Mochama v Ogoti (Civil Appeal E083 of 2023)
[2025] KEHC 1468 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E083 OF 2023

DKN MAGARE, J

FEBRUARY 26, 2025

BETWEEN

SYLVESTER RATEMO MOCHAMA ..... APPELLANT

AND

EVANS NYAKEYA OGOTI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.N. Abuya (CM), given on 25.7.2023 in Kisii CMCC E703 of 2021. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:

    a. Liability 100%

    b. General damages Ksh. 1,000,000/=.

    c. Special Damages Ksh. 21,670/=.

    d. Costs of the suit.

2. The appeal is against liability and the award of damages. However, the Appellant filed a 5-paragraph Memorandum of Appeal. It is certainly not edifying for advocates to present five argumentative grounds of appeal and end up arguing only one issue. The grounds are thus ancillary, repetitive, prolixious, and a waste of judicial time. This court will have to deal with whether the magistrate erred in finding in awarding damages.

Pleadings

3. The Plaint dated 19.7.2021 claimed damages arising from injuries caused through an accident that occurred on 5.6.2021 involving the Respondent's motorcycle registration number KMEV 254E and the Appellant's motor vehicle registration number KCX 702V that occurred along Kisii-Migori road at

Kobil Petrol Station junction. The motor vehicle is said to have violently collided with the motorcycle. The Respondent pleaded particulars of negligence on the part of the Appellant and also that he suffered the following injuries:

i. Scalp contusion

ii. Facial abrasion

iii. Chest contusion with resultant rib fractures

iv. Back contusion

v. Fractures of the right radius and ulna

vi. Dislocation of the left patella

vii. Bruising of the right leg

Evidence

4. PW1 was No. 85663 PC Kenneth Walumbo of Kisii Police Station. He produced the police abstract and testified that the accident had occurred and motor vehicle registration No. KCX 702V was to blame. On cross-examination, it was his case that the driver of the motor vehicle emerged from a junction and collided with the motorcycle rider on the highway. The case was still pending under investigation.

5. PW2 was the Respondent. He relied on his witness statement and produced the documents filed in court as a bundle. On cross-examination, he testified that he was riding the motorcycle on the highway when the Appellant hit him from the side he was joining the road. The Appellant did not indicate that he wanted to join the highway. The motor vehicle hit him to his left side on its front, and he fractured his hand, and his knee was dislocated. One of his ribs was also fractured.

6. PW3 was Daniel Nyameino, Senior Clinical Officer from Kisii Teaching and Referral Hospital. He relied on the P3 form and medical report dated 11.6.2021 also produced in evidence. He also produced treatment notes and x-ray films. He confirmed the injuries as pleaded and stated that the Respondent's permanent disability was assessed at 4%. On cross-examination, it was his case that he examined the Respondent 4-5 days after the accident. He did not conduct X-rays. The injuries according to him, were grievous, and the Respondent had not healed fully.

7. DW1 was Dr. James Ohandi Otieno. It was his testimony that he examined the Respondent, and he had a fracture on the right-hand ulna and bruises to the scalp, forehead, and right leg. On cross-examination, it was his case that the x-rays showed a fracture on the right upper limb. He stated that the injuries in the first medical report were not clinically confirmed.

Submissions

8. I have not had sight of the Respondent's submissions. On his part, the Appellant filed submissions dated 9.12.2024. It was submitted that the Respondent did not prove liability, and the lower court awarded 100% liability in favor of the Respondent in error. He relied on Section 107 of the *Evidence Act* and cited inter alia Peter Okello Omedi v Clement Ochieng [2006] eKLR. Based on this, it was submitted that a liability of 50:50 would be proper. However, during the hearing, liability was abandoned, and rightfully so. The Appellant prayed that the court reduce the award to 200,000/=. No reason was provided.

9. The second authority was the case of George Raini Atungu v Jared Ogwoka Ondari [2021] eKLR, where R.E. Ougo J confirmed the award by the lower court for a sum of Ksh.1,000,000/=. The injuries suffered by that claimant were head injury with cut wounds on the left parietal region of the head, Chest contusion, fracture of the ribs on the right side, multiple bruises on the upper limbs bilaterally, fracture of the right tibia/fibula bones, fracture of the pelvis; and multiple bruises of cut wounds on the lower limbs.

10. On general damages, it was submitted that the medical report by Dr. Obondi indicated that the Respondent had suffered multiple soft tissue injuries which had healed with no permanent disability. He relied on the case of National Industrial Credit & 2 Others v MNO [2024] eKLR to submit that Ksh. 200,000/- would be adequate compensation. The other authorities all relate to soft tissue injuries award between 120,000/= to 250,000/=.

Analysis

11. 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.

12. The jurisdiction for this court to review the evidence in the lower court should be done but with caution. In the cases of Peters v 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..."

13. The duty of this court in the appeal is thus to reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another v 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..."

14. On liability, the Appellant did not call any evidence. The driver of the accident motor vehicle did not testify or give evidence. As such, the evidence of the Respondent was as such uncontroverted. In the case of Janet Kaphiphe Ouma & Another v Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga v Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere

allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

15. The Defence filed by the Appellant in the lower court on liability thus contains mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove his case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

16. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau v 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."

17. 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....."

18. 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 v 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.

> 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."

19. The Respondent's clear evidence was that he was riding the motorcycle on the highway. The Appellant was driving his motor vehicle, joining the road without indicating, and the motor vehicle then collided with the motorcycle. The Appellant gave no account or explanation. There was thus no basis upon which to trace negligence on the part of the Respondent as contributory negligence was not proved.

20. The burden of proving negligence lay with the Respondent, while the burden of proving contributory negligence lay with the Appellant. The Appellant raised contributory negligence in his defence. I find no evidence presented by the Respondent as to how he could not avoid the accident. He did not prove circumstances that could make it difficult to slow down, swerve, or stop. Consequently, the defence of contributory negligence was plausible. I align with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where 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."

21. Whereas it was submitted for the Appellant that the police officer who testified in court was not an eye witness as to find negligence, I do not think the lower court's reasoning was based solely on the absence of the eye witness. Even where there is no eyewitness, there must be evidence that will fill the gaps that an eyewitness would have filled. The evidence of the Respondent on what occurred was plausible and not controverted. And again, the court may find the evidence of an eyewitness quite incredible and invaluable. Therefore, even without an eyewitness, negligence could be inferred from the general factors surrounding the case. As was held in the case of EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR:

> A case cannot collapse merely on the basis that there were no eye witnesses. The court can, on the basis of circumstantial evidence or evidence adduced by the Defendant that tends to prove his involvement in the alleged act infer culpability on the part of the Defendant.

22. Therefore, I find no basis upon which to fault the lower court's finding on liability. I uphold liability of 100% against the Appellant. This was rightly not pursued at the hearing.

23. On quantum, the Court of Appeal pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service v 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.

24. For the appellate court to interfere with the award, it is not enough to show that the award is high, or had I handled the case in the subordinate court, I would have awarded a different figure. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

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

25. Therefore, where damages are proved to be at large, they must be commensurate with similar injuries. The injuries that the Respondent suffered were as follows:

i. Scalp contusion

ii. Facial abrasion

iii. Chest contusion with resultant rib fractures

iv. Back contusion

v. Fractures of the right radius and ulna

vi. Dislocation of the left patela

vii. Bruising of the right leg

26. The Appellant's case is that his doctor's medical report and testimony revealed multiple soft tissue injuries, not fractures. This was in an attempt to discredit the medical report dated 11.6.2021 produced by Daniel Omaiyo Nyameino for the Respondent. 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. Expert reports are not necessarily binding, and this court is not bound to accept them. As was held in Shah and Another v 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."

27. The evidence in the expert report and testimony should be considered alongside other evidence to enable the court make a finding whether or not it believes in such evidence. In Parvin Singh Dhalay v 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."..."

28. DW1 testified that he sent the Respondent for a second x-ray, but the Respondent never returned. To this court, this confirms that the only x-ray based on which a credible medical report was prepared was the one conducted by the Respondent and so has a higher probative value as regards the presence of fractures.

29. The report by DW1 was prepared after the one by Daniel Omaiyo Nyameino. The second expert is under a duty to comment on the metrics used by the first expert. This was not done. The P3 form was not impugned. It is the primary and official evidence of injuries. The injuries pleaded were all in the P3 form. There were also special damages related to the X-rays. The treatment notes from the Kisii Teaching and Referral Hospital equally confirmed a fracture of the left knee from fractures and dislocation of the left knee.

30. On the other hand, DW1's report generalized and failed to give the specific injuries that the Respondent sustained. It isn't very ethical of the doctor to make a finding that a plaster of Paris was applied and find no underlying reason for the same. The report is at best bogus. The court rightly disregarded the same. It is the duty of professionals to proffer proper opinions based on the documents at hand. Chemical evidence of a fracture is otiose when there was an X-ray. Had the good doctor, found the first medical report improper, nothing could have been easier than to comment about the same.

31. In this regard, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v 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. The evidence by the Respondent's medical expert thus has a higher probative value and I adopt it. I proceed to establish whether the award of damages was erroneous as urged by the Appellant.

33. The Appellant contended that the assessment of damages was excessive and not commensurate with the injuries. The lower court awarded damages as follows:

a. General damages Ksh. 1,000,000/=.

b. Special damages Ksh. 21,670/=.

34. As regards general damages, the lower court awarded Ksh. 1,000,000/-. The court is duty bound to evaluate whether the award was inordinately high in the circumstances. The lower court did not specify the authority based on which a finding on general damages was reached. The Respondent relied on Makueni HCCA No. 34 of 2018- Mbithe Muinde William v Rose Muteu Mulatya and Machakos HCCA No. 132 of 2012- Peter Namu Njeru v Philemon Mwagoti. In Peter Namu Njeru (supra), the Plaintiff suffered the following injuries and the court awarded Kshs. 700,000/- in general damages, which was upheld on appeal – comminuted crush fracture of the distal ½ of the right radius, avulsion fracture of the right ulna styloid process, fracture of the right 6th rib on the posterior aspect and persistent pain in the right knee.

35. The injuries suffered in Mbithe Muinde William (supra) are completely different and I will not allude to that authority. Therein the Plaintiff suffered a fractured tibia and fibula. Similarly, in Peter Namu Njeru (supra), whereas the authority presented largely similar injuries as this case, the case was decided in 2016 and I proceed to find more recent authorities.

36. The damages must be commensurate to the injuries for consistency in the judicial award. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

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

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

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

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

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

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

38. In the case of George Raini Atungu vs. 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.

39. In my reevaluation, the injuries as presented in George Raini Atungu (supra) and Peter Namu Njeru (supra) were comparable to this case. However, this court will take into consideration the passage of time and inflation.

40. The award of Ksh 1,000,000/= was inordinately high as to amount to an erroneous estimate of damages. An award of Ksh 600,000/= will suffice.

41. On special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

42. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses.

43. In the case of David Bagine v 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"

44. The pleadings and evidence by way of receipts produced by the Respondent confirm the award and I do not see any basis to interfere with the finding of the lower court. The appeal on special damages is dismissed.

45. In the circumstances, the appeal on liability is dismissed. The appeal on special damages is dismissed. The appeal on general damages is allowed. The award of Ksh 1,000,000/= is set aside. In lieu thereof, I substitute with an award of Ksh. 600,000/=. 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.

46. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, 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.

47. In the circumstances, costs follow the event. The change is minimal. The split is equal. In the circumstances, each party to bear its own costs.

Determination

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

a. The appeal against liability is dismissed.

b. The award of Kshs. 1,000,000/= as general damages is set aside. In lieu thereof, I substitute with an award of general damages of Ksh. 600,000/=.

c. Each party to bear its own costs.

d. Right of Appeal 14 days.

e. Stay of execution for 30 days.

f. 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: -

Ms. Anyango for the Appellant

Mr. Nyangosi for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.