



**Onyango v Odep (Civil Appeal E178 of 2023)
[2024] KEHC 11370 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E178 OF 2023
RE ABURILI, J
SEPTEMBER 26, 2024**

BETWEEN

MICHAEL ONYANDO ONYANGO APPELLANT

AND

CHARLES ATHIAMBO ODEP RESPONDENT

*(An appeal arising out of the Judgment & Decree of the Honourable
Cheruiyot in the Chief Magistrate's Court at Kisumu delivered
on the 29th September 2023 in Kisumu Civil Suit No. 70 of 2021)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a plaint dated 5.3.2021 in which the respondent prayed for general damages and costs of the suit, as a result of injuries sustained following a road traffic accident.
2. The respondent averred that on the 24th February 2021, he was a lawful pillion passenger aboard motorcycle registration number KMEX 308T along Kisumu – Nairobi road when at around Nyamasaria, the appellant's motor vehicle registration number KCN 854L was so negligently, carelessly and recklessly driven, managed and/or controlled as to enter the highway from the feeder road and violently hit the motorcycle on that the respondent had boarded.
3. The parties entered into a consent on liability at 80:20 in favour of the respondent on the 6th April 2023. The trial court proceeded to award the respondent Kshs. 400,000 as general damages less 20% contribution.
4. Aggrieved by the trial court's judgement on quantum, the appellant filed his appeal dated 19th October 2023 in which he raised the following grounds of appeal:



- a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on a quantum before him superficially and consequently coming to a wrong conclusion on the same.
 - b. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damage and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
 - c. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 - d. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis a vis the respondent's claim.
 - e. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that the award of general damages was excessive and unjustifiable and that an award of Kshs. 100,000 as proposed before the trial court would be sufficient to compensate the respondent.
7. The appellant relied on the case of *Ndugu Dennus v Ann Wangari & Another Kiambu HCCA No. 54 of 2016* where the court awarded Kshs. 100,000 for soft tissue injuries similar to those sustained by the respondent which injuries were; Blunt head injury, head concussion and blunt injuries to the chest and hands.
8. The appellant also relied on the case of *Godwin Ireri v Frankline Gitonga Meru HCCA 47 of 2015 (2018) eKLR* where Kshs. 90,000 was awarded for general damages for similar injuries like those sustained by the respondent herein, which injuries were; two cuts on the forehead, cuts on the scalp to the occipital region and bruises on both left and right ankle.
9. The appellant thus submitted that the appeal should be allowed with costs and further set aside the award made by the trial court.

The Respondent's Submission

10. The respondent submitted that the appellant had not shown how the trial magistrate acted upon some wrong principle of law, or that the amount awarded was so extremely high as to constitute an erroneous estimate of the damage to which the respondent was entitled.
11. The respondent relied on the case of *Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo HCCA No. 17 of 2019* where Riechi J upheld the general damages of Kshs. 350,000 for the plaintiff who sustained similar injuries to the respondent herein as well as the case of *Charles Gichuki v Emily Kawira Mbuba & Another (2018) eKLR* where the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and left thigh where Sergon J substituted the trial court's award of Kshs. 400,000 with Kshs. 300,000.
12. The respondent submitted that the appeal ought to be dismissed with costs to him.



Analysis and Determination

13. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence adduced and make its own conclusions. It must, however, bear in 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. In that regard, 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 *Mkube 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 *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.”
16. 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.
17. In the case of *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017* [2018] eKLR the court rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”
18. I have considered the submissions tendered together with the authorities cited by the parties. As the Respondents did not cross-appeal against the finding and conclusion of the trial magistrate, I find the



issue for determination is simply whether the award of quantum of damages was too high as contended by the Appellant.

19. General damages are damages at large whose purpose is to compensate the injured party to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible, comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).
20. It is not in dispute that the respondent was injured following the accident in which liability was determined by consent hence the question is what was the nature and extent of the injuries and what award should those injuries attract.
21. In his statement of claim filed on the 5th March 2021, the respondent pleaded that he sustained the following injuries:
 - i. Tender neck due to neck injury
 - ii. Swollen left hand bruised and tender
 - iii. Minor bruises right hand
 - iv. Tender chest wall on the right side
 - v. Tender right knee joint with multiple bruises
 - vi. Swollen right ankle joint with bruises and tender
22. The said injuries were confirmed by the P3 form and treatment note attached to the respondent's plaint. The treatment notes from St. Georges Medical Centre that the respondent produced as an exhibit revealed that the respondent had sustained deep cut wounds and multiple soft tissue injury. No medical expert was called by either of the parties to testify on the said injuries. However, the medical report produced as an exhibit by the respondent filled by one Dr. S.R. Patel concluded that the respondent had sustained "whip lash injury to the neck and soft tissue injury to the right knee." Dr. Patel further stated that since no x-rays were taken and as further treatment was not given, the respondent's spinal and right knee joint pain could be due to osteo-arthritis relating to his age. I also note that the P3 form produced by the respondent described the degree of injury sustained by the respondent as harm.
23. Taking all the above into consideration, it is my view that the nature of injuries sustained by the respondent were soft tissue. As noted by Dr. Patel, there was no evidence adduced before court to support the respondent's claim that the pain in the respondent's spine and right knee were as a result of the accident.
24. The injuries suffered by the respondent were soft tissue injuries. I have found the following cases quite helpful in terms of comparison:
 - i. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR 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/ general damages and substituted it with an award of Kshs 140,000.

- ii. 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.
 - iii. 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.
25. Guided by the comparable cases above, it is my finding that the award of Kshs 400,000 for the soft tissue injuries sustained by the respondent was high. It is my further finding that an award of Kshs 160,00 was sufficient and just. I set aside the award of Kshs 400,000 and substitute therefore an award of Kshs 160,000.
 26. In the end, I allow this appeal. I set aside the judgment for Kshs 400,000 general damages and substitute the same with an award of Kshs 160,000 general damages. This award shall be subject to 20% contributory negligence as agreed by the parties leaving a balance of Kshs 128,000 general damages plus costs of the suit in the lower court and interest from the date of judgment in the lower court until payment in full.
 27. On costs of this appeal, as the award has considerably reduced, I order that each party bear their own costs of this appeal.
 28. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER, 2024

R.E. ABURILI

JUDGE

