



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogembo & another v Maisa (Civil Appeal 72 of 2021)  
[2023] KEHC 436 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 72 OF 2021  
REA OUGO, J  
JANUARY 26, 2023**

**BETWEEN**

**SHABAN MOSETI OGEMBO ..... 1<sup>ST</sup> APPELLANT**

**GEORGE OGEMBO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CYRUS ANYONA MAISA ..... RESPONDENT**

**JUDGMENT**

1. The appeal before the court challenges the finding of the trial magistrate on both liability and quantum. The appellants in their memorandum of appeal June 30, 2021 raises the following grounds of appeal:
  1. That the award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance.
  2. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
  3. The learned magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injury claims thus occasioning miscarriage of justice.
  4. That the learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.
2. Although, the appellant has challenged liability, the record shows that on February 2, 2021, the parties entered a consent on liability in the ratio of 70:30 in favour of the respondent. The only issue before this court is damages awarded by the subordinate court.



3. The appeal is challenging the award of quantum and I now turn to consider whether the damages awarded were inordinately high. The parameters under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR as follows:

"An appellate court will not disturb an award for general 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.."
4. A brief summary of the case before the trial court was that the respondent was travelling along Kilgoris-Kisii road as a pillion passenger on motor cycle registration number KMEE 156H when the driver of KCL 537J (owned by the appellants) veered off the road and hit the motor cycle. The respondent as a result of the accident sustained the following injuries:
  - i. Chest contusion
  - ii. Blunt trauma to the scarp
  - iii. Degloving injury on the right hand.
  - iv. Degloving injury on the left knee.
  - v. Deep cut wound on the right knee.
  - vi. Bruises on the left toes.
5. The initial treatment notes from Kiogoro Medical centre reveal that the respondent sustained bruises and deep cut wound on the right knee. The P3 Form and the Medical report were prepared by Dr Morebu and his finding of the injuries sustained by the respondent was similar to those enumerated in the plaint. He formed the opinion that the respondent sustained degloving injuries with multiple severe body injuries that were in the process of healing with large disfiguring permanent ugly scars.
6. According to the medical report by Dr Kumenda, DEXH1, upon examining the respondent on the January 29, 2020, he noted that the scars on his face, right shoulder, anterior wall of the stomach and both knees had healed well. The knees also flexed and extended without limitation. He formed the opinion that the respondent sustained soft tissue injuries of the right knee and foot but had healed well without permanent disability.
7. After carefully looking at the treatment notes and medical reports by both parties, it is not in dispute that the injuries sustained by the respondent were soft tissue injuries.
8. The trial magistrate in her judgment awarded the respondent Kshs 800,000/- as general damages. The question raised by the appeal is whether the award is excessive considering awards by courts for plaintiffs that have sustained similar injuries.
9. The parties filed their submission to address the issue raised in the appeal. The appellant has proposed an award of Kshs 150,000/- as adequate compensation. They cited the case of *Daniel Gatana Ndungu & Another v Harrison Angore Katana* (2020) eKLR in which the court awarded Kshs 140,000/- where the plaintiff sustained soft tissue injuries to the head, chest and both hands.
10. The respondents in their submissions argued that the award of Kshs 800,000/- was not inordinately high to warrant interference by this court as there is no evidence that the trial court acted on wrong principles of law.



11. In the case of *Francis Ndungu Wambui & 2 others v Purity Wangui Gichobo* [2019] eKLR the plaintiff suffered a laceration to the left foot as well as a degloving injury to the base of the thumb and was awarded Kshs 250,000/-. In this case the respondent sustained degloving injuries on the right hand and left knee as well as other soft tissue injuries. According to the medical report by Dr Morebu, there was no anticipation of disability as the respondent was in the process of healing. In the circumstance, an award of Kshs 300,000/- would be most sufficient. I therefore do not find that an award of Kshs 800,000/- awarded by the trial magistrate as excessive warranting interference by this court.
12. I therefore set aside the award of general damages by the subordinate court and substitute it with an award of Kshs 300,000/-. The award is subject to the agreed contribution before the trial court.
13. The appellant is awarded cost of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**RE OUGO**

**JUDGE**

**In the presence of:**

Miss Opondo for the appellant.

Respondent Absent.

**Orwasa/ Wilkister C/A.**

