni Njukia** (2022) eKLR in which it was urged that Ksh. 150,000/= was reduced to Ksh. 80,000/= on appeal for mild head injury.

15. The Respondent also filed submissions dated 5.9.2025. It was submitted that the award of Ksh. 250,000/= was the fairest estimate of damages. He relied on **Baloch Faisal & another v Elloy Kawira Nthiiri** (2019) eKLR where it was submitted Ksh. 200,000/= was awarded 5 years ago for the Respondent who suffered similar injuries.

Analysis

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

17. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

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

18. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others** [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> *.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.*

19. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

20. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited** [1958] EA 424, the court therein rendered itself as follows:-

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

21. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

22. The appeal before this court is on quantum only. The trial court awarded the sum of Kshs. 250,000/= as general damages. Notably, the court did not cite or rely on any authority as the basis for the said award. The Appellant sustained the following injuries:
    (i) Scalp contusion
    (ii) Left facial crush wound
    (iii) Left mandibular region contusion
    (iv) Lower mouth lip contusion
    (v) Right arm lacerations
    (vi) Right knee joint contusion and bruising

23. I have no reason to doubt the medical evidence contained in the report prepared by the clinical officer, Daniel Nyameino (PW1) dated 23.12.2021. The Appellant did not tender any medical evidence to the contrary. Viewed alongside the notes

of the trial court, and in the absence of any opposing medical opinion, I find no reason to fault the lower court's conclusion on the nature and extent of the injuries sustained by the Respondent. I therefore uphold the finding that the injuries pleaded were duly proved by the evidence on record.

24. The foregoing must be understood in the context of judicial precedent on expert reports or opinions. The court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> **"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."**

25. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

> "… such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available

evidence there is proper and cogent basis for doing so."

26. Courts must give proper respect to the opinions of experts, but such opinions are not, as it were, binding on the courts and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** where it was held that:

> **"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of** *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, **Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-**
>
> **"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-** "*Because this is the evidence of an expert, I believe it.*"

27. The court will proceed on the premises that the evidence by PW1 and PW2 corroborated on the nature and extent of the injuries. It is also critical that the injuries are not disputed. The only question raised is the extent of the quantum of damages.

28. In order to deal with quantum of damages, this court has to be aware that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries, as was established in *Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR*. However, the Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that *comparable injuries should attract comparable awards.*

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

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

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

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

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

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

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

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

31. 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.**

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

> 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'
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> We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive

awards on damages important to replicate herein thus:

> I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.

33. 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.

34. Further, in the case of **Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294** being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard {1963} 2 ALL ER* 625 Sykes J stated as follows:

> The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

35. 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…..

36. Guided by the foregoing principles, this court will only interfere with the award if it is shown to be inordinately high or founded to be based on wrong principles of law. If the award is merely on the higher side, but not inordinately so, there would be no justification for interference. For an appellate court to disturb an award of damages, it is not sufficient to show that the amount is high or that had the appellate court been sitting as the trial court, it would have awarded a different figure.

37. I proceed to determine similar fact cases in relation to damages as applicable to this appeal. Therefore, I find the following cases to present similar fact situations to the appeal herein. In **Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR**, the Respondent suffered severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. The Court awarded Kshs. 350,000/= in general damages.

38. In **Francis Ochieng and Another v Alice Kajimba** [2015] eKLR, the Respondent sustained a cerebral concussion with

loss of consciousness for two hours, massive haematoma on the right parietal head, subconjuctual haematoma of the right eye, loss of 5 anterior lower and two upper teeth, perioribital ecchymosis and cut wound on the right hand and knee. An amount of Kshs. 350,000/= was awarded in 2015.

39. In **Mulwa & Another v Nzai (Civil Appeal E072 of 2023) [2024] KEHC 6898 (KLR) (10 June 2024) (Judgment)** the court awarded Kshs. 250,000/=, being a reduction from the lower court's award of Ksh. 400,000/= for the Respondent who had suffered the following injuries: small bruise on the right ankle, soft tissue injuries on lower back and right lower limb, blunt object injury to the lower and right limb, bruises on the right lower limb.

40. The appellant used authorities for minor superficial injuries. The Respondent used a decision of **Baloch Faisal & another v Elloy Kawira Nthiiri** [2019] KEHC 11239 (KLR), where the claimant suffered soft tissue injuries to the head, both knees, chest, back and injury to upper incisor teeth. The injuries healed but left scars on the forehead and upper lip. This decision was over 6 years old but was in all fours with the current matter.

41. The authorities cited by the Appellant relate to cases involving blunt object injuries and other mild soft tissue injuries, which, in my view, bear no relevance to the present matter. Consequently, I find and hold that an award of Ksh. 250,000/= was not inordinately high as to amount to an

erroneous estimate of damages. The award represents a fair estimate of general damages.

42. Before I depart, I note that the court ignored all submissions on quantum by the parties. It gave a figure without support of authorities. This does not edify the court and explain to the losing party the *raison d'être* for the award. This causes anxiety and a feeling that the figure could be arbitrary. I have seen three decisions of the court where the same amount is awarded whether this was soft tissue injuries or otherwise. The court must rely on judicial precedent and not a figure abstractly obtained or gut feeling. The court may need to consider reflecting on this area as it goes to the next level. To assist in this, the Deputy Registrar of the court shall serve this decision on the trial court.

43. Nevertheless, whether by fluke or luck, the current decision was correct on quantum. Consequently, the appeal is dismissed. The next issue is costs.

44. The aspect 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.**

45. Costs are generally discretionary. However, the discretion is not arbitrary. 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.

46. 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, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

47. Costs follow the event. In this case the event is the dismissal of the appeal. The Respondent has earned costs. They shall have costs of Ksh. 65,000/=.

Determination

49. Consequently, the court makes the following orders:

(a) The appeal lacks merit and is dismissed with Ksh. 65,000/=.

(b) 30 days stay of execution.

(c) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **27th** day of **October, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Mokaya for the Respondent

Court Assistant – Michael