Sakawa v Kenyenya (Civil Appeal E206 of 2024)
[2025] KEHC 18689 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E206 OF 2024

DKN MAGARE, J

DECEMBER 17, 2025

BETWEEN

MAGARA IBRAHIM SAKAWA ..... APPELLANT

AND

ERICK NYAKUNDI KENYENYA ..... RESPONDENT

(An appeal from the Judgment and decree of Hon. V.M. Moguche, SRM, given on 30.10.2024 in Etago PMCC No. E074 of 2023.)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.M. Moguche, SRM, given on 30.10.2024 in Etago PMCC No. E074 of 2023. The appellant was the defendant in the matter.

2. The Memorandum of Appeal dated 27.11.2024 is against the award of general damages and finding on liability. The appellant challenges the failure of the court below to have regard to pleadings on fraud, bias, finding of 100% liability and award of excessive damages while disregarding the expert evidence from the appellant.

3. The Plaint dated 28.03.2022, claimed damages for an accident that occurred on 26.05.2021 along Ikoba-Tabaka murram road, involving motor cycle registration KMDJ 374 J Bajaj and Motor vehicle Registration No. KCS 904 L, wherein the respondent who was riding on the said motor cycle suffered injuries.

4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages of Ksh. 7,800/= and injuries as follows;

    a. Scalp contusion and abrasions

    b. Dislocation of the left shoulder joint

c. Right hip joint contusion

d. Left tibia and fibula fractures

5. The Appellant entered appearance and filed defence dated 30.1.2023. They denied being owners of the subject motor vehicle, and any accident involving the vehicle and the motor cycle. They blamed the ride of the said motor cycle. It was their case that the motor vehicle was on its rightful lane when the motor cycle suddenly rammed into its rear. Particulars of negligence were set out in two places. They also pleaded particulars of fraud and falsification. Issues were thereafter joined.

6. The lower court heard the parties and proceeded to render the impugned judgement as follows:

a. Liability of 100% against the Appellant

b. General damages of Ksh. 600,000/=

c. Special damages of Ksh 7,050

Total - Ksh 607,050/=

7. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein. However, there is no appeal on special damages.

Evidence

8. During the hearing, PW1 was Daniel Nyameino, a Senior Clinical Officer at KTRH, produced treatment documents for the respondent and a receipt of Ksh 6,500/=. He was examined on the availability of the X-ray films.

9. PW2 was PC Alfred Komen of Homabay Traffic base. He produced an abstract for the said accident. The said vehicle was going to the same direction as the motor cycle. It overtook the motorcycle and, in the process, knocked down the motorcyclist. He suffered injuries and was taken to KTRH and Marble Hospital. He was the investigating officer, then based at Gucha traffic base. The driver of the lorry was blamed.

10. PW3 was the Respondent. He adopted his statement dated 28.02.2022, which materially is in the same line as the plaint. He stated he had not healed from the accident as he uses painkillers and could not walk well. On cross-examination, he stated that he was hit from behind. The road was clear, but the vehicle was speeding. He said that he had two pillion passengers, that is, a mother and child. He had his reflector jacket and helmet on. He stated that he was cut on the head, left shoulder dislocation, and back. On re-examination, he said that it is not illegal to carry a mother and a small child.

11. DW1 was George Mauti, who adopted his statement dated 19.04.2023. On cross-examination, he stated that the accident occurred on 19.05.2023. He denied being to blame. He stated that the vehicle belonged to Ibrahim. He said that the rider fell on the left side. The appellant did not deem it necessary to file the said statement or place it in the record of appeal.

12. DW 2 was Dr. Walter Adero who testified that he examine the respondent on 15.04.2024 and concluded that this was a case of fraudulent impersonation. The injuries were absent; they did extra findings to support the said findings. He stated that the injuries were severe and they left footprints. It was his case that they heal between 18 and 36 months. He stated that he had attached an X-ray report but not the radiologist's report, as he did not find it necessary. He said that doctors can have different opinions and he had his. He had not received any complaint from KTRH regarding fictitious documents.

Submissions

13. The Appellant filed submissions dated 28.08.2025. They stated that the Respondent did not sustain the injuries. He was a fraudulent claimant. They stated that the history given to Dr. Walter S. Adero did not match the injuries. This was said to be cogent evidence of the lack of injuries. They stated that they passed the test set by the Court of Appeal in the case of Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR):

    25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

    > " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

14. They indicated that there was a fracture of the tibia and fibula, but there were no scars. Reliance was placed on the case of Peter Omoke Omonyi v Charles Kamau Muthoni [2017] KEELC 1467 (KLR), the Environment and Land Court(BN Olao J) held as follows:

    > In Mapis Investment (K) Ltd Vs Kenya Railways Corporation (2005) 2 K.L.R 410, the Court of Appeal cited with approval LINDLEY L.J. in SCOTT VS BROWN DOERING, MINAB & CO. (3) (1892) 2QB 724 as follows:
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    > > "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. If the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him".

15. On general damages, they posted that a sum of Ksh 350,000/= will suffice. Reliance was placed on the cases of Munene v Mbarire (Civil Appeal 488 of 2015) [2023] KEHC 18417 (KLR) (Civ) (19 May 2023) (Judgment), where the court awarded a sum of Kshs 450,000/= in lieu of for bruises on the right side of the face, both elbows, right groin, right knee and fracture of the right tibia/fibula. Further reliance was placed on Civicon Limited v Richard Njomo Omwancha & 2 others [2019] KEHC 8373 (KLR). It is not clear which award the appellant requested.

16. On the actual liability, the appellant submitted that Respondent was an author of his own misfortunes and those of the other pillion passengers.

17. The Respondent filed submissions dated 6.10.2023. They submitted that the allegations of fraud are quasi criminal and must be proved distinctly and to a standard higher than the ordinary standard. The same was thus not strictly proved. Reliance was placed on the ELC Muriithi v Makena & another [2024] KEELC 6936 (KLR), where CK Yano, J held as doth:

    > On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases.

18. It was stated that the appellant merely inferred without cogent evidence of concealment as required. Further reliance was made in the case of Central Kenya Limited v Trust Bank Limited & 12 others [2020] KEHC 4747 (KLR), where it was held that there must be cogent evidence, as set out hereunder:

> 34. Important as well is that the hypotheses of the Plaintiff's case is that the entire transaction, beginning from the resolution to the taking of the charges, was fraudulent. The Plaintiff therefore bore a heavy burden of providing cogent proof of the fraud. Of this burden it has been said by Tunoi JA(as he then was) in Vijay Morjaria Vs Nansingh M Dabar and another(2000)eKLR ;
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> > "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489

19. On quantum, the Respondent stated that the authorities relied on by the appellant were for soft tissue injuries and dislocations. He placed reliance on the case of Okoth v Sunday & another [2025] KEHC 2136 (KLR), where D K Kemei awarded Kshs 700,000/= for lacerations on the occipital scalp, cut wound on the forehead, Blunt injury to the chest, Blunt injury to the back, lacerations on the right wrist & right hand, and fracture to the left femur.

20. On liability, it was contended that the appellant did not produce evidence to contradict the Respondent. They contended that liability cannot be speculative. Reliance was placed on the case of Baro Ngo Sevelius Yophen v Jared Ndemo [2020] KEHC 3253 (KLR), where the court, Ougo J stated as follows:

> 11. There is no contention that the respondent was a pillion passenger. It was not shown how his failure to wear a helmet or how the fact that there were two pillion passengers on the motorcycle would have contributed to the occurrence of the accident. As a pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident.

21. The court was urged to dismiss the appeal with costs for lack of merit.

Analysis

22. 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.

23. 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..."

24. 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. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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..."

25. The court will handle the matter in three limbs, that is:

a. Fraud

b. Liability

c. Quantum and injuries

26. As pointed out by the Respondent, the High Court in the case of Getembe Prime Distributors v Orangi [Supra] addressed the question of proof of fraud succinctly as follows:

21. In other words, 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. In this case, the burden of proving fraud was on the Appellant. They did not tender evidence. The consequence of such non-tendering of evidence is that the question of fraud falls flat on its belly. 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."

22. The question of proof of fraud is not an idle one. When fraud is pleaded, it must be specifically proved by the party alleging. The Respondent has no duty to prove that they did not engage in fraud. In other words, there is no duty to prove the negative. In the case of Orieny & another v National Bank of Kenya (Civil Appeal E016 of 2023) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment), RE Aburili, J stated as follows: The first principle is that an allegation of fraud must be specifically pleaded and proved. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be

distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.

"The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the court stated that:"We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the Court stated that:

> "...Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....."

27. It is in this line that tenets of interpretation must be respected. Absence of evidence is neve evidence of absence. It is not enough for the appellant to rely on the inferior premise in coming to a conclusion on fraud. He must strive to impeach the documents. He cannot bring a witness to give contrary views and allege that he has inferred fraud. The witness must attack the documents produced as of dubious origin.

28. The court is surprised that Dr. Adero could descend so low and tender such evidence. A Surgeon of the caliber he describes ought to be able to provide professional advice to the client. For example, he let the appellant down by not advising of the place of open and closed fractures. By arguing that the absence of a scar is the absence of a fracture, the witness or a party tendering such evidence is not credible. This is highly speculative, as there was no evidence that this was an open fracture, commonly known as a compound fracture. Reading the opinion of Dr Adero, I did not recall the adage of paying the piper, I remembered words of G V Odunga, while addressing the words of C B Madan in the case of Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR, as follows:

> Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:
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> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that:

> " In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an act which is antithesis to transparency and vice versa..."

29. Being an expert, the court is only awed into believing every kind of opinion thrown around. The court is ultimately the finder of facts. Professional opinions remain opinions. To be fair to the good doctor, he could not resist the truth that a fracture heals between 18 and 26 months. In other words, one and a half years to 3 years. Having examined the patient, the fracture was definitely healed after three years.

30. This 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."

31. 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."

32. 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 as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, 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:-
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> > "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."

33. Dr. Adero lost a golden chance to help the court in finding the truth by engaging in skullduggery, chicanery, and subterfuge instead of strict adherence to a professional duty to find medical facts. I dismiss his report as having no probative value.

34. The documents from KTH were not impeached. The police evidence of the respondent's injury remained unchallenged. The appellant's evidence of the accident also confirms the injury. The evidence as tendered by Daniel Nyameino, a clinical officer, is unchallenged. Critically important, Dr. Adero failed in terms of methodology and triangulation of the medical documents, which were already available. He preferred rumours, hyperbole and inferences. The court below was thus correct that there was no fraud.

35. In a case where fraud is alleged, it is not enough to simply infer fraud from the facts. Fraud was not proved. There was no effort to impeach any single document of injury and treatment. The allegations of fraud were thus unfounded. They are thus dismissed in limine.

36. On liability, proper, the Appellant urged the court to find that the lower court erred in finding the Appellant 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

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

37. Evidentially, the burden may shift, but the legal burden of proof remains constant throughout the trial. In 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. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

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

39. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the 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. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. 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;-
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

41. The Appellant's witness did not give cogent evidence on how the accident occurred. If the appellant was correct, then the motorcycle could have fallen on the right side of the vehicle. In his case, the Appellant maintained that the bike fell on the left. The only explanation was that the motor vehicle was overtaking the motorcycle, not any other reason. The scene, as described by both the appellant's driver and the respondent, points irrefutably to one conclusion: it is the motor vehicle that was overtaking dangerously. The extent of the injury, even after an oblique hit, indicates the vehicle was traveling at an abnormally high speed.

42. However, I do not agree with the court below that the owner of the motorcycle was a necessary party to share liability. The representative as a rider can ideally shoulder liability. This is different with respect to the pillion passengers.

43. The next question, therefore, is whether, after the respondent established, negligence on the part of the appellant, the appellant was able to prove contributory negligence. 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. All that is necessary to establish such a defence is to prove that the injured party failed to take reasonable care for their own safety and that such failure contributed, in some degree, to the accident or the damage suffered. The essence of contributory negligence lies not in a breach of duty to the defendant, but in a failure to take reasonable precautions to avoid foreseeable harm to oneself. See Davies v. Swan Motor Co. Ltd or Nance v. British Columbia Electric Railway).

44. It was the duty of the Appellant to prove contributory negligence on the part of the respondent. The appellant sought to show that the respondent was carrying two pillion passengers, had no valid insurance, among other things. These were not shown to have contributed to the accident in any way. Such matters are for other offices and are of no interest to a court determining liability for occurrence of an accident. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " 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".

45. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01:49.99, there can be no better equal chance. This is the rule in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 in which the courts held inter alia that; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

46. In this case, the appellant was not able to show any contribution by the respondent. Therefore, I affirm the lower court finding of 100% liability against the appellant.

47. For the court to interfere with the award, it is not enough to find it as being high; it must be inordinately high as to amount to an erroneous estimate of damages. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

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

48. The said principles for disturbing awards have been distilled over the years. In the case of Butt v Khan [1978] KECA 24 (KLR), the court of appeal [Madan, Wambuzi & Law JJA] posited as hereunder:

> An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

49. This was also addressed in the case of Southern Engineering Company Ltd v Mutia [1985] KECA 49 (KLR), where the court of appeal [Hancox, Nyarangi JJA & Gachuhi Ag JA] stated as follows:

> ... 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. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in H West & Son v Shephard, [1964] AC 326 at page 353, and reads as follows:-
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> > "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 in 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.

50. These principles were addressed by the court of appeal, sitting in Mombasa [Kneller, Hancox and Nyarangi, JJ.A] in the locus classicus case of Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] KECA 42 (KLR), as follows:

> This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:
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> (a) Proceeded on a wrong principle; or
>
> (b) Misapprehended the evidence in some material respect.
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> (...)
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> And a member of an appellate court when he naturally and reasonably says to himself 'what award would I have made?' and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. West (H) & Son v Shephard Ltd [1964] AC 326, Lord Morris of Borth -Y-Gest.

51. The lower court awarded a sum of Ksh 600,000/= as damages. Premium was taken that the appellant was not treated with the serious injury at first. Lest we forget, that the priority in May 2021, the court takes judicial notice, was on the COVID-19 treatment. However, the respondent was treated, and the fracture was managed conservatively.

52. The decisions relied on by the appellant range from Ksh 450,000/=, while the respondent's range from 600,000/= to 700,000/=. To substitute a sum of 600,000/= with 400,000/ =, will be substituting an opinion of the court below with an opinion of what this court could have awarded.

53. The court notes that amounts between 450,000-600,000/= are within the same continuum. At least the appellant agrees that the injuries were serious. They have however, healed. The injuries suffered were scalp contusion and abrasions, right hip joint contusion, fractures left tibia and fibula and dislocation of the left shoulder joint.

54. In the case of Musyoka v Korir & another [2024] KEHC 5849 (KLR), W. Musyoka, while summarizing similar injuries, stated as follows;

> I have surveyed the following decisions, where the claimants had suffered similar or comparable injuries. In George Raini Atungu v Moffat Onsare Aunga [2021] eKLR (Ougo, J), Kshs. 650,000.00 was awarded for a fracture of the right tibia and fibula bones, a fracture of the left radius and ulna, and contusions to the chest and the pelvis. Nahson Nyabaro Nyandega v Peter Nyakweba Omboga [2021] eKLR (Maina, J), it was a compound fracture of the right tibia bone; cut wound on the right leg; and bruises on the face, and the court awarded Kshs. 650,000.00. In Ndwiga & another v Mukimba [2022] KEHC 11793 (KLR) (Njuguna, J), the court awarded Kshs. 500,000.00, for fractures of the tibia and fibula, and tenderness and swelling on the left leg. In Atunga v Mogambi [2022] KEHC 9854 (KLR) (Ougo, J), the injuries were fractures of the tibia and fibula bones; dislocation of the right hip joint; multiple lacerations on the lower limb; bruises, with multiple cut wounds, on the upper limbs; Dislocation of the right shoulder; chest trauma; and bruises on the frontal part of the head, and Kshs. 550,000.00 was awarded. In Munene v Mbarire [2023] KEHC 18417 (KLR)(Njagi, J), the court awarded Kshs. 450,000.00, for fractures of the right tibia and fibula bones; and bruises on the right side of the head, both elbows, right groin and right knee.

55. The decisions relied on were the 2019 and 2020 decisions. The respondent, on the other hand, relied on more current decisions. The Court of Appeal, 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.

56. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, 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..."

57. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

58. So my duty as the appellate court is threefold regarding quantum of damages: -

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

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

c. The award is simply not justified from evidence.

59. To be able to do this, I need to consider similar injuries, take into consideration inflation, and other comparable awards. The awards point to the award given by the court below as proper and within range. The court cannot interfere with the same. The appeal on quantum is accordingly dismissed.

60. There was no appeal against the award on special damages. This leaves the issue of costs only. They are 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.

61. Costs are generally discretionally. 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.

62. 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.

63. Costs follow the event. In this case, the event is the dismissal of the appeal. Costs of Ksh. 95,000/= will suffice.

Determination

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

    a. The appeal lacks merit and is accordingly dismissed.

    b. The Respondent shall have costs of Ksh. 95,000/=.

    c. 30 days stay of execution.

    d. 14 days right of appeal

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF DECEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael