



REPUBLIC OF KENYA



**KENYA LAW**  
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**Opiyo v Abiud (Civil Appeal E134 of 2021)  
[2023] KEHC 2024 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E134 OF 2021**

**TA ODERA, J**

**FEBRUARY 27, 2023**

**BETWEEN**

**DOROTHY ATIENO OPIYO ..... 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.
3. Appellant joined issue with the respondent.
4. 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 .
5. 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.
6. The appellant submitted that he sustained the following injuries ;
  - a. Fracture of the pelvic bone.
  - b. Pain on the right hip joint.
  - c. Deep cut wound /tear wound on the upper lip.
  - d. Multiple bruises on the left arm.
7. 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.
8. 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.”
9. 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.
10. On damages he cited the following authorities;
  1. *Joseph Njeru Luke & 3 others v Stella Muki Kioko* (2020)eKLR (2012) where the court awarded the sum of Kshs 750,000/= for fracture of the pelvis bone and soft tissue injuries .



2. [\*Ali Malik Brothers Motor \(K\) Limited & another v Emanuel oduor Onyango\*](#) NRB HCCA no 25 of 2016 (2018) eKLR where the appellate court upheld an award of Ksh 300,000/= for soft tissue injuries and a dislocation .
  3. [\*George karanja MUKUNDI v Mariera Francis & another\*](#) (2022) eKLR where an award of Kshs 700,000/= was given to plaintiff who suffered fracture of pelvic sprain hymen and cuts of the right knee and this was upheld by the High court .
11. Respondent submitted that the Magistrate based his findings on the injuries proved by plaintiff and that that the fracture was not proved as no x-rays films were produced to support the same .Also that the multiple bruises indicated in the p3 form were not in the discharge summary.
  12. 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 .

### 13. Issues for determination

1. Whether the damages awarded were not commensurate with the injuries sustained?

### Analysis and determination

14. 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”.

### Injuries sustained

15. I have seen the cited cases (Supra) cited by the appellant and I note that in those cases, the injuries sustained fractures.
16. The appellant told this court that she sustained discharge summary (Pexh 2) indicates fracture of the pelvic bone , pain in the right hip joint and cut wounds on the upper lip . I have seen the p3 form and it also indicates. The discharge summary indicates fracture of the pelvic bone, right hip joint pain, multiple bruises on the arms and cut wounds on the upper lip. PW2 the clinical officer who filled the P3 form (pexh 3) said he did not produce the x-ray films and he never indicated that he referred to them. He also said that he did not record the facility where the patient was treated. PW3 the records officer and St Joseph’s Nyabondo hospital admitted that she did not have the patient’s file in court and said it was in the hospital file. The multiple bruises are not in the discharge summary and PW2 did not justify where he got them from since he also did not indicate whether he referred to initial treatment notes. The trial magistrate was right in his finding about exaggeration of the said injuries, the x ray films were not produced herein to confirm the fractures. It is trite law that he who alleged must prove. X – ray films are evidence that a patient sustained a fracture in the absence of the same the fractures have not been proved. I do agree with the trial Magistrate that there is no evidence that appellant sustained any fracture as no x-ray films were produced herein.



17. I find that the injuries sustained by the appellant were pain in the right hip joint and cut wound on the upper lip. .

### **Quantum**

18. I have re-evaluated evidence herein, the injuries, sustained by the appellant and the inflation factor and the recent authorities cited by both parties herein. The injuries in the cases cited by the appellant are more serious than the one sustained by the appellant herein as they include fractures while in this appeal they are soft tissue injuries. The injuries in the case cited by respondent are comparable to the ones in the instant appeal. The current trend of awards for soft tissue injuries ranges from 30,000-300,000 and in this finding I am persuaded by the *Pitalis case* (Supra). 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.”

19. 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.”

20. The learned trial magistrate did not err in awarding general damages in the sum of Kshs 200,000/= as it was as per the current trend of awards for similar injuries. I uphold the award. I thus dismiss the appeal with costs to respondent.

21. Right of Appeal.

**T.A ODERA**

**JUDGE**

**27.2.2023**

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**In The Presence Of;**

Mukhongo for Appellant.

No appearance for Respondent.

Court Assistant; Laura Apondi.

