



**Okello & another v Otieno (Civil Appeal E007 of 2024)
[2024] KEHC 15128 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E007 OF 2024
KW KIARIE, J
NOVEMBER 28, 2024**

BETWEEN

ISAIAH OLOO OKELLO 1ST APPELLANT

UNITED SSAIASS INVESTMENT 2ND APPELLANT

AND

EVALINE ADHIAMBO OTIENO RESPONDENT

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's
SPMCC No. E110 of 2022 by Hon. B. Omwansa – Senior Principal Magistrate)*

JUDGMENT

1. Isaiah Oloo Okello and the United Ssaiass Investment, the appellants herein, were the defendants in Oyugis Senior Principal Magistrate's SPMCC No. E110 of 2022, where the claim was for general and special damages following a road traffic accident involving motor vehicle KDB 094A and the respondent, a pillion passenger. He sustained injuries and filed a suit for damages. The appellants were held a hundred per cent liable. The respondent was awarded Kshs. 985,000/= general damages.
2. The appellants were dissatisfied with the judgment and filed this appeal through the firm of Okong'o, Wandago & Company Advocates. They presented the following grounds of appeal:
 - a. The learned trial magistrate erred in law when he failed to consider the fact that the onus of proving negligence rested squarely on the one who alleged, being the plaintiff, and never shifted to the defendant and in failing to apportion liability against the plaintiff in the circumstances.
 - b. The learned trial magistrate erred in fact and law when he held that the appellant was 100 per cent liable for the occurrence of the accident in the circumstances of the case.



- c. The learned trial magistrate erred in law when he failed to consider the respondent's pleadings against the evidence that the respondent led at the trial, which ran counter to the pleadings and could only further err when he failed to apply the principle that a party is bound by their pleadings in her judgment.
 - d. The learned magistrate erred in fact and law in awarding general damages of KShs.985,000/- which amount was so manifestly high in the circumstances that it represented an exaggerated and erroneous estimate vis-à-vis the respondent's injuries.
 - e. The learned magistrate erred in fact and law when, without proof and or credible evidence and absent pleadings in that regard, he putting into consideration when making his determination imaginary resultant disabilities suffered by the respondent that were not proved by the respondent or indicated in any of the 2nd Medical Reports before court.
 - f. The learned trial magistrate decided the case against both the pleadings and the evidence that the respondent led during the trial.
 - g. The trial magistrate, in effect, awarded damages that were excessive, high, and exaggerated in the circumstances of the case.
3. The respondent, represented by Everlyne Kuke & Company Advocates, opposed the appeal. She contended that the magistrate's decision on liability and damages was supported by sound evidence and aligned with the law.
 4. As the first appellate court, I understand my responsibility to thoroughly examine all the evidence available, considering that I did not have the opportunity to observe the witnesses during their testimony. The *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123 case sets the precedent that the first appellate court must review and assess the evidence presented in the trial court and make its conclusions accordingly.
 5. There are two versions of how the accident complained of, happened. According to the respondent, motor vehicle KDB 094A hit the motorcycle on which she was a pillion passenger from behind. This was near a junction. She denied that the motorcyclist was turning right when the accident occurred.
 6. Conversely, Isaiah Oloo Okello (DW1) contended that though they travelled in the same direction as the motorcyclist, the latter turned to the right without indicating. He was about three meters behind the motorcycle.
 7. The evidence of CPL. James Mbogo (PW2) stated that the accident occurred when the motorcyclist joined a feeder road to the right. This evidence gives credence to the contention of the 1st respondent.
 8. It would appear that the driver of motor vehicle KDB 094A did not keep a safe distance while the motorcyclist attempted to turn to the right when it was unsafe. The Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] stated:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame... The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the



opposite party we would think that liability for the accident could be equally on both the drivers. We, therefore, hold each driver equally to blame.

9. In the instant, I find that the driver of motor vehicle KDB 094A and the motorcyclist are liable in equal proportions. Each, for the avoidance of doubts, is to shoulder fifty per cent liability. Therefore, I set aside the judgment on liability and substitute it as stated above.

10. The appellant suffered the following injuries:

- a. Fracture of the pelvic bone;
- b. Multiple cut wounds on the left shoulder and
- c. Deep cuts on the left ankle joint.

She proposed an award of Kshs. 3,000,000.00 in general damages.

11. The appellants proposed an award of Kshs. 450,000.00 general damages.

12. In urging her case, the respondent relied on the decision in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR. In this case, the plaintiff suffered the following injuries:

- a. Fracture of the right femur;
- b. Fracture of the ribs 3-6;
- c. Pain in the right side of the chest and the right thigh; and
- d. Persistent pain in the right knee.

She was awarded Kshs.4,000,000.00 in general damages.

13. The appellants cited the following decisions where:

- a. In *Peter Gakere Ndiangu v Sarah Wangari Maina* [2021] eKLR, the respondent was awarded Kshs.500,000.00 in general damages for pelvic fracture and soft tissue injury to the right thigh and chest.
- b. In *Mariqueta Nkoyai M'thiringi v Shadrack Mwendwa & another* [2020] eKLR, Kshs.500,000.00 was awarded in general damages for a pelvic fracture, bruises on the pelvic region, dislocation of left hand on the 2nd and 3rd metacarpal carpal joints, deep cut wound on the palmar aspect, with several tendons and muscles, sprained left foot and ankle joint and a cut wound on the plantar aspect left foot.
- c. In *Equity Bank Limited v Josephine Nyabaro Nyaruri* [2020] eKLR, a sum of Kshs. 550,000.00 was awarded in general damages to the respondent, who sustained a fracture of the pelvis, a degloving injury of the right knee, and a deep-cut wound on the right thigh.

14. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v. Khan* [1981] KLR 349 on page 356, Law JA stated:

...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 a figure which was either inordinately high or low.



15. I have perused the cases relied on by the parties in the trial court. Considering the injuries sustained by the respondent herein, I am persuaded to find that the award was inordinately high. Therefore, I set aside the trial magistrate's award and substitute it with an award of Kshs.500,000.00 in general damages and half the costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

