Ondieki v Omoi & 3 others (Civil Appeal E114 of 2023)
[2025] KEHC 1474 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E114 OF 2023

DKN MAGARE, J

FEBRUARY 25, 2025

BETWEEN

JULIUS ONONGA ONDIEKI ..... APPELLANT

AND

JEREMIAH OGECHI OMOI ..... 1ST RESPONDENT

RYCE EAST AFRICA LIMITED ..... 2ND RESPONDENT

MWALIMU NATIONAL SACCO ..... 3RD RESPONDENT

ELKANA ASUMA MARORIA ..... 4TH RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 6.9.2023 in Kisii CMCC No. 10 of 2020 by Hon. P.K Mutai, PM. The lower court heard the matter and made the following findings:
    i. Liability against the Appellant – 30%
    ii. Liability against the 1st and 4th Respondent – 70%
    iii. General damages of Kshs. 800,000/-.
    iv. Special damages - Nil
    v. The case against the 2nd and 3rd Respondents were dismissed.
2. The Appellant, being aggrieved, preferred 8 grounds in the Memorandum of Appeal. I have perused the 8-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. 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."

3. The Court of Appeal had this to say in regard to Rule 86 [now 88] of the court of Appeal Rules(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:
>
> "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. 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."

5. The Memorandum of Appeal raises only two issues as follows:

   a. Liability

b. Quantum

6. In the Plaint dated 15.1.2020, the Appellant sought general damages, costs and interest. The claim arose from the accident of 3.12.2019. The plaintiff was a pillion passenger on motorcycle Registration No. KMEP 918N along Oyugis-Kisii road at Nyakoe area. He stated that the 1st Respondent's motor vehicle Registration No. KCP 660X Isuzu Tipper lorry was so negligently driven that it collided with the motorcycle, causing the Appellant severe personal injuries.

7. The following injuries were pleaded:

   a. Mild head injury

   b. Brain concussion

   c. Fracture of the right ulna lower 1/3

   d. Fracture of the right tibia

   e. Fracture of the right fibula

   f. Dislocation of the left ankle joint

8. The 1st Respondent entered appearance and filed a defence dated 20.2.2020 denying the averments in the plaint. The 1st Respondent also took out a Third-Party Notice against the 2nd Respondent. Subsequently, the 2nd Respondent also took out a Third Party Notice against the 4th Respondent.

Evidence

9. PW1 was the Appellant. He relied on his witness statement dated 15.1.2020. He produced a bundle of documents of the even date, in evidence. It was his case that he was the pillion passenger. He stated that they were riding on the left-hand side of the road when the 1st Respondent's motor vehicle registration No. KCP 660X hit them from behind. The Appellant suffered injuries to the head and face and fracture of the hand and right leg.

10. On cross-examination, he further testified that he saw lights from the lorry, which hit them suddenly from behind. He did not have a helmet. He was treated at Kisii Teaching and Referral Hospital, where he was admitted for two months.

11. PW2 was No. 82476 Corporal Agnetta Shiloli of Nyanchwa Police Station. She was not the investigating officer, as the investigating officer had been transferred. She relied on the police abstract, which was produced in evidence. According to her, the accident occurred on 3.12.2019 at 2330 hrs. The lorry knocked down the cyclist Cornelius Mose. On cross-examination, she testified that the lorry was from Kisii towards Oyugis, and the motorcycle was from the opposite direction. According to her, it was not clear how the accident occurred.

12. DW1 was Jeremiah Ogechi Omoi, the driver of the accident lorry. He relied on his witness statement dated 20.2.2020. He stated that he was the Defendant and an adult male of sound mind and disposition. He was driving motor vehicle registration number KCP 660X at a moderate speed and when reaching the area around Nyakoe, a motor cycle Reg. No. KMEP 918N HIRO abruptly joined the road. He suddenly applied brake and swerved to the right to avoid knocking him. He was not liable whether vicariously, directly or indirectly insofar as he did not occasion the accident. He posited that the allegations contained in the plaint were false and misleading. He did not address the falsity of the allegations. He prayed that the suit be dismissed with costs.

13. On cross-examination, he stated the motorcycle appeared from his left side to his side, then moved to the sideway and back. The rider then blocked the lorry's way. The lorry was 50 metres away, and he was driving at 40 km/h. He applied brakes, and the truck skidded because it had rained.

14. DW2 was Evans Nyaberi, the sales coordinator of the 2nd Respondent. He relied on his witness statement dated 1.11.2020. He produced the letter dated 16.10.2018 instructing the 3rd Respondent to release the lorry to Elkanah Asuma Maroria. He also produced the delivery note and detainer indemnity form. His evidence on cross-examination was that they sold the lorry to Mwalimu Sacco through its client, the 4th Respondent on 16.10.2018, and by the time of the accident herein, they were not the owners of the lorry.

15. The 3rd and 4th Respondents did not controvert the evidence given and did not call any witnesses. This will have ramifications, as will be seen shortly.

Submissions

16. The Appellant submitted that the 1st and 3rd Third Parties did not recall the Appellant for cross-examination, and as such, the evidence of the Appellant in the lower court on liability was uncontroverted. That the lorry hit the motorcycle from behind. On quantum, reliance was placed on cases a case decided 34 years ago. The same are otiose, and I do not identify them as presenting the correct estimate of the damages awardable in this case.

17. The 1st Respondent, on the other hand, submitted that PW1's case was that the motorbike was hit from behind, while PW2's case was that the lorry and the motorbike were coming from opposite directions. Therefore, it was submitted that the Appellant, as a pillion passenger, was also to share the blame with the rider for the motorbike he boarded and carried an excess of 2 more passengers. Reliance was placed on Rosemary Kaari Muriithi v Benson Njeru Muthitu & 3 Others [2020] eKLR. Therefore, it was submitted that the lower court did not err on liability.

18. On quantum, it was submitted that Kshs. 800,000/= was adequate. They argued that the lower court correctly awarded it. Reliance was placed on Munene v Mbarire (Civil Appeal No. 488 of 2015) [2023] KEHC 18417, on which the lower court based its finding.

Analysis

19. 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. In the case of Mbogo and Another v 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."

20. The Court must remember that it has 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 that of the lower court, as parties cannot read into those documents matters extrinsic to them.

21. In the case 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..."

22. The said duty was explained in the case of Selle & Another v. Associated Motor Board Company Ltd. [1968] EA 123, where 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."

23. The burden of proof is on whoever alleges. This is succinctly set out in Sections 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya as hereunder:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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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."

24. The burden of proof was also addressed by the Court of Appeal in the locus classicus case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the said court 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."

25. The burden of proof is neither on the Plaintiff nor the Defendant but on the party stat alleges specific matters. It is on the party who alleges. In Evans Nyakwana –v- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general proposition, 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."

26. A party who persuades the court more than the other of the likelihood of the events in controversy will carry the day. 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 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."

27. The balance of probability standard means that a court is satisfied an event occurred as stated by Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 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....."

28. The position is also that the evidence must carry a reasonable degree of probability, but not so high as is required in a criminal case. In Palace Investment Ltd –v- 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."

29. 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.

30. The Appellant alleged that the lorry was to blame 100%. The 1st Respondent refuted the claim and alleged that the motorcycle was to blame. PW1's testimony was that the lorry hit the motorcycle from behind, while DW1's case was that it is the motorcycle, coming from the opposite direction, that came in the lane of the lorry, hence the accident. The lorry driver indicated that he was driving at 40 Kph. He also stated that he was 50m away. At that speed, there was sufficient time to stop, even in the unlikely event the allegations were true.

31. In any case, the 1st Respondent did not join the motor cyclist to the suit. A court cannot apportion liability with non-parties. Further, there has to be pleadings related to the Appellant being to blame. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR, Justice R.E. Aburili stated as follows: -

> " On the need for this court to have a wholesome examination at the evidence and pleadings which includes the witness statement by the defendant witness, the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 stated as follows on the importance of pleadings:
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> "…. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the 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…"[emphasis added].

32. In his written statement of defence, the 1st Respondent listed particulars of negligence on the part of the rider of the motorcycle as well as the Appellant. However, there was no nexus between the Appellant and the causation of the accident. 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: -

> " 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. v Stephen Mutinda Mule & 3 others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> "…..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.....

...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."

33. The 1st Respondent was duty bound to bring out his case fully and support it with evidence as to the manner in which the Appellant, as a pillion passenger was to blame for the causation of the accident. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal 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."

34. In absence of pleadings, evidence, if any is produced, will still not be considered for such evidence will not support the content of the case before the court. 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.....'"

35. Ipso facto, it was not open to have a passenger share blame of the motor cyclist. If a party wishes to hold the motor cyclist to blame, then must as a corollary join them and tender evidence against them. It does not matter that the passenger was committing a traffic offence by being in an overcrowded motor

vehicle. That does not give a carte blanche to the 1st Respondent to injure or maim them. In any case, there must be pleadings to that effect. It is not only pleadings but also evidence. It is not enough to submit without evidence. Mwera J (as he then was), posited as follows when postulating on what is the role of submissions. He stated that they (submissions) are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 it was stated that:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

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

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

37. The Court of Appeal was more succinct that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

38. It was the duty of the 1st Respondent to prove contributory negligence. In Pauline Wangare Mburu v Benedict Raymond Kutondo & another [2005] KEHC 2370 (KLR), the court observed as follows;

> The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.

39. Apportionment of liability should be according to the degree of fault. In Kenya Power & Lighting Company Ltd v JWK (Suing as father and next-friend of JKW) & another (Civil Appeal E012 of 2021) [2023] KEHC 1642 (KLR) (28 February 2023) (Judgment), LN Mugambi J posited as follows:

In apportionment of liability, I am guided by the case of Khambi and Another vs. Mahithi and Another [1968] EA 70, where it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

40. They were to do so after pleading against a party. The 1st Respondent failed to do so and was to fail miserably. DW1's evidence was that the rider came from the left and joined the lane of DW1. The rider was not a party to the matter. They could not find him liable. Even if the court did so, it could not shift the blame to the passenger. The 1st Respondent had a duty to prove contributory negligence. The evidence tendered without pleadings is of no use. 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".

41. The motor vehicle Registration No. KCP 666X 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."

42. 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....."

43. I find no reason for holding the Appellant liable to any extent. The accident was caused by the recklessness of the driver. The Appellant was not shown to share in the accident. Even if there were excess passengers, this did not cause the 1st Respondent to fail to control the vehicle when they saw the motorcycle over 50m away. The extent of the injuries was not consistent with the alleged speed of 40 Km/h. The evidence on record show that the accident was caused solely by the negligence of the 1st Respondent. The 4th Respondent is vicariously liable for the actions of the 1st Respondent.

44. This court finds that the Appellant herein was a pillion passenger and was not to blame. The rider of the motorcycle was not a party to this case. The issues of carrying excess passengers were not pleaded and even though the 1st Respondent made attempt to raise them in submissions, I do not consider such issues as part of this case. 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:
>
> ".....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."

45. A mere passenger ought not to have been blamed. The lower court erred in blaming the Appellant. In Janerose Auma Ochumba v John Nyangi & another [2021] eKLR, J.R Karanjah, J posited as doth:

This court's view in that regard would be that the respondents were fully liable for the accident as the deceased being a mere passenger had no form of control of the vehicle. His presence in the vehicle was permitted and authorized by its driver who, as it were, was the controller and manager of the vehicle. There was no evidence that the deceased was a fare paying passenger. It cannot therefore be said that he disregarded his own safety as a fare paying passenger by boarding and travelling in unauthorized m/vehicle.

46. I agree, with nothing useful to add, to the sentiments of my sister, R. Lagat-Korir J, as captured in the case of Highland Creamers & Food Ltd v Ngetich (Civil Appeal 040 of 2023) [2024] KEHC 11128 (KLR) (25 September 2024) (Judgment) as doth:

In any event, the Respondent bore no liability as he was a pillion passenger and had no control of the motorcycle. I agree with Gitari J. in *Ndatho vs Chebet (Civil Appeal 8 of 2020)* [2022] KEHC 346 (KLR) (16 March 2022) (Judgment) where she held:

".....As pillion passenger, the respondent had no control of the motorcycle and could not have done anything to cause or avoid the accident....."

37.Similarly, in West Kenya Sugar Co Limited vs Lilian Auma Saya (2020) eKLR, Njagi J. held:-"The respondent was only a passenger on the motor cycle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident....."

47. The net effect is that the court erred in holding the Appellant, a pillion passenger liable. The case against the rider was not in court. The court thus erred in apportioning liability to the Appellant at 70:30. The same is set aside in toto. In lieu thereof, I substitute with an order finding the 1st and 4th Respondents to be 100% liable, jointly and severally. The 4th Respondent is vicariously liable for the actions of the 1st Respondent.

48. On quantum, there was no appeal on special damages. I proceed to deal with general damages only.

49. The lower court awarded Kshs. 800,000/- in general damages based on Third Engineering Bureau City Construction Group v Evelyne Kerubo Rangi [2020] eKLR. Therein, the Plaintiff suffered the following injuries:

i. Chest contusion

ii. Compound right radio fracture

iii. Compound right ulna fracture

iv. Bruises on the hands

v. Bruises on the right elbow

vi. Bruises on the buttock

vii. Right tibia fracture

viii. Right fibula fracture

50. An ideal applicable judicial authority would be one that spelt out the injuries suffered against the award to enable reference and comparison by similar cases. The court did not indicate the factors it considered or the authorities.

51. The only medical report produced was one by Dr. Philip Nyameri Abuka dated 3.12.201. It showed injuries sustained by the Appellant herein as follows:

a. Mild head injury

b. Brain concussion

c. Fracture of the right ulna lower 1/3

d. Fracture of the right tibia

e. Fracture of the right fibula

f. Dislocation of the left ankle joint

52. The same medical report was, however, not tested in cross examination. The court has to assess the effect of the injuries on the Appellant. The Discharge Summary from Kisii Teaching and Referral Hospital produced by the Appellant indicated that the Appellant was admitted to the hospital on 4.12.2019 and discharged on 10.1.2020. This is about one and a half months and also speaks of the seriousness of the injuries the Appellant must have suffered. In the absence of any contrary medical evidence, I find no reason to disbelieve the medical evidence that the Appellant produced in court. I am satisfied that the injuries pleaded were proven by evidence.

53. No two cases are precisely the same, and 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. v. 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."

54. The principle on the award of damages is settled. In Charles Oriwo Odeyo v. 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 for similar injuries are mere guidelines; each case should be treated on its own facts.

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

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

55. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were laid out in the case of Kenya Bus Services Limited v. 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."

56. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No 2) [1985] eKLR 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 a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.

57. 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.'

We find the words of Lord Denning in the West (H) & Son Ltd [1964] A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

"I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

58. 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."

59. Further, 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."

60. 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....."

61. 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. 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.

62. I proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Dennis Matagaro v 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/=.

63. Similarly in the case of Thomas Mwendo Kimilu v Annne Maina & 2 others [2008] eKLR and Jacinta Wanjiku v 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.

64. In my view, the injuries suffered by the Appellant in the appeal herein are largely similar to the above two cases. The Appellant herein also suffered a fracture of the ulna lower 1/3 besides the fracture of

the tibia and fibula and soft tissue injuries. Therefore, I am guided that the award of Kshs. 800,000/= granted by the lower court was not inordinately low. I uphold it.

65. The net effect of the foregoing is that the appeal on quantum fails. The appeal on liability succeeds. The judgment of the lower court is set aside. In lieu thereof, I find the 1st and 4th Respondents 100% liable for the accident.

66. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

67. 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.

68. In the circumstances, I allow the appeal on liability and dismiss the appeal on quantum. The Appellant shall have costs of Ksh 85,000/=.

Determination

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

a. The appeal on liability is allowed. The finding of 70:30 is set aside. In lieu thereof, the 1st and 4th Respondents are 100% liable.

b. The appeal on quantum lacks merit and is dismissed.

c. The Appellant shall have costs Ksh. 85,000/= payable by the 1st and 4th Respondents jointly and severally.

d. 30 days stay of execution.

e. 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: -

Mr. Ombati for the Appellant

Mr. Kipyegon for the 1st Respondent

No appearance for the 2nd, 3rd and 4th Respondents

Court Assistant – Michael

M. D. KIZITO, J.