



REPUBLIC OF KENYA



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**Ochola v Owuor (Civil Appeal E039 of 2022)
[2024] KEHC 7689 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E039 OF 2022
RE ABURILI, J
JUNE 25, 2024**

BETWEEN

WILLIS ONYANGO OCHOLA APPELLANT

AND

ELLY ODHIAMBO OWUOR RESPONDENT

*(An appeal arising out of the Judgment & Decree of the Honourable
Temu in the Senior Principle Magistrate's Court at Nyando
delivered on the 12th May 2022 in Nyando SPMCC No. 157 of 2019)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent for injuries sustained while he was travelling as a passenger aboard motor vehicle registration number KCL 574H belonging to the appellant that was negligently driven as to veer off the road at the Ahero Junction. The respondent thus sought general damages as well as special damages of Kshs. 8,552 and costs of the suit.
2. The appellant filed his defence and denied all the averments on the plaint and prayed for dismissal of the suit.
3. The trial court held the appellant 100% liable for the accident and proceeded to award the respondent Kshs. 250,000 as general damages. The special damages were proven and the trial court proceeded to award them as pleaded.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 18th May 2022 raising the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant on both issues of quantum.



2. That the learned trial magistrate erred in law and fact in using the wrong principles in assessment of damages thereby arriving at an erroneous decision.
 3. That the learned trial magistrate erred in law and in fact by failing to take into account the evidence on record hence arriving at a wrong decision.
 4. That the trial magistrate erred in law and fact by awarding the respondent Kshs. 250,000 in general damages which was excessive considering that the injuries sustained by the plaintiff is soft tissue injuries.
 5. That the learned trial magistrate erred in assessing general damages at Kshs. 250,000 and failed to apply principles applicable in award of damages and comparable award made for similar injuries.
5. The parties filed written submissions to canvass the appeal which was essentially against quantum of damages awarded.

The Appellant's Submissions

6. On behalf of the appellant, counsel submitted that the P3 dated 3/1/2019 and medical report from Dr. Obed Omuyoma list the same injuries as those that are in the Plaint. That it is clear that the Appellant sustained soft tissue injuries as per Dr. Obed Omuyoma's medical report. Counsel submitted that the award made by the lower court being Kshs. 250,000.00 was high considering the injuries sustained by the Respondent were soft tissue injuries. The appellants were of the view that an award of Kshs 100,000.00 would be sufficient and reasonable compensation.
7. The following authorities were cited in support of the submissions on quantum of damages:
 - i. *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR which awarded Kshs Kshs. 100,000/= for similar injuries would be adequate to compensate for the injuries suffered in this case.
 - ii. *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR in which the court reduced the award from Kshs. 40,000.00-70,000.00
8. The appellant urged the court to allow this appeal with costs, upset the award made by the trial court and substitute it with Kshs 100,000.

The Respondent's Submissions

9. It was submitted that the Record of Appeal was not complete because it did not have the decree and that failure by the appellant to attach a decree to the record of appeal was fatal to his case contrary to Order 42 Rule 2 and Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules*. Reliance was placed in the Supreme Court of Kenya in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR where the court held inter alia that if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law and that an incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.
10. The respondent submitted that the trial court's award was fair in the circumstances considering that at the time the respondent was testifying in court, he had not yet recovered from the injuries sustained in the accident.



11. It was submitted that the authorities relied on by the appellant in this appeal were different from those that were considered by the trial court and that this was not proper practice and ought to be ignored.
12. The respondent submitted relying on the case of *Easy Coach Ltd v Emily Nyangasi* (2017) eKLR where the plaintiff suffered facial injuries, injury to the chest, injury to the back, injury to the right hand with cut wound and injury to the right leg with cut wounds and general damages for pain, loss of amenities was assessed at Kshs. 700,000.

Analysis and Determination

13. 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 *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. Accordingly, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

15. In the instant case, the liability is not contested and neither is the nature of injuries sustained by the respondent. The only issue for consideration is whether the award of general damages of Kshs. 250,000 was inordinately high as to warrant this court’s interference.
16. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730, Kneller J.A. stated:

“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 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. See *Ilango V Manyoka* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto* [1970] E.A. 414, 418, 419. This court follows the same principles.”

17. The principles espoused in the above Court of Appeal decision have stood the test of time and continue to be applied by all appellate courts.
18. The respondent pleaded that as a result of the accident he sustained the following injuries:
 - i. Soft tissue injuries of the right shoulder joint.



- ii. Blunt injury to the anterior chest wall leading to soft tissue injuries.
 - iii. Blunt injury to the neck leading to soft tissue injuries.
 - iv. Blunt injury to the back leading to soft tissue injuries.
 - v. Soft tissue injuries of both knee joints.
19. In essence, the respondent sustained soft tissue injuries. The trial court awarded Kshs. 250,000 as general damages which was impugned by the appellant as being inordinately high and not in line with comparable awards. The respondent urged this court to uphold the same.
20. The injuries suffered by the respondent were soft tissue injuries. They healed without any issue. I have found the following cases quite helpful in terms of comparison: -
- a. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR where the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/- on general damages and substituted it with an award of Kshs 140,000/-
 - b. In *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa* [2020] eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000/=. On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000/=.
 - c. In *John Wambua v Mathew Makau Mwololo & another* (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000/= and this was affirmed by the High Court.
21. From the initial treatment notes produced as PEx 4, there were pains and bruises in the injured areas. There was no evidence of any deep cuts. The medical report produced by PW2 Dr Obed Omuyoma confirms that all the injuries were blunt. The degree of injury as assessed by PW2 and PW3 was harm. Taking into consideration the aforementioned authorities, and considering that the soft tissue injuries had no residual effect on the respondent as they had healed at the time of hearing of the case, according to PW2 who stated that the patient had fully recovered, I find that the award of Kshs 250,000 on the higher side.
22. I am cognizant of the fact that no two cases can be the same and that time lapse and inflation affects awards. However, the court must also take into account the fact that the economy of the country is not thriving for businesses.
23. For the above reasons, I find that an award of Kshs 150,000 would sufficiently compensate the respondent for the soft tissue injuries sustained. This final award is supported by the recent award in Bomet HC Civil Appeal No. E005 of 2022, *Pascal v Ouko* (Civil Appeal E005 of 2022) [2023] KEHC 24463 (KLR) (18 October 2023) (Judgment) where the plaintiff /respondent sustained injuries involving:
- i. Chest contusion.
 - ii. Blunt trauma to the back.
 - iii. Blunt trauma to the scalp.



- iv. Blunt trauma to the neck.
 - v. Blunt trauma to the upper limbs.
 - vi. Blunt trauma to the lower limbs.
 - vii. Lacerations on the right knee.
24. The learned Judge reduced the award from from Kshs 211,550/= to Kshs 155,000/=.
25. Taking into account all the above, I find this appeal to have merit. It is allowed. I therefore set aside the award of kshs 250,000 general damages and substitute it with an award of kshs 150,000 general damages. This will earn interest at court rates from the date of judgment in the lower court until payment in full.
26. As the damages have been substantially reduced, I order that each party bear their own costs of this appeal.
27. I so order.
28. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

