



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kembe v Abiud (Civil Appeal E133 of 2021)  
[2023] KEHC 1673 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E133 OF 2021**

**TA ODERA, J  
FEBRUARY 27, 2023**

**BETWEEN**

**LINET ACHIENG KEMBE ..... APPELLANT**

**AND**

**OYIER ODERO ABIUD ..... RESPONDENT**

*(Appeal from the Judgment and decree of the Honorable S.O Temu Senior  
Principal Magistrate in Nyando SPMCC No. 64 of 2020 Delivered on 04.11.21)*

**JUDGMENT**

1. The appellant filed a suit in the Senior Principal Magistrate's Court at Nyando seeking general damages for injuries allegedly sustained in a road traffic accident involving respondent's Motor vehicle registration no KCD 934 K in which he was a passenger and was allegedly negligently driven by the driver or agent of the respondent.
2. Respondent denied that the appellant was a passenger in its said vehicle, liability and in the alternative he pleaded contributory negligence on the side of the appellant. He also denied that appellant is entitled to damages. Appellant joined issue with the respondent.

The appellant listed the following grounds of appeal;

- i. The Learned Magistrate Erred in Law and in facts in awarding the appellant damages which were inordinately low as to represent the erroneous estimate and not commensurate with the injuries suffered by the appellant.
- ii. The Learned Magistrate Erred in Law and in fact in writing a judgment which is at variance with the pleading and against the weight of evidence.



- iii. The Learned Magistrate Erred in Law and in fact by failing to appreciate the degree , extent and Long term effect of the appellant’s injuries there by awarding the appellant damages which were inordinately low / little taking all the relevant factors into consideration .
- He prayed for;
- a. Setting aside of the judgment in Nyando Senior Principal civil case no 64 of 2020.
  - b. Make its own findings on quantum based on the pleadings, evidence on record and the submissions of parties.
  - c. Costs of this Appeal.
3. The appellant submitted that he sustained the following injuries ;
- a. Dislocation of the right hip joint.
  - b. Dislocation
  - c. H right knee joint
  - d. Chest pain
  - e. Head ache
  - f. Stiff neck
  - g. Severe back pain
  - h. Tenderness and swelling on left hand.
4. Also that the appellant supported this by his evidence and the same were corroborated by the medical doctor PW2 in the p3 form. Further that the medical records from St Josephs Nyabondo Hospital produced by PW4 and the discharge summary also confirm the said injuries. It was also submitted that general damages in the sum of Kshs 150,000/= was low and not as per the current trend of awards. The appellant cited the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] eKLR
5. Where it was held that “ The assessment of damages in personal injury case by court is guided by the following principles: -
- 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 (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR.”
6. He submitted that the trial magistrate misapprehended the evidence by considering fractures to be mere soft tissue injuries and not multiple soft tissue injuries did not consider the current range of awards and the inflation factor and hence gave a low award of general damages.



7. On damages he cited the following authorities;
  1. *Carolyn Indasi Mwononyo v Kenya Bus company Limited* (2012) where the court awarded the sum of Kshs 350,000/= for soft tissue injuries and dislocation.
  2. *Veronica Mkanjaal v Charles Kimanga Babu*(2020) eKLR where the appellate court upheld an award of Ksh 300,000/=) for soft tissue injuries and a dislocation .
  3. *Veronica Mkanjala v Patrick Nyasinga Amenity* (2021) eKLR where the court upheld an award of Kshs 300,000/= as general damages for a plaintiff who had suffered both soft tissue injuries and dislocation.
8. Respondent submitted that the Magistrate based his findings on the injuries proved by plaintiff and that the injuries in the P3 form and the discharge summary were not consistent. Counsel singled out severe head ache, severe chest pain and back ache which were in the p3 form but not the discharge summary. Also that not all the pleaded injuries are supported by the treatment notes and discharge summary. Also that neither the treatment notes nor x-ray films were produced herein.
9. On damages respondent cited the case of *Pitalis Opiyo Ager v Daniel Otieno Owino & another* (2020)eKLR where respondent sustained fracture of tibia fibula and bruises on the right hand and general damages were awarded by the lower court at Ksh 1,200,000/= but on appeal he same were reduced to Kshs 300,000/= as x -ray were not produced to confirm the alleged fractures. The respondent also cited the case of *Dhiraj Manji v Tyson Ouma* (2021)eKLR. Where the court found that it was not possible to determine whether there was a fracture as the x-ray films were not produced to prove the same.

#### **Issues for determination**

1. What were the injuries suffered by the appellant?
2. Whether the damages awarded were commensurate with the injuries sustained?

#### **Analysis and determination**

11. This is a first appellate court and it is the duty of this court to re-evaluate the entire evidence on record and arrive at its own independent conclusion on the case as was held in the case of *Gitobu Imanyara & 2 others V Attorney General* (2016) eKLR, to wit;
 

“..... Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.
12. I have seen the cited cases (Supra) in the case of *Veronica Mkanjaal v Charles Kimanga Babu*(2020)eKLR the appellant suffered dislocation of the left ankle joint , dislocation of the left wrist joint and multiple soft tissue injuries while in the *Veronica Mkanjala v Patrick Nyasinga Amenity* (2021) eKLR where appellant Sustained multiple soft tissue injuries and a dislocation of the left hip joint and in the Caroline case appellant was awarded general damages in the Sum of Kshs 350,000/=

#### **Nature of injuries sustained by appellant**

13. The discharge summary indicates dislocation of right hip joint, chest pain and pain in the right thigh only. I have seen the p3 form and it indicates severe head ache, stiff neck, severe chest pain and severe back pain and tender swelling of the hands and dislocation of the right hip joint and right knee joint.



This is surprising as the discharge summary is the document which contains initial treatment and shows the last treatment before discharge. It is clear from the foregoing that the p3 form and the discharge summary are at variance with the pleaded injuries as some of the injuries pleaded are not in them. The trial magistrate was right in his finding about exaggeration of the said injuries. There is no evidence that appellants sustained any fracture as no x-ray films were produced as admitted by Pw2.

14. I find that the injuries sustained by the appellants were dislocation of the right hip joint, and chest pain in the right thigh only.

### **Quantum**

15. I have re-evaluated evidence herein, the injuries, sustained by the appellants and the inflation factor and the recent authorities cited by both parties herein and I note that most of them involved two dislocations and soft tissue injuries while in the instant appeal the injuries included one dislocation. The injuries in the cited cases are thus slightly serious than the ones in the instant suit. The court of appeal in the case of *Child Welfare Society of Kenya v Republic, Ex-parte Child in Focus Kenya & AG & Others* [2017] eKLR per Waki, Nambuye & M’noti JJA held as follows, citing *Mbogoh & Another v Shah* [1968] EA 93, held :-

“I think it is well settled that this court will not interfere with the exercise of 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 it should not have taken into consideration and in doing so arrived at a wrong conclusion.”

16. The court President, Sir Charles Newbold in the same case stated:

“For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice.”

17. The learned trial magistrate thus erred in awarding damages which were low against the current trend of awards for similar injuries where the awards for soft tissue injuries with dislocation range from Kshs 200,000= 300, 000/=range. I find that the general damages of Kshs 150,000/= awarded to the appellants the lower side. I proceed to award general damages in the sum of Kshs 250,000/= .I thus proceed to substitute the general damages of Kshs 150,000/= with Kshs 250,000/=. The Appeal therefore partially succeeds.

18. Each party to bear its own costs. Right of Appeal.

**T.A ODERA - JUDGE**

**27. 2.2023**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

Mukhongo for Appellant.

No appearance for Respondent.

Court Assistant; Laura Apondi.

**T.A ODERA - JUDGE**



27. 2.2023

