Ntabo v Nyamwamu (Civil Appeal E117 of 2023)
[2025] KEHC 1912 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1912 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E117 OF 2023

DKN MAGARE, J

FEBRUARY 25, 2025

BETWEEN

BENJAMIN ARAMO NTABO ..... APPELLANT

AND

DANIEL OMWAMBA NYAMWAMU ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 13.9.2023 in Kisii CMCC No. 219 of 2020 by Hon. C. Ocharo, SPM.

2. The lower court awarded general damages of Kshs. 600,000/- and Special damages of Ksh. 6,500/-. The Court also allowed liability at 80:20 in favour of the Plaintiff as against the Defendant. The Appellant was the Defendant in the lower court suit.

3. The Appellant, being aggrieved, preferred 10 grounds in the Memorandum of Appeal. I have perused the 10-paragraph memorandum of appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise memorandum of appeal without arguments, cavil, or evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule 1 provides as doth: -

> "1. (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.
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> (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.

4. The Court of Appeal had this to say in regard to Rule 86[now] (which is pari materia with Order 42 Rule 1) 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..."

5. A Memorandum of Appeal raising repetitive grounds of appeal clouds the key issues for determination and is unwarranted. In 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 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."

6. The memorandum of appeal raises only two issues, that is:

   i. Liability

   ii. Quantum

7. In the Plaint dated 16.3.2020, the Respondent sought general damages, special damages and costs and interest. The claim arose from the accident that occurred on 2.1.2019 when the Respondent was riding his motorcycle Registration No. KMD 879N along Kisii-Migori road when the Appellant's motor

vehicle Registration No. KCN 710L was so negligently driven that it collided with the motorcycle causing the Respondent severe personal injuries.

8. The following injuries were pleaded:

    a. Right radius fracture

    b. Right ulnar fracture

    c. Right tibia fracture

    d. Bruises on the face

    e. Lacerations on the face

    f. Deep cut wound on the right big toe

9. The Appellant entered appearance and filed a defence dated 3.8.2020 denying the averments in the plaint and blaming the Respondent.

Evidence

10. PW1 was Dr. Morebu Peter. He relied on the Respondent's medical report which he produced in evidence. He then testified that the Respondent suffered a fractured tibia, right radius, right ulna and soft tissue injuries. On cross-examination, he stated that he examined the Respondent on 31.1.2019. He was not the treating doctor.

11. PW2 was No. 88300 PC Moses Kasera of Kisii Police Station. He relied on the police abstract, which was produced in evidence. According to him, the accident occurred on 2.1.2019 at 7 pm. The driver of the motor vehicle came to the station and reported that his vehicle had collided with the Respondent. The Respondent was overtaking from the left-hand side of the road.

12. On cross-examination, he testified that the investigating officer had since been transferred from the station. He had the OB extract but not the police file. He did not know whether the driver of the accident motor vehicle had been charged. From the police abstract, the rider was to blame.

13. PW3 was the Respondent. He relied on his recorded witness statement dated 16.3.2022 and also produced the bundle of documents of even date. He testified that he was heading to Kisii town, and there was a lorry coming from opposite sides. Motor vehicle registration No. KCN 710L tried to overtake him but realized it could not and then hit him.

14. On cross-examination, he testified that he was wearing gum boots, a helmet, and a reflector. The matatu was overtaking him, which was why the accident occurred. He saw the matatu in the side mirror, and it was at high speed. He was injured and admitted to Kisii Teaching and Referral Hospital for 2 days. His leg and hand were fractured.

15. DW1 was Cpl. Zachariah Sawe of Kisii Police Station. He sought to rely on the police abstract to testify for the Appellant, but the Respondent raised an objection, which was sustained as the document was not on the defence list of documents. The appellant did not call the driver of the accident motor vehicle.

Submissions

16. The Appellant submitted that the Respondent had not discharged the burden of proof on liability as per the required balance of probabilities. Reliance was placed on Sections 107 and 108 of the *Evidence Act*.

17. In this regard, it was submitted that liability could not exist without fault. He cited Eunice Wayua Munyao v Mutilu Beatrice (2017) eKLR.

18. On quantum, it was submitted that Kshs. 250,000/- would have been adequate compensation. I have perused the cases relied on and note the injuries therein were less severe. They did not take into account the fact that the Respondent herein suffered fractures on the ulna and radius and also tibia.

19. On his part, the Respondent submitted that the Respondent satisfied the burden of proof in civil cases, he urged this court not to interfere with the discretion of the lower court and cited inter alia Peters v Sunday Post Ltd (1958) EA 424.

20. On quantum, it was submitted that the award of Kshs. 600,000/= was not inordinately high. He cited a plethora of authorities to support this position and which I have considered.

Analysis

21. This being a first appeal, this court must 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.

22. 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."

23. 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.

24. 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..."

25. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. The burden of proof is set out in Sections 107-109 as follows:

> " 107.
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> (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.
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> (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.
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> 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.
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> 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."

27. 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."

28. 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."

29. A party who persuades the court more than the other of the likelihood of the events in controversy will, therefore, carry the day. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

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

30. What constitutes as a standard of proof was addressed by 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....."

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

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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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."

32. The accident cannot be said to have occurred by magic or unidentified flying object. In a courtroom situation, we deal with empirical evidence on what is more probable than the other. The court can get it wrong, but if better still 50.01:49.99, there can be no better equal chance. The Appellant alleged that the lorry was to blame 100%. The Respondent refuted the claim and alleged that it was the motor vehicle to blame. The case of PW1 was that the lorry hit the motorcycle from behind, while DW1's case was that it is the motorcycle, coming from the opposite direction, came into the lane of the lorry, hence the accident.

33. The Appellant filed a defence but did not call the driver of the accident motor vehicle at the hearing. The evidence of the Respondent as to the occurrence of the accident was largely uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- 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."

34. The Defence filed by the Appellant in the lower court thus contained mere allegations that were not substantiated in evidence. There was no evidence tendered in support of the allegations in the defence. Particulars of contributory negligence thus are otiose and of no use without supporting evidence. This is not to say that the Respondent had a tough pass and had no burden of tendering evidence. Even where defence is not filed, the plaintiff must prove his/her case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –vs- 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."

35. Where the Respondent proved his case to the required standard, it was the duty of the Appellant to prove contributory negligence. The Appellant failed to do so. PW3's evidence was uncontroverted. It came out in evidence that the motorcycle was hit by the matatu. The evidence of PW1 shows that the matatu was trying to overtake an oncoming lorry. The evidence stood unshaken and credible. In the case of Mac Drugall App v Central Railroad Co. Rbr 63 Cal 431 the court held that; -

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

36. In the case of Amani Kazungu Karema –Vs- Jackmash Auto Ltd &Another the court posited as doth:

> " Where the circumstances of the accident give rise to 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."

37. The motor vehicle Registration No. KCN 710L could not have caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

> " Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

38. The above decision was also cited with approval by the Court of Appeal in Nairobi Civil Appeal No. 179 of 2003 - in Re Estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR where the Court of Appeal reiterated as doth: "Well driven motor vehicles do not just get involved in accidents....."

39. Therefore, I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the driver of KCN 710L. I am in consonance 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:
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> > " .....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."

40. On quantum, the lower court awarded Kshs. 600,000/- in general damages but without citing any supporting authority. In this case, the only medical report produced was one by Dr. Morebu Peter. The same showed that the Respondent suffered the following injuries:

a. Right radius fracture

b. Right ulnar fracture

c. Right tibia fracture

d. Bruises on the face

e. Lacerations on the face

f. Deep cut wound on the right big toe

41. The court has to assess the effect of the injuries on the Appellant. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report dated 31.1.2019 and viewed in line with the lower court's finding. Without any contrary medical evidence, I find no reason to fault the lower court's finding and uphold the injuries suffered as the injuries pleaded and proved on evidence.

42. 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 as stated 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."

43. 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 injury public must be at the back of the mind of the trial Court.

44. In 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
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> necessarily represent the results which should prevail in Kenya, where the 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 & amp; 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.
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> 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.
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> 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).

45. 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 to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

46. The court of appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs. Meru Express Service 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.

47. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

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

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

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

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

    iii. The award is simply not justified from evidence.

49. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

50. 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.

51. Therefore, this court has to establish similar fact scenarios, though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be a disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR. However, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

52. 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.

53. 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 sometime 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."

54. 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.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

55. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so.

56. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

57. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

58. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR the plaintiff had sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the tibia and fibula and had been awarded Kshs. 700,000/=.

59. Similarly in the case of Thomas Mwendo Kimilu Vs. Annne Maina & 2 others [2008] eKLR and Jacinta Wanjiku Vs. Samson Mwangi [2006] eKLR the Court awarded Kshs. 700,000/= for the Plaintiff who sustained fracture of the right tibia and fibula, fracture of the humerus and amputation of the finger in 2006.

60. In *Kiama v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment), the Respondent suffered a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries and the High Court reduced an award of Kshs. 700,000 to Ksh. 400,000/= in general damages. It must be borne in mind that there was no ulna and radius fracture therein as is herein and the injuries herein are thus more severe.

61. The injuries suffered by the Appellant in the appeal herein are largely similar to the above cases. Therefore, I am guided that the award of Kshs. 600,000/- granted by the lower court was not inordinately high, and I uphold it.

62. The net effect of the foregoing is that the appeal on both liability and quantum fails. The next question is the question of costs.

63. 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.

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

    (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is

the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

65. In the circumstances, costs follow the event. The Respondent is entitled to costs. They are so awarded.

Determination

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

    a. The Appeal lacks merit and is dismissed.

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

    c. 30 days stay of execution.

    d. The file is closed.

DELIVERED, DATED, and SIGNED at NYERI on this 25th day of February, 2025. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael

M. D. KIZITO, J.