Omundi v Josemo Distributors (Civil Appeal E103 of 2022)
[2025] KEHC 1115 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E103 OF 2022

DKN MAGARE, J

FEBRUARY 26, 2025

BETWEEN

MESHACK ANTHONY OMUNDI ..... APPELLANT

AND

JOSEMO DISTRIBUTORS ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. D.O. Mac'Andere (SRM) given on 10.11.2022 in Kisii CMCC No. E561 of 2020)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.O. Mac'Andere (SRM) given on 10.11.2022 in Kisii CMCC No. E561 of 2020. The court delivered Judgment on 18/10/2022 as follows:

    a. Liability 50:50

    b. General damages Ksh. 350,000/=

    c. Special damages Ksh.5,030/=

    Less contribution - Ksh.177,515/=.

    total - Ksh.177,515/=

2. I note that the decree extracted is wrong and should read the correct figures. The Appellant was aggrieved and set 11 grounds of appeal. I shall not repeat them here as they are ancillary, repetitive, prolixious and a waste of judicial time. This is contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides as doth: -

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

4. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor the repetitiveness of grounds of appeal, which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. This court will have to decide the issues of liability, quantum, and nothing more.

Pleadings

6. The Appellant filed suit on 23.11.2020 for an accident on 23.08.2020 along Kisii-Keroka road at Gudka station. The Appellant was riding motorcycle registration number KMEP 775 U, while the Respondent was said to be the owner of motor vehicle registration number KBQ 673J. The vehicle allegedly lost control, veered off the road, and hit the motorcycle. The Appellant is said to have suffered the following injuries:

i. Right knee dislocation

ii. Bruises on the mouth

iii. Chest contusion

iv. Blunt trauma to the left elbow

v. Bruises on the right hand.

vi. Blunt trauma to the back

vii. Blunt trauma to the right thigh.

7. The Respondents filed defence dated 18.12.2020 denying liability and blamed the Appellant for the accident. They relied on the highway code and the doctrine of res ipsa loquitor.

Evidence

8. PW1 PC Moses Kasera testified on 6/9/2021 that he was attached to the Kisii Traffic Base. He recalled the subject accident of 23.09.2020. The accident was said to be a hit and run, as reported by the Appellant and a pillion passenger. He blamed the motor vehicle as it hit the motorcycle from behind. He issued the driver a notice to attend court, but he did not turn up in court. On cross-examination, he stated that the report was made at 1905 hours. In this case, the driver did not stop but proceeded to Nakuru. It was his evidence that the driver was required to stop after an accident.

9. PW2 was a pedestrian. He stated that the driver left the scene, and as such, there was no scene to visit. The said driver went to the police station after four days.

10. The Appellant testified that he was riding and was hit from behind. He stated that he attended driving classes for one year.

11. Dr. Peter Morebu Momanyi testified on the injuries suffered as:

a. Right knee dislocation

b. Bruises on the mouth

c. Chest contusion

d. Blunt trauma to the left elbow, back, thigh and hand

12. He relied on various documents on record. He stated that the P3 was signed on 27.08.2019 (the one on record is dated 27.08.2020). The date must have been erroneous.

13. The Respondent's witness, Charles Nyakundi Marira, was a worker and not the lorry driver in issue. He stated that he was not the driver but was near the vehicle and not inside. He noted that the motorcycle overtook the lorry on the left, rolled, and fell. He blamed the motorcycle as it was not supposed to overtake at Gudka. No reason was given for the alleged bar to overtake the locus in quo. He was prevaricating whether he was there or not. Finally, he admitted that he did not witness the accident. The defence case was closed without calling the driver or any eye witness.

Submissions

14. The appellant filed submissions dated 14.11.2024, which set out the duty of the first appellate court. They also set out the injuries suffered in extension. They blamed the Respondent for negligence. They submitted that the court erred in finding the parties equally liable when direct, circumstantial, and

documentary evidence showed that there was actionable negligence on the part of the Respondent. They stated that at least two elements of negligence were proved, that is, failure to have due regard of the motor vehicle and failure to take any step to avoid the accident.

15. On quantum they stated that the award was inordinately low as to amount to an erroneous estimate of damages. They relied on the decision of Catholic Diocese of Kisumu v Tete [2004] eKLR, where the Court of Appeal, [Tunoi, O'kubasu & Githinji JJ A stated:

> It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.

16. The Appellant posited that it is not enough that there is a balance of opinion or preference as held in the case of Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, where the Court of Appeal held that:

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

17. Reliance was placed on the decision of Naomi Momanyi v G4S Security Services Kenya Limited [2018] eKLR, where the court stated in paragraph *9* as follows:

> " 9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).

18. Finally, reliance was placed on Easy Coach Limited v Emily Nyangasi [2017] eKLR, where a claimant was injured on the right leg, right hand, and left leg and she was treated as an inpatient, and that skin from the right thigh was grafted to the left lower leg. She had facial injuries. The injuries proved, in that case, were injuries to the chest, and injury to the back, injury to right hand with cut wound, injury to right leg with cut wounds. The court found that the most serious injuries were on the right hand which healed with a 10 cm scar with keloid formation on the elbow, and on the right leg which was treated through grafting and healed with 18 cm scar right thigh, 26 cm scar right leg, 28 cm scar right leg below the knee and 12 cm scar right foot with keloid formation.

19. The Respondent stated that the burden of proof was placed on the Appellant pursuant to Sections 107 to 112 of the *Evidence Act*. It is important to note that sections 110 and 111 are not applicable in civil proceedings. They argued that the rider did not have the requisite training or authorization,

which is said to have caused the accident. They relied on the case of Paul Lawi Lokale v Auto Industries Limited & another [2020]eKLR, where Hon. Justice R. Nyakundi, held as doth:

> I'm also unable to fault the Learned Magistrate's findings that both motorcycle registration no. KMDE 362M and Motorcycle registration no. KMJA 461H were equally to blame for the accident.

20. The Respondent also relied on the case of Hussein Omar Farah v Lento Agencies [2006] eKLR, where the court stated:

It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118, this Court said:-

> "The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."
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> The Court said further:-
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> "The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."

21. The Respondent relied on the decision of SYT v TA [2019] eKLR, which I agree with completely, where the Court of Appeal [OUKO, (P), MAKHANDIA & M'INOTI, JJ.A] held as doth:

> The trial court made a factual finding that was confirmed by the first appellate court that the respondent's claim against the appellant was not controverted after the former failed to tender evidence to the contrary. It follows that the respondent's contention that the appellant had failed to perform his marital duties, deserted the respondent and was a womanizer remained unchallenged. But above all we cannot interfere with them for they are findings of fact.

Analysis

22. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

23. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

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

24. The duty of the first appellate court as stated by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another V Associated Motor Board Company and Others [1968] EA 123, where the Judges in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-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."

25. 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.

26. 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..."

27. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S. Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would, as far as possible, be compensated by comparable awards, but it must be recalled that no two cases are exactly the same."

28. 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.

29. Finally, in deciding whether to disturb the quantum given by the Lower Court, the Court should be aware of its limits. 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, 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..."

30. 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. 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.

31. To do this, I need to consider similar injuries, 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.

32. The court found no eyewitnesses. It found parties 50:50 liable. I am unable to understand what constitutes eyewitnesses. The Appellant was an eyewitness. The other witness was the driver, who chose not to tender evidence. The evidence of DW1 is pure hearsay. It has no place in the annals of the court record. It is a collection of rumours, surmises, and conjectures. It is such witnesses that were discussed 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:

> "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."
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> 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..."

33. The burden of proof is on whoever alleges. This is provided for in sections 107-109 of the *Evidence Act* as follows:

> " 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. 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."

35. 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."

36. The burden of proof lies on whosoever alleges. 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. The burden is not on the Plaintiff or the Defendant, it is on the party who alleges. 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 fi no evidence at all were given as either side."

38. The only evidence on record was that of the Appellant. The Respondent did not tender any credible evidence. The police officer confirmed that the driver fled the scene. There is no other explanation for his not giving evidence other than the evidence being adverse to the Respondent. The driver chose not to attend after fleeing summons served by PW1. Under Section 112 of the *Evidence Act* the court is bound to make a negative inference. 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."

39. There was no explanation from the driver, who was alive. His absence can only infer that the version of events will confirm the evidence of the Appellant. There was no question of the qualification of the Appellant to ride. He cannot prove that which he is not bound to prove. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002

where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

40. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal the court stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p. 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ..... for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

41. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

42. Indeed, the pleading in the material part admits that the motorcycle was in front. The defence states in paragraph *8*(i),

> i. joining the main road from a feeder road and abruptly stopping in front of the motor vehicle registration number, KBQ 673 J.

43. Where the story of overtaking came from is beyond peradventure. It could be part of the fables of Hyssop. There was no evidence to support this allegation. Though the particulars of negligence became otiose without defence evidence, parties cannot depart from their pleadings. I therefore find and hold that the court below erred in law and in fact in disregarding cogent evidence of the Appellant. The same was corroborated by PW1. The evidence was not controverted. In Board of Trustee Meru Diocese Kirimara Parish v Dores Wanja Bore [2020] eKLR, L.W. Gitari, posited as doth:

It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence. It follows that the statement of defence is nothing more than mere allegation. The issue of uncontroverted evidence was addressed by Justice Mwongo in Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another 2019 eKLR where he stated:-

"22. There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of Shaneebal Limited v County Government of Machakos [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

24. Similarly, in Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga 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".

25. In Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated:

"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

44. The court proceeded and pronounced itself as follows:

26. In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court's determination and

substitute with this court's determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages.

27. In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally."

In this case the failure by the defendant to adduce evidence, not only to challenge the evidence but to give their side of the story must impact this appeal negatively. The defendant did not controvert the evidence tendered by the plaintiff. It is only the plaintiff who led evidence on how the accident occurred due to the manner of driving by the defendant's driver and/or agent and the vehicle was defective at the time as it only had one head lamp. The doctor's evidence on the nature of injuries that the Plaintiff sustained was not controverted. The respondent discharged the burden of proof to the required standard- that is, on a balance of probabilities.

45. In Securicor Security Services (K) Ltd v Muritu [2004] eKLR, LKimaru, J as he then was posited as follows;

> The Respondent in his defence denied that he had entered into any agreement with the Appellant and therefore did not owe anything to the Appellant. The Appellant established that it had a valid agreement between itself and the Respondent. It also proved, on balance of probabilities, that it had rendered services to the Respondent, which services were not paid for. This evidence was not controverted. The Respondent chose not to adduce any evidence to controvert the evidence adduced by the Appellant. It is therefore the finding of this Court that the Appellant did prove its case on a balance of probabilities.

46. The case of Hussein Omar Farah v Lento Agencies [2006] eKLR is apt for this matter. It applies where the court is unable to decide. In this case, the Appellant provided cogent evidence, and the Respondent provided pleadings. Further, the case of Lawi Lokale v Auto Industries Limited & another [supra] is inapplicable as the driver testified on what happened. The court had earlier stated:

> Further that the Plaintiff alleged that motor cycle registration number KMJE 461H veered off its lane and encroached on the lane where motorcycle registration number KMDE 362M was a collided with it from the evidence that the Appellant tendered the trial court was left in doubt whether motorcycle registration number KMJE 461H veered off to the left or right since the eye witness and the police officer who visited the scene contradicted each other on this fact. Furthermore, the court doubted whether or not there was a corner at the point where the accident happened since the two witnesses who were called by the appellant equally contradicted themselves on this fact.

47. The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries as stated in the case of Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR, that:

> " The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."

48. This was also the position in the case of SYT v TA [supra], which the respondent aptly referred to. In the absence of the driver's or an eye witness's evidence, the Appellant's evidence remains uncontroverted.

49. In the circumstances, in the absence of evidence to controvert the occurrence of the accident as enumerated by PW1 and PW2, there was no basis for finding parties 50:50 liable. Therefore, I find that the Respondent was wholly to blame. I set aside the award of 50:50 and substitute it with an order finding the Respondent 100% liable.

Special damages

50. The Appellant stated that a sum of Ksh.11,910/= was proved as special damages. The Appellant had pleaded the following: -

    a. Ksh. 6,500/= for medical report

    b. Ksh. 4,860/= treatment expenses.

    c. Ksh 550/= for KRA search.

    Total – Ksh.11,910/=

51. Receipts produced are exhibits 9b for (550)/=, exhibit 8 treatment expenses of more than 5,000/=, though some are faded. The amount pleaded was Ksh.11,910/=. The totals are more than Ksh.11,910/=. The court listed the above including Ksh 5,030/= in exhibit 8 and awarded only that leaving out the receipt for the medical report and search. There is no explanation for this.

52. Special damages must not only be pleaded but specifically 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"

53. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR, the Court of Appeal reiterated that special damages must not only be specifically pleaded but also strictly proved with as much particularity as circumstances permit.

54. In this case, the damages were not only particularized but also specifically proven. The court was not correct in failing to award Ksh. Ksh.11,910/= as special damages. The appeal on special damages is allowed. The award of special damages of Ksh 5,030/= is set aside and substituted with a sum of Ksh.11,910/=.

General Damages

55. 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 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."

56. 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 public must be at the back of the mind of the trial court. In the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

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

57. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being 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.

58. 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 disturbing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for 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.

59. For the appellate court to interfere with the award, it is not enough to show that the award is high or low or that had I handled the case in the subordinate court, I would have awarded a different figure. This court has to consider that the actual injury suffered is the objective part of the assessment in establishing whether the lower court erred in its assessment. In the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."
>
> It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:
>
> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

60. It was agreed that these were generally soft tissue injuries. Dr. Peter Morebu Momanyi testified on the injuries suffered as right knee dislocation, bruises on the mouth, chest contusion, and blunt trauma to the left elbow, back, thigh, and hand.

61. In the case of Lilian Anyango Otieno v Philip Mugoya Ogila [2022] eKLR, Fred A. Ochieng J, as he then was awarded 150,000/= for only a minor soft tissue injury but also suffered a concussion for a few minutes coupled with a head injury.

62. In Francis Ochieng & another v Alice Kajimba [2015] eKLR, a sum of Ksh. 350,000.00 was awarded for multiple soft tissue injuries without fractures and head injuries, which aggravated the injuries. These are more serious injuries. In the case of *Thuo & another v Nanzala (Civil Appeal E075 of 2022)* [2024] KEHC 2978 (KLR) (21 March 2024) (Judgment), G Nzioka J, set aside a sum of Kshs 600,000/= awarded as general damages and substituted it with a sum of Kshs 400,000/= for fracture of the distal end of right humerus, dislocation of the right elbow joint, blunt injury to the anterior chest wall leading to soft tissue injuries. These were more serious injuries than in the current case.

63. The award was more than adequate compensation for the injuries. The appeal on general damages is thus not merited and is accordingly dismissed.

Costs

64. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has 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– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

65. The Appellant is partially successful. He shall have costs of Ksh. 65,000/=.

Determination

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

    a. I set aside the award of 50:50 and substituted it with an order, finding the Respondent 100% liable.

    b. Appeal against the award of general damages of Ksh.350,000/= is dismissed.

    c. I set aside the award of special damages of Ksh.5,030/= and, in lieu thereof, substitute with a sum of Ksh. 11,910/=.

    d. Special damages shall attract interest from 23.11.2020, the date of filing of suit in the lower court.

    e. General damages shall attract interest from 10.11.2022, the date of Judgment in the lower court.

    f. The Appellant shall have costs of Ksh. 65,000/= for the appeal.

    g. There shall be 30 days stay of execution.

    h. Right of appeal 14 days.

    i. 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: -

Nyaenya for Angasa for the Appellant

Mr. Kipyegon for the Respondent

Court Assistant – Michael