Ondimu v Keragori (Civil Appeal E198 of 2024)
[2025] KEHC 15086 (KLR) (22 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E198 OF 2024

DKN MAGARE, J

OCTOBER 22, 2025

BETWEEN

JARED OCHOKI ONDIMU ..... APPELLANT

AND

BEN NTABO KERAGORI ..... RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree of the lower court delivered on 22.10.2024 in Kisii CMCC No. E699 of 2022 by Hon. D.O Mac' Andere (SRM). The Appellant was the Defendant in the in the lower court.

2. The court entered judgment for the Respondent as follows;

    a. 100% liability

    b. General damages Ksh. 500,000/=

    c. Special damages of Ksh. 55,750/=

    d. costs and interest

3. Being aggrieved, the appellant preferred 5 grounds of appeal in the Memorandum of Appeal dated 05.11.2024, as follows:

    a. The award of general damages awarded to the Responded was manifestly and inordinately excessive in the circumstances.

    b. The learned magistrate erred in law and fact in holding the appellant 100% liable, whereas the accident was wholly or substantially caused by the Respondent and the third party, on whose behalf the suit is mounted (sic).

c. The learned magistrate acted in error when the same failed to evaluate the evidence on record thus reaching erroneous decision (sic).

d. The learned magistrate erred when the same misapprehended relevant principle applicable in assessment of damages in personal injuries claims.

e. The learned magistrate erred in law and fact in when the same relied on extraneous issues as a basis of his determination on liability (sic).

4. The appeal is on both liability and quantum. The third ground is otiose and serves no useful purpose. The test for damages is set out by the Court of Appeal, when it pronounced itself succinctly on these principles 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.

5. Evaluation of evidence cannot be a standalone issue since the court is not evaluating the judgment for correctness but a retrial as shall be seen shortly.

Pleadings

6. Vide a plaint dated 14.9.2022, the Respondent sought general damages for pain and suffering and special damages of Ksh. 55,410/=. The latter were awarded and not subject of this appeal. The claim arose from the accident that occurred on 08.05.2022 when the Respondent was said to be riding motor cycle registration number KMDJ 333L along Kisii-Nyamataro area at Denmark when the appellant's driver drove motor vehicle registration number KDE 259 U so negligently and as a result lost control, left its lane and knocked down the motor cycle. The Respondent was said to have suffered severe personal injuries.

7. The Appellant entered appearance and filed defence denying the averments in the plaint and blaming the accident on the rider of motor cycle registration number KMDJ 333 L. They also denied ownership of motor vehicle registration number No. KDE 259 U. Without prejudice they relied on the doctrine of res ipsa loquitor. A total of 23 particulars of negligence were set out. They sought to rely on the Highway Code, *Traffic Act* and the principle of volenti non fit injuria.

8. They indicated that they were in due course to join the owner of motor cycle registration number KMDJ 333L to the proceedings. This latter exercise was in futility.

9. The record of appeal dated 26.06.2025 was filed. Further, a supplementary record of appeal was filed. It contains the lower court's proceedings and notes.

Evidence

10. The Respondent testified as PW1. He produced the documents in the list of documents dated 14.09.2023 and relied on his witness statement of the same date. It was his case that the Appellant was negligent. He produced receipts for Ksh. 52,416/=. He produced a total of 11 exhibits with exhibit 11 being a bundle of receipts for 45,366/=.

11. On cross examination the Respondent stated that he had a driving license and attended a named driving school. He stated that he only produced receipts from Kisii Teaching and Referral Hospital.

12. PW2 was PC Moses Kasere attached to Kisii Police Station undertaking traffic duties. He produced a police abstract for the accident and stated that the same was hit and run. The report was made the following day as hit and run and a motor cyclist, the respondent was injured. The reportee indicated that the driver later recorded a statement that he knocked down motor cyclist and sped off towards Nyamataro.

13. On cross examination he stated that he was not the investigating officer and he did not know whether the vehicle was licensed. On reexamination, he stated that the accident occurred at 3.30 pm and was reported at night at 0025 hours.

14. Daniel Nyameino a Senior Clinical Officer testified that the respondent was treated at KTRH. He produced a P3 Form, treatment notes, and a medical report. He stated that in arriving at the report, he relied on the treatment notes from KTRH, X-ray film, head CT scan, abdominal ultra sound discharge summary and P3. He produced 8 documents, including a receipt as exhibit 5(b).

15. On cross examination, he stated that he examined the patient two months after the accident. He took the history and carried out physical examination. The injuries were soft tissue injuries and multiple skull fractures. He testified that the respondent required medicine to prevent epilepsy.

16. On the part of the appellant, one witness testified, that is, Joel Amenya Kerosi. He testified that there was an accident on the material date and he was blamed. He adopted his statement dated 22.10.2023. In the statement he stated that there was no accident on the said date and invited the Respondent to strict proof. He stated that motor vehicle registration number KDE 259 U was stationary at the time of the accident and could not have hit the Respondent. He testified that he was driving towards town. A cyclist came onto the road. He hooted but the Respondent did not move. He joined the road abruptly and was hit. According to him, there were oncoming motor vehicle so he swerved.

17. On cross-examination, he stated that the said vehicle had been parked at the Kisii Central Business District, near Equity Bank and Total Petrol Station. He further testified that he was at home at the material time and did not make any report since he was unaware that an accident had occurred.

Submissions

18. The Appellant filed submissions dated 28.08.2025. It was submitted that the court erred in not apportioning liability. The Appellant submitted that it is the Respondent who was to blame for ramming into a stationary vehicle that was lawfully parked beside the road. They prayed that the suit should be dismissed.

19. On quantum, the Appellant submitted that an award of between Kshs. 100,000/= and 150,000/= would have sufficed. He contended that the injuries set out in paragraph 6(a) of the plaint were the same as those reiterated by the court. According to the Appellant, the Respondent failed to demonstrate that any further treatment was undertaken. In support of this submission, reliance was placed on the case of Ogembo & another v Arika (Civil Appeal 29 of 2021) [2022] KEHC 12219 (KLR) (28 July 2022) (Judgment), where R.E.A Ougo J, set aside an award of general damages of Kshs 500,000/= and substituted with an award of Ksh 150,000/= for general damages. The claimant in that matter had sustained chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee.

20. They further relied the case of S J v Francesco Di Nello & another [2015] KECA 606 (KLR) where the court of appeal [Okwengu, Mwilu & Odek, JJ.A] gave the guidelines for award of damages. It is fair to set the same herein in full as doth:

The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of Ossuman Dhahir Mohamed & another v Saluro Bundit Muhumed [1997] KECA 422 (KLR) wherein the following passage, in the case of Kigaragari V Aya [1982 – 1988] IKAR 768 is employed;

To enable us to decide this we must look at our own awards in cases of injuries of similar nature or of similar sequelae. Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.

And as to the extent to which an appellate court can interfere with a trial court's assessment of general damages, the principles are well established, Salim S. Zein T/A Eastern Bus Service & Another V Rose Mulee Mutua [1997] KECA 94 (KLR) in the following words;

The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage (change of citation is mine).

21. The Respondent filed voluminous submissions spanning twenty-three (23) pages. It is neither edifying nor desirable for a summary to exceed the length of the original record. The court has, however, thoroughly considered the submissions and will confine its analysis to issues germane to the determination herein. Superfluous and repetitive portions of the submissions will be disregarded. The Court duly notes all submissions relating to its duty.

22. The substantive submissions commence at page 10, where the Respondent contends that he suffered multiple serious facial bone fractures, hematoma, and scalp contusions. These injuries were supported by documentary evidence, including CT scan reports confirming the fractures.

23. The respondent submitted that there was no rebuttal evidence tendered. Reference was made to the decision of the Court of Appeal [Tunoi, O'Kubasu & Githinji JJ A] in the case of Catholic Diocese of Kisumu v Tete [2004] KECA 154 (KLR), as follows:

> ... 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 difference 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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate...

24. It was further submitted that the foregoing was also reiterated in the cases of Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, where 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.

25. They argued that discretion of the individual judge is to be exercised judiciously. Reliance was placed on case of Southern Engineering Company Ltd V Mutia [1985] KECA 49 (KLR), where the court of appeal, [Hancox, Nyarangi JJA & Gachuhi Ag JA] expressed themselves as follows:

> 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 to prior decisions which are relevant to the case in question.
>
> The passage is from Lord Morris' speech in H West & Son v Shephard, [1964] AC 326 at page 353, and reads as follows:
>
> The difficult task of awarding money compensation in a case of this kind is essential a matter of opinion of judgment and of 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 an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that this sphere there are inevitably 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.
>
> Even more definite regarding the upward trend was the statement made by Madan JA twenty-one months later in Ugenya Bus Services v Gachoki Civil Appeal 66 of 1981, where there was a hand injury but also the amputation of the right leg, as follows:
>
> I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs. 20,000.00 for the loss of a forearm or Kshs. 50,000.00 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.

26. They submitted that the award of Ksh. 500,000/= was consistent with similar awards. The respondent relied on the cases of Rwaken Investments Limited v Isaac Kiprop Chelunyei & another [2016] eKLR where an award of Kshs. 1,200,000/= was substituted with one of Kshs.800,000/= for several fractures, out of range with the injuries suffered herein. Reliance was placed on the case of Specialized Aluminium Renovators Limited & another v Stephen Mutuku Musyoka [2021] KEHC 5094 (KLR), where an award of Ksh 500,000/= was affirmed in 2021 for fracture of the frontal nasal bones, fracture of nasal bones, fracture of right orbit, frontal lobe hemorrhage, contusion and bleeding into sinuses. The court was urged to have regard to the inflationary trend. They submitted that for special damages, a sum of Ksh. 55,750/= were proved.

27. On liability, the Respondent submitted that the Court's finding was an accurate reflection of the events that transpired on the material date. According to them, the factual matrix was corroborated by the police evidence. It was submitted that the accident was a hit-and-run incident. The Respondent contended that the driver gave two conflicting accounts, and that the Appellant's testimony was inconsistent with his written statement, suggesting that the statement had been fabricated. The person

driving the vehicle, it was argued, exhibited glaring negligence and recklessness. Reliance was placed on the case of Kansa V Solanki [1969] EA 318 where the former East Africa Court of Appeal stated as follows:

> Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.

Analysis

28. 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 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.

29. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

30. In Prudential Assurance Company of Kenya Ltd v Jutley & another [2005] KECA 262 (KLR), the court posited as follows:

> It is apparent that in reaching those conclusions, the learned judge placed much reliance on the following passage in Odgers Construction of Deeds and Statutes and statutes (5th Edition) at p. 106:
>
> Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence. As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we

have previously seen is admissible for explaining or translating words and expressions used therein.

31. It is a strong thing for an appellate court to depart from the findings of fact made by a trial judge who had the advantage of seeing and hearing the witnesses firsthand. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

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

32. In Nyambati Nyaswabu Erick Vs 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.

33. The duty of the court regarding damages is settled that the state of the Kenya economy, the welfare of the insured and the public must be at the back of the mind of the trial court. In the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

34. Finally, in deciding whether to interfere with the quantum awarded by the lower court, this Court must remain mindful of the limits of its appellate jurisdiction. The assessment of damages is an exercise of judicial discretion, and interference is only warranted where it is shown that the trial court acted on wrong principles, or that the award is so inordinately high or low as to represent an entirely erroneous estimate of the damages.

35. The burden of proof lies on the party who wishes the Court to make a finding in their favour. This principle is anchored in Sections 107-109 of the *Evidence Act*, Cap 80, Laws of Kenya, which provide that:

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.

36. This question was addressed in the case of Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four By Four Safaris Company Ltd [2004] KECA 65 (KLR) by the Court of Appeal [O'kubasu, Githinji & Waki, JJ.A] as follows:

> As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:
>
> " 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."
>
> There is however the evidential burden that 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 sections 109 and 112 of the Act, thus:
>
> 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.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
>
> The two sections carry forward the often repeated evidential adage: "he who asserts must prove."

37. Therefore, the burden of proof does not rest upon the plaintiff or the defendant merely by virtue of their titles in the proceedings; it lies on the party who asserts or alleges a fact that requires proof. In the case of Evans Nyakwana –vs- 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 if no evidence at all were given as either side.

38. Further, the question that then arises is what constitutes proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526, aptly observed 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.

39. The balance of probability standard means that a court is satisfied the occurrence of the event was more likely than not. In Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 it was 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 even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....

40. The degree of proof must carry a reasonable degree of probability, but not so high as is required in a criminal case. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.

41. The occurrence of the accident cannot, therefore, be attributed to magic or to some unidentified flying object. In a courtroom context, this court is guided by empirical evidence and must determine matters on the basis of what is more probable than not. While it is possible for a court to arrive at an erroneous

conclusion, the standard remains that even a slight tilt in probability, say 50.01% as against 49.99%, is sufficient to establish a fact on a balance of probabilities. I further note that upon cross-examination, DW1 sought to attribute blame to the cyclist.

42. It was the duty of the Appellant to prove contributory negligence. In Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431, the Court reaffirmed that a party alleging contributory negligence bears the evidential burden of establishing, on a balance of probabilities, that the injured party contributed to the occurrence of the accident. The court stated as follows:

> In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence.

43. Liability in negligence cannot exist in the absence of fault. 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.

44. The Appellant alleged that the Respondent was to blame for the accident. However, the Appellant fell into serious error. Cases are proved by evidence, not by submissions. A party cannot introduce or establish facts through submissions. As Mwera J aptly observed when addressing the role of submissions, they are merely a means through which counsel or an able litigant focuses the court's attention on the salient points of the case that deserve close scrutiny in order to firmly establish a claim. This principle was articulated in the case of Nancy Wambui Gatheru vs. Peter W. Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

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

45. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their precence or absence does not in any way prejudice a case. This position was clearly stated in Ng'ang'a & Another v Owiti & Another [2008] eKLR, where the Court held that submissions are merely intended to assist the court in understanding the evidence and the law but do not constitute evidence in themselves. The court posited as follows:

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

46. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

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

47. The Appellant presented four inconsistent scenarios regarding the events surrounding the accident. First, he claimed that he was in his house and that no accident occurred since the vehicle was parked at Equity Bank. Secondly, he asserted that he was in his house when the vehicle, which had been parked, allegedly hit another vehicle by the roadside, a version that only emerged through submissions. Subsequently, he suggested that an accident had indeed occurred but that he was unfairly blamed for it. Lastly, he contended that he was not the driver of the said vehicle.

48. These contradictions exemplify the kind of evidentiary inconsistency that Madan J. (as he then was) had in mind in N vs. N [1991] KLR 685 when he expressed himself in the following terms:

> I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.

49. I have no difficulty in dismissing the allegations made by the Appellant. This position is compounded by the fact that a different set of facts were pleaded, yet the Appellant sought to prove an entirely different version at trial. As the court of appeal [GBM Kariuki, PO Kiage & K M'Inoti, JJ] aptly observed in addressing the extent of proof and the binding nature of pleadings, parties are bound by their pleadings and must fully and faithfully set out their cases therein.

50. The net effect is that I find no basis upon which to believe the Appellant's account. The trial court was wholly correct in rejecting the Appellant's version of events. The evidence on record points to a hit-and-run incident, and the Appellant failed to offer any plausible explanation as to how the accident could have occurred without negligence on his part. All elements of contributory negligence remained unproved.

51. Where the Respondent had proved his case to the required standard, it was incumbent upon the Appellant to establish contributory negligence. In my view, the Appellant failed to discharge that burden. In Hussein Omar Farah v Lento Agencies [2006] eKLR, the Court of Appeal held that—

> " It is trite law that where a defendant alleges contributory negligence, the burden lies upon him to prove such negligence on the part of the plaintiff. Failure to do so leaves the defendant fully liable."

52. When such a defence of contributory negligence 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 the case of

Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR 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.

53. There was no evidence tendered or led relating to the contribution of the respondent to the accident. I do not find any fault with the court on the finding on liability. Accordingly, the appeal on liability is dismissed.

54. On quantum, the principal injuries sustained by the Respondent were a scalp contusion with resultant multiple calvarial and facial bone fractures. These included fractures of the right frontal, right parietal, and left occipital regions, accompanied by haemorrhagic contusions. There were also right frontal, ethmoidal, and maxillary hemosinus findings, as detailed in the medical report and radiological (CT scan)evidence produced in court.

55. Other injuries were scalp laceration, neck contusion, chest contusion, abdominal contusions, and back contusions. Both parties used wrong authorities to deal with the case. The appellant's submissions are based on a fallacy that the second injury above was not suffered. The court found that the Respondent suffered soft tissue injuries and multiple skull fractures.

56. In the case of David Kibue Mchomba & another v Alex Mutua Munyao [2019] eKLR, the Plaintiff suffered simple fracture to the head and the trial court awarded Ksh 800,000/=, which was upheld on appeal in 2019.

57. In Maintenance Limited and Another v WA (a minor suing through father next friend SKH) ELD HCCA No. 52 of 2008 [2015] eKLR the court upheld an award of Kshs. 800,000/= in 2015 where a child sustained a depressed fracture of the skull on the left temporal area, brain concussion and soft tissue injuries and loss of consciousness for 3 hours.

58. In Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR - where there was depressed fracture of skull, loss of consciousness, scars of the left tempo-parietal area and bruises of left leg; the award was Kshs 500,000/=.

59. In the case of GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku [2020] eKLR a claimant who suffered multiple fractures of frontal left orbital roof; right temporal bones; bleeding in the skull airspace, cut on the head and cut on the chin. The general damages award was increased from Kshs 300,000/= to 500,000/=.

60. In Moiz Motors Limited & Another v Harun Ngethe Wanjiru [2021] KEHC 8702 (KLR), the High Court, on appeal, reduced an award of Kshs. 700,000/= to Kshs. 500,000/= for a plaintiff who had sustained multiple injuries. The injuries included a depressed frontal bone fracture of the skull, severe

facial tissue injuries, soft tissue injuries to the chest, both knees, and both hip joints, as well as severe soft tissue injuries to the toes of the right leg.

61. Consequently, flowing from the foregoing, I find no merit in the appeal. The appeal was based on a misconceived idea that no fractures were pleaded. This was fallacious and had no basis in pleadings and evidence. The appeal on quantum lacks merit and is accordingly dismissed.

62. What remains is the question of costs. The issue of costs is governed by section 27 of the *Civil Procedure Act*, which provides as follows:

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

63. 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.

64. 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.

65. The matter having been dismissed; the Respondent is entitled to costs. The appeal is accordingly dismissed with costs of Ksh. 85,000/=.

Determination

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

    a. The entire appeal lacks merit and is accordingly dismissed with costs of Ksh. 85,000/=.

    b. 30 days stay of execution on costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF OCTOBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Opondo for the Appellant

Mr. Omandi for the Respondent

Court Assistant – Michael