Okware v Ndolo (Civil Appeal E1248 of 2024)
[2025] KEHC 7762 (KLR) (Civ) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1248 OF 2024

DKN MAGARE, J

MAY 29, 2025

BETWEEN

VINCENT ONDIEKI OKWARE .... APPELLANT

AND

PAUL MUTUNGA NDOLO .... RESPONDENT

(Appeal from the Judgment and decree of Hon. S. N. Muchangi (PM) given on 28.06.2024 in Milimani Commercial Courts CMCC No. 2089 of 2020)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S. N. Muchangi (PM) given on 28.06.2024 in Milimani Commercial Courts CMCC No. 2089 of 2020. the appellant was the defendant in the court below. Though the memorandum of appeal appears to be on quantum and liability, all grounds are on quantum. The memorandum of appeal dated 30.10.2024 raises the following grounds:

    a. That the learned trial magistrate misdirected and ignored the applicable tenets, deviated from relevant authorities cited in the Appellant's submissions thus disregarded the well-founded principles of judicial precedent.

    b. The trial magistrate erred in law and in fact by awarding Kshs.1,500,000/= as general damages which award was manifestly high and entirely erroneous in the circumstances.

    c. That the learned trial magistrate erred in failing to give her reasons for finding that the sum of Kshs.1,500,000/= in general damages to the Respondent was reasonable and/or adequate compensation.

    d. That the learned magistrate erred in law and in fact in failing to find that the nature of injuries suffered by the Respondent did not warrant an award of Kshs.1,500,000/=.

e. That the learned trial magistrate erred in awarding such an inordinately high award of damages for such injuries that have resolved and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent.

f. That the learned trial magistrate erred in law and fact in making assessment of special damages at Kshs.101,662/= when the said figure was not specifically pleaded and proved by evidence leading to a wrong exercise of discretion in the circumstances.

g. That the learned trial magistrate erred in superficially validating the evidence tendered before the court on future medical expenses thereby arriving at a wrong exorbitant award of Kshs.300,000/=.

2. The Memorandum of Appeal thus raises only one issue of quantum in regard to:

a. general damages

b. Future medical expenses

c. special damages

3. Ground 1 of the memorandum of appeal is otiose and has no relevance to the appeal. This is because the authorities and submissions disregarded must relate to an issue for determination. An issue of submissions cannot be raised in vacuo. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

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

4. 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."

5. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi 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.

Pleadings

6. Vide an amended plaint dated 19.03.2021, the Respondent pleaded that he was involved in a road traffic accident on 16.11.2019 at North Airport road where he was a pedestrian and was hit by motor vehicle registration number KCT 823R Subaru, which veered off the road and injured him. He pleaded the following damages:

   a. Medical report Ksh 3,000/=

   b. Motor vehicle search 550/=

   c. Medical expenses 55,912/=

   d. Future medical expenses 300,000/=

   e. Loss of income

   f. Loss of future earning

7. In effect special damages of Ksh 59,462/= and Ksh 300,000/= future medical expenses were pleaded. The Appellants entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint.

8. The Respondent pleaded the following injuries:

   a. Open transverse fractures at the distal shaft of the right tibia and fibula bones.

   b. Transverse fracture of the distal fibula shaft.

   c. Soft tissue injuries on the right leg.

   d. Soft tissue injuries on the left leg.

9. The lower court heard the parties and proceeded to render judgment on 28.06.2024, finding the Appellant 100% liable. This finding was not controverted and is final as regards this appeal. I have however noted that it is addressed in submissions. The same has no basis in view of Order 42 rule 4 of the Civil Procedure Rules which provides as follows:

   The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

   Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

10. The foregoing rests questions regarding liability.

Evidence

11. The Plaintiff testified as PW1, relying on his witness statement dated 11.12.2019 and produced documents as per his list of documents dated 11.12 2019. He stated the suit motor vehicle was driven at a very high speed at Cabanas -Transami road. The vehicle lost control and hit him. He was taken to Kenyatta National Hospital where he was given first aid, plaster of Paris was applied. He was later that day taken to Ladnan Hospital where internal fixation was done. He was discharged after 2 weeks. That he sustained fractures on both legs. He stated on cross examination, that he was walking along Airport Road. He was hit by the suit motor vehicle among others. He closed his case. The appellant did not testify save that medical reports were produced by consent of parties.

12. Dr. Titus Ndeti Nzina prepared a medical report detailing injuries as set out in the plaint. He stated that internal fixation for the fractures was done with implants. He was of fair general condition with a walking aid as at 20.2.22020 when he examined the respondent. Although a medical report was said to have been admitted, it does not form part of the record. It is also not on the list of the appellant's list of documents.

13. I had to seek the original record for the same. The two doctors give the Respondent 10% disability. The injuries were generally agreed between the two doctors.

Submissions

14. The Appellant submitted that the award of general damages and damages for future medical expenses were excessive. It was submitted that an award of Kshs. 101,662/= as special damages was erroneous. These were said not to be specifically pleaded and proved. They stated that no actual payments were demonstrated to have been made. Reliance was placed on the case of Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR, as follows:

    Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in HAHN v SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

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

15. They also stated that the invoices were not stamped or verified from Kenyatta National Hospital. They stated that secondary evidence could not be admitted. Reliance was placed on In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR. He stated that the invoices could have been NHIF discounted.

16. They averred that a sum of Ksh 300,000/= for future medical expenses was excessive. They stated that an amount of Ksh 110,000/= will have sufficed. Reliance was placed on the case of Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor (Civil Appeal 58 of 2020) [2021] KECA 52 (KLR) (8 October 2021) (Judgment), where the court of appeal [RN Nambuye, W Karanja & PO Kiage, JJA] posited as follows:

Addressing the issue on interfering with the trial court's discretion, this Court in Civil Appeal Number 192 of 2006, Tracom Limited & another v Hasssan Mohamed Adan (supra) pronounced itself as hereunder:-"In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award – see the case of Henry H. Ilanga v M. Manyoka [1961] EA 705 at page 713."

17. On general damages, they posited that a sum of Ksh 1,000,000/= will be adequate. Reliance was placed on the cases of Civicon Limited v Richard Njomo Omwancha & 2 others [2019] eKLR, where Majanja J awarded Kshs. 450,000/= in lieu of general damages of Kshs. 1,000,000.00. The claimant had suffered deep cut wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint.

18. The Appellant also relied on the case of Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR and Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR.

19. The respondent filed submissions on 9.12.2024. He supported the lower court decision. They submitted that there was no appeal on liability hence only quantum. They stated that the duty of the court was set out in the case of Butt v Khan [1978] eKLR, where the court of appeal [Madan, Wambuzi & Law JJA] posited as follows in respect of the duty of the court to disturb damages. They stated as follows:

    An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

20. The Respondent submitted that award of Ksh 1,500,000/= was not inordinately high. Reliance was based on the authority of Teresiah Ngugi & another v Michael Masia Kimende [2018] eKLR, where general damages for pain and suffering and loss of amenities of Kshs. 1,500,000/= were awarded. In reducing the award from 2,000,000/= to 1,500,000/= for injuries described as facial bruises, blunt chest injury with fractured ribs, and compound fracture of the right tibia and fibula, the court stated as follows:

    The trial court was entitled to take into account the inflation trend in this country and the ages of the cited authorities in making the award however taking to account the disability degree (70%) relied on, the award of Kshs. 2 million was inordinately high in the circumstances and thus set aside the same and substitute it with award of Kshs. 1,500,000/= On future medical expenses, it was submitted that the Respondent's doctor's report was misleading and ought to have been disregarded by the lower court.

21. On special damages they submitted that the same must be specifically pleaded and proved. They stated that the sum awarded was for the receipts tendered in evidence. They stated that the claim for future medical expenses unlike general damages must also be specifically pleaded. Reliance was based on the case of Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR, where the Court of Appeal [P. K. Tunoi, P. N. Waki, J. W. Onyango Otieno] posited as hereunder:

We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma (2004) 1 EA 91, this Court, stated:-

> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."

22. The respondent submitted that the appeal lacked merit and should be dismissed.

Analysis

23. 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.

24. 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."

25. The duty of the first appellate Court was laid down in the 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."

26. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters v Sunday Post Limited [1958] EA 424, 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..."

Special Damages

27. A sum of 59,462/= was pleaded. The court has no jurisdiction to award over and above the said amount. In the case of David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177), that:

    [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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.

    In Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

28. Similarly, in Anne Wambui Ndiritu v 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."

29. Therefore, it follows that the initial burden to prove the quantum of damages lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case.

30. In this case, the court could not award an amount not pleaded. 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: -
    >
    > ".....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."

31. In the case of Malawi Railways Ltd v 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....
>
> 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."

32. 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 v 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......'"

33. The next question is whether the court can deal with questions of stamping the receipts. This is not an issue taken in the lower court. There is no standard practice showing that Kenyatta National Hospital documents have stamps. It cannot be raised not in the memorandum of appeal but in submissions. The Respondent who was in court was not cross examined on this aspect. Receipts for search and medical reports were produced with no contestation.

34. From the record, an amount of Ksh 40,000/- is indicated as paid in the invoice dated 16.11.2019. Additionally, a payment of Ksh 2,000/- was made on the same date. Other tax invoices reflect amounts of Ksh 1,000/-, Ksh 29,000/-, Ksh 5,802/-, and Ksh 2,200/-. Receipts were also produced for Ksh

1,310/-, Ksh 4,500/-, and Ksh 2,100/-. However, the Respondent did not plead all these amounts. Therefore, the maximum payable under the head of special damages is Ksh 59,462/-. The award of Ksh 101,662/- is thus without basis and is hereby set aside. In its place, judgment for special damages is entered in the sum of Ksh 59,462/- as special damages.

General Damages

35. The trial court awarded general damages of Kshs. 1,500,000/-. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda v Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001. It is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently. In Nyambati Nyaswabu Erick v 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."

36. The foregoing was settled in the cases of Butter v Butter Civil Appeal No. 43 of 1983 [1984] KLR where the Court of Appeal held as follows in paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ……is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

37. Therefore, 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.

38. The Court of Appeal pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service 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.

39. 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.

40. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that comparable injuries should attract comparable awards. 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 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.

41. Consequently, in my reevaluation, I have to analyze similar fact authorities to arrive at a conclusion as to whether the award of general damages was excessive in the circumstances. In James Gathirwa Ngungi v Multiple Hauliers (EA) Ltd [2015] eKLR, the plaintiff was awarded Kshs. 1,500,000.00 in general damages after sustaining compound comminuted fractures of the right tibia and fibula, a fracture of the left ulna, head injury, deep cut wound to the parietal region, soft tissue injuries and bruises on both hands, multiple facial cuts and lacerations, and a fracture of the right leg. Similarly, in Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another [2014] eKLR, the plaintiff, who suffered extensive fractures of the left tibia and fibula, soft tissue injuries to the left leg, and a fractured collar bone, was awarded Kshs. 2,500,000.00 in general damages.

42. In the case of *Ochiel & Another v Musyoki (Civil Appeal E42 of 2022*) [2024] KEHC 4943 (KLR) (14 May 2024) (Judgment), Limo J relied on the case of David Mutembei v Maurice Ochieng Odoyo [2019] eKLR, where a respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1,600,000/- . This was reduced on appeal to Kshs. 800,000/-.

43. I lave said enough to show that the award was inordinately high. The respondent had fractures in both limbs at the shaft distally. However, the degree of injury was 10%. The award of Ksh 1,000,000/= will suffice in the circumstances. The consequence of the foregoing is that I set aside the award of Ksh. 1,500,000/= and substitute same with an award of Ksh 1,000,000/=.

Future Medical Expenses

44. On future medical expenses, I note the Appellants' medical doctor proposed Ksh 80,000/=. The main injuries were an open transverse fractures at the distal shaft tibia and fibula bones and transverse fracture of the distal fibula shaft of the left leg. The cost of fixing the same was over Ksh 156,000/= as per the invoices. The proposal for Ksh 80,000/= was rejected by the court below. The court accepted Ksh 300,000/=. This was the discretion of the court. In analyzing experts, the court has duty to come up with the most pragmatic approach to a matter. In Parvin Singh Dhalay v Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo v

George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

45. This court cannot substitute exercise of discretion for its own. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another 1957 KLR 27 as follows: -

The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

46. Regarding future medical expenses, the governing principle was explained by the Court of Appeal in Kenya Bus Services Ltd v Gituma [2004] EA 91 as follows:

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.

47. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another v Shah and Others [2003] 1 EA 290:

"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

48. Further, the Court of Appeal on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

"... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

49. The award of Ksh 300,000/- was based on the evidence presented before the Court. The said amount is therefore proper. Accordingly, the appeal in respect of this head is dismissed.

50. 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.

51. 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.

52. The results were a mixed grill. The best order is for parties to bear their own costs.

Determination

53. In the circumstances, I make the following orders: -

a. The appeal on general damages is allowed. The sum of Ksh 1,500,000/= is set aside. In lieu thereof, a sum of Ksh 1,000,000/= is awarded for general damages for pain and suffering and loss of amenities.

b. The appeal on future medical expenses is dismissed.

c. Appeal on special damages is allowed. A sum of Ksh 101,662/= is set aside. In lieu thereof an award of Ksh 59,462/= is awarded.

d. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF MAY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Diru for the Appellant

Ms. Akasi for the Respondent

Court Assistant – Michael