



REPUBLIC OF KENYA



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**Mathenge v Chepngeno (Civil Appeal E033 of 2023)
[2025] KEHC 1108 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E033 OF 2023
DKN MAGARE, J
FEBRUARY 26, 2025**

BETWEEN

CHARLES MWANGI MATHENGE APPELLANT

AND

IVIN CHEPNG'ENO ALIAS IVY CHEPNGENO RESPONDENT

*(Being an appeal for the Judgment and decree of Hon. E.N. Angima
(SRM) delivered on 17th April, 2023 in Nyeri CMCC No. E293 of 2021)*

JUDGMENT

1. This is an appeal from the judgment and decree by the Honourable Senior Resident Magistrate Hon. E.N. Angima on 17th April, 2023 in Nyeri CMCC No. E293 of 2021. The Appellant filed an appeal and set forth the following grounds of appeal.
 - a. The learned magistrate erred in law and in fact in unduly disregarding the Appellant's evidence adduced in trial.
 - b. The learned trial magistrate erred in law and misdirected herself when she failed to consider the Appellant's submissions on both points of law and facts.
 - c. The learned trial magistrate erred and misdirected herself as to the exact cause of the accident and the nature of the Respondent's injuries and therefore erred in law and in her assessment of damages.
 - d. The learned trial magistrate erred in fact and law and misdirected herself in finding that the Respondent is entitled to general damages of Kshs. 804,550/=, which amount is manifestly excessive.



- e. The learned trial magistrate misdirected herself in ignoring the principles applicable in awarding the quantum of damages and relevant authorities on the quantum cited in the written submissions presented and filed by the Appellant.
 - f. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent and further failed to apply the precedents and tenets of law applicable.
 - g. That the learned magistrate erred in law and fact in arriving at her said decision.
 - h. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
2. The grounds set out are unduly verbose and repetitive. Grounds 1, 2, 7, and 8 raise absolutely no legal or factual issue. A proper memorandum of appeal should follow the dictates of Order 42 Rule 1 of the Civil Procedure Rules, which provides as doth: -
- “1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
3. The Court of Appeal had this to say about compliance with Rule 86 [now 88] of the Court of Appeal Rules, (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

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

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

Pleadings

2. The Respondent filed a suit on 21.9.2021 claiming damages for a road traffic accident of 10.06.2020 along Nyeri-King'ong'o road in the Chania River area. The Respondent was a pedestrian while the



Appellant was the registered owner of motor vehicle registration No. KCG 763K Toyota Hiace Matatu. The Respondent pleaded particulars of the Appellant's negligence, which the Appellant duly denied. Special damages of Ksh. 4,550/= were pleaded. The respondent pleaded injuries as follows:-

- a. Fracture of the lateral end of the left clavicle.
 - b. Displacement (subluxation) of the left acromioclavicular joint.
3. The Appellant filed defence on 8.11.2021. He denied being the registered owner of motor vehicle registration No. KCG 763K Toyota Hiace Matatu. He blamed the Respondent, and, in the alternative, they stated that the accident was beyond the control of the Appellant. The Appellant denied that the doctrine of *res ipsa loquitur*, and vicarious liability was applicable. It was his case that the doctrine of *volenti non fit injuria* applied.

Evidence

4. PW1, PC Antony Opiyo, testified for the Respondent on 14.11.2022. He testified that an accident occurred involving the Respondent and motor vehicle registration No. KCG 763K Toyota Hiace Matatu. According to the witness, the Respondent was crossing the road from right to left and had completed almost 80% of the road when she was knocked down by the Appellant's driver.
5. The witness continued that he investigated the case and blamed the Appellant's motor vehicle registration No. KCG 763K Toyota Hiace Matatu. He stated that there was a stage in the area, and it was a proper place to cross. The visibility was clear, there were no potholes, and it was during the day at 1750 hours. It was his evidence that the impact was on the far left side of the vehicle, hence evidencing that the pedestrian was virtually completing the crossing.
6. The Respondent was PW2. She testified and adopted her statement dated 13.8.2021 and produced exhibits. She stated that she was crossing the road when she was knocked by the Appellant's motor vehicle registration No. KCG 763K Toyota Hiace Matatu. She lamented that she had not healed on the hand, which could not work. It was her case that she was approaching the yellow line. Her case was that other vehicles were far from motor vehicle registration No. KCG 763K Toyota Hiace Matatu.
7. The Appellant did not tender any evidence in support of his case. Parties filed submissions. The court delivered judgment on 17.4.2023 in favour of the Respondent as follows:-
 - a. Liability 100% against the Appellant.
 - b. General damages Ksh. 800,000/=
 - c. Special damages Ksh.4,550/=Total Kshs. 804,550/=
8. This resulted in the appeal herein. The court directed that the matter proceeds by way of submissions. None were filed by either party since November 2024 despite giving numerous chances to do so.

Analysis

9. 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 firsthand. 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 it 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.”

10. The duty of the first appellate court was stated in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, to be:

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

11. 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 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...”

12. The standard of proof in civil cases is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“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 than 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.”

13. This was further enunciated in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions* [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities



are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

14. There are only 2 issues that arise from this appeal, that is:

- a. Proof of liability
- b. Assessment of quantum

15. On proof of liability, the burden of proof was on the Respondent. However, she testified on how the accident occurred, and the evidence of PW1 buttressed this. The Respondent was lawfully crossing the road. The Appellant made a mountain from the fact that the Respondent was crossing. Crossing is allowed, so long as it is done within the dictates of the highway code. Guidelines 5 and 6 of the highway code provide on how pedestrians cross the road as follows: -

"5 how to cross the road:

- a. Look right, look left, look right again, then listen before crossing the road. DO NOT run.
- b. If traffic is coming, let it pass. Look all around again and listen.
- c. Do not cross until there is a safe distance in the traffic and you are certain that there is plenty of time. Remember, even if traffic is a long way off, it may be approaching very quickly.
- d. Do not cross the road diagonally.
- e. Avoid crossing the road at a sharp bend.

6. When it is safe, go straight across the road - Do Not run.

- a. Keep looking and listening for traffic while you cross, in case there is any traffic, you did not see or in case other traffic appears suddenly.
- b. Look out for cyclists and motorcyclists travelling between lanes of traffic.
- c. Do not walk diagonally across the road

16. The evidence of the two witnesses pointed to the negligence of the Appellant. It must be remembered that there can be no liability without 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."

17. Therefore, liability in tort is predicated on the existence of a duty of care, a breach of that duty, and causation; that is, a causal connection between the duty of care, breach, and injury thereof. In the case



of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused....

What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case.”

18. It was the duty of the Appellant to prove contributory negligence on part of the Respondent. Contributory negligence arises independent of the duty of care. This is a duty owed to oneself. In the case of MacDruggall 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.”

19. It was incumbent upon the court to analyze the evidence available to determine liability. In the comparative jurisprudence in the case of Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987 Theobalds J enunciated as follows; -

“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.”

20. Further, the burden lies on a party upon whom the blame of negligence has been cast. The Appellant cannot escape liability by keeping quiet. 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; -

“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).

21. The Appellant’s driver was one of the two eyewitnesses to the accident. He opted not to give evidence. The court is entitled to make a negative inference. This will equally apply to the refusal to place a second medical report on the record early enough. These two pieces of evidence must be taken that had they been produced, they would have been averse to the Appellant. In the case of *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*, Justice G.V. Odunga as then he was stated as doth:

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

22. The evidence tendered by the Respondent and her witness was not contested. It was cogent and showed negligence on the part of the Appellant. The Respondent was completing crossing when he was hit. It is evident that the Appellant took no regard to other road users in particular the Respondent. Having not tendered any evidence in support, then the question of contributory negligence does not arise.

23. No blame can be apportioned to the Respondent in absence of evidence in support of contributory negligence. The Appellant failed in their duty to prove contributory negligence. There must be cogent evidence tendered to prove either negligence or contributory negligence. This court dealt with the issue of contributory negligence in the case of *Cadama Builders Limited v Mutamba ((Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal E093 of 2021) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment)*, where Kasango J stated as follows:-

“No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant’s pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent’s pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of *Charterhouse Bank Limited (under statutory management) vs Frank Kamau (2016) eKLR*, as follows:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without



such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *KARUGI & ANOTHER V. KABIYA & 3 OTHERS* (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.”

24. Ground 1 of the memorandum of appeal is otiose. There was no evidence tendered by the Appellant at the trial. There was thus nothing to disregard. Submissions are not evidence and cannot be a basis for decision. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they 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 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.”

25. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in *Ngang’a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, that:

“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.”

26. 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.”



27. Having analyzed the evidence, it is apparent that the particulars of contributory negligence were not proved. On the other hand, the evidence on record pointed to the Appellant as the cause of the accident. I find no difficulty in dismissing the appeal on liability.
28. On quantum, the Appellant raised a compounded question that Ksh. 804,550/= was excessive. These were both special and general damages. On the other hand 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 as held in *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, where 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.”

29. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injured public must be at the back of the mind of the trial court.
30. Finally, in deciding whether to disturb the quantum given by the lower court, the court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously in the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages. 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.

31. For this court to interfere with the award, it is not enough to show that the award is high, or had I handled the case in the subordinate court, I would have awarded a different figure. So, my duty as the appellate court is threefold regarding the quantum of damages:
- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
 - c. To ascertain whether the award is simply not justified from evidence.
32. To be able to do this, I need to consider similar injuries and take into consideration inflation and other comparable awards. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not



disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

33. Secondly, the court is to have regard to both the burden and standard of proof for civil cases. On the other hand, the burden of proof is on the party wishing the court to assert a fact as well set out in Sections 107-109 of the Evidence Act as hereunder:

“ 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.”

34. General damages of Ksh 800,000/= were awarded for fracture of the lateral end of the left clavicle and displacement (subluxation) of the left acromioclavicular joint. No decision was relied on except an authority laying the principles to be applied, that is Simon Taveta v Mercy Mutitu Njeru [2014] eKLR, where the court of Appeal [Visram, Koome, & Otieno - Odek, JJ.A.] stated as follows:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. There is no dispute as to the critical nature and extent of injuries suffered by the respondent. This Court needs to strike a chord of fairness in the quantum of damages awarded.... On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries.

35. The principles which guide a court in awarding damages were enunciated by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730[Hancox, Nyarangi JJA & Gachuhi Ag JA] as follows:

“...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. 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, 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:



“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....

it is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries. No two cases are precisely the same, either in the nature of the injury or in the age, circumstances of, or other conditions relevant to, the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award. The duty in this respect is well stated, again by Lord Morris in Jag Singh’s case (supra) at page 1385, as follows:-

“It need hardly be emphasised that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If, however, it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardised or that there should be any attempt to rigid classification. It is but to recognise that since in a court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

36. In the lower court, the Respondent relied on the decisions of Judy Ngochi v Kamakia Eleselelo Ledamoi (2019)eKLR, where an award of 1,000,000/= was given on 22.10.2019 by G.V. Odunga, as he then was, for lacerations of little finger, blunt injury to right arm, fracture right humerus, blunt injury left shoulder, fracture left clavicle and chip fracture of right acromion. In that case, there were implants inserted on the left clavicle and right humerus and he would require their removal at the cost of Ksh. 300,000/=.
37. The Respondent also relied on the case of Francis Murangiri Josiah and Ephantus Mwangi Josiah V Stanley Kiuriam’ Mutunga (2017) eKLR. In that case, the court confirmed an award of Ksh 800,000/= for a fracture of the right clavicle, fracture of two left-sided rib fractures with haemothorax (abnormal collection of blood in the pleural space), laceration of the right lower eyelid, and bruise on the left side of the chest.
38. The Respondent did not file submissions in the lower court and in this court. It is hard to fathom which submissions were not considered. This appears to be a standard appeal where all manner of grounds are raised, with vain hope that one will stick.
39. The Respondent suffered a fracture of the lateral end of the left clavicle and displacement (subluxation) of the left acromioclavicular joint. The patient file from Nyeri General Hospital indicates that the Respondent suffered a clavicle fracture. Dr. Muleshe, in his report dated 5.7.2020 (wrongly dated as



the receipt is dated 22.7.2021), indicated that the Respondent suffered the above injuries as a result of the accident of 10.6.2021. The examination was carried out on 5.7.2021.

40. The injuries were fairly serious. The court must compare recent and comparable decisions in arriving at its decision. In *Lawrence Wairimu Wainyoike & another v Joseph Letting* [2021] eKLR, the High Court upheld an award of Kshs. 800,000/= for the plaintiff who suffered deep cut wound on the forehead, fracture left clavicle, blunt injury to the chest and blunt injury to the shoulder.
41. In the case of *The UAP Assurance Limited & 2 others v Rachael Warigia Ndungu* [2022] eKLR, the High Court upheld an award of Kshs.650,000/ in general damages for the Plaintiff, who suffered a fracture of the right clavicle among other soft tissue injuries. Similarly, in the *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko* [2019] eKLR the court upheld an award by the lower court of Ksh. 700,000/- to the Plaintiff, who had suffered a fracture of the clavicle.
42. In a more recent case of *Wachira & 2 others v Kiburi (Civil Appeal E024 of 2021)* [2023] KEHC 25952 (KLR) (30 November 2023) (Judgment) Maureen Odero, J reduced an award of Ksh. 1,200,000/- to Ksh. 700,000/- for a Plaintiff who had suffered the following injuries:
- i. Fracture of the right clavicle bone (collar bone)
 - ii. Blunt injuries to the right elbow with a small deep fracture
 - iii. Blunt injury to left foot
 - iv. Bruises on the back
43. The Ksh 800,000/- award for the injuries suffered was thus within range. I find no error on part of the lower court.
44. Special damages must be pleaded and strictly proved. In the case of *David Bagine Vs Martin Bundi* [1997] eKLR, the court of appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990* (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi (1982-88)* IKAR 681 at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it.”

45. Special damages must be pleaded and proved, before they can be awarded by the Court. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, Luka Kimaru J, as then he was, stated as doth; -

“In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh, Civil Appeal No. 42 of 1983* [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:



“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

46. The special damages that were pleaded were Ksh. 4,000/= for medical report and Ksh. 550/= for copy of records. Receipts to this effect were produced. There is thus no challenge on special damages. The appeal in respect thereof is dismissed.
47. Having found no fault in the lower court decision, it follows that the appeal must give way. The same lacks merit and is accordingly dismissed. What then becomes 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.
48. 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.

49. The Respondent was successful in the appeal. Even where success is razor-thin, it is still a success. In the circumstances, costs of Ksh 105,000/= will suffice.

Determination

50. The upshot of the foregoing is that I make the following orders:-



- a. The appeal is dismissed for lack of merit.
- b. Costs of Kshs. 105,000/= to the Respondent.
- c. 30 days stay of execution.
- d. Right of appeal 14 days.
- e. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 26TH DAY OF FEBRUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njuguna for the Appellant

No appearance for the Respondent

Court Assistant – Michael

