



Ogola v Kihiu (Civil Appeal E094 of 2021) [2023] KEHC 17705 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E094 OF 2021**

JRA WANANDA, J

MAY 26, 2023

BETWEEN

VICTOR OGOLA APPELLANT

AND

MARY WAITHE KIHU RESPONDENT

JUDGMENT

1. This Appeal arises from a suit seeking compensation for injuries suffered by a 44 years old female which arose as a result of a road accident. The Appeal is framed as being against the trial Court's determination both on liability and on assessment of quantum. In the suit, the Appellant was the Defendant whereas the Respondent was the Plaintiff.
2. By the Plaintiff filed on 07/08/2019 in Eldoret Chief Magistrates Court Civil Case No. 661 of 2019, the Respondent sued the Appellant seeking general damages, special damages, costs of the suit and interest. The Plaintiff was filed through Messrs Mwinamo Lugonzo & Co. Advocates.
3. It was alleged that the accident occurred on 14/05/2019 along the Eldoret-Webuye road, it involved the motor vehicle registration number KAE 291B alleged to be owned by the Appellant, the Respondent was a passenger in the vehicle, the vehicle was carelessly, negligently and/or recklessly driven thus causing it to lose control and roll and that as a result, the Respondent suffered multiple blunt injuries.
4. The Appellant filed his Statement of Defence on 02/10/2019 wherein he denied liability and, in the alternative, blamed the Respondent for causing or contributing to the accident. The same was filed through Messrs Kairu & McCourt Advocates. Subsequently, there was a Change of Advocates whereupon Messrs Kimondo & Gachoka Advocates took over conduct of the defence.
5. The suit proceeded to full trial wherein the Respondent called 4 witnesses. On his part, the Appellant did not call any witness.



Respondent's Evidence

6. PW1 was Dr. Joseph Sokobe who had examined the Plaintiff after the accident. He produced his Medical Report dated 19/07/2019 and Receipt for Kshs 6,000/- for the services he rendered. He also produced the P3 Form.
7. PW2 was Police Constable Chesere Kiptoo from Eldoret Traffic Police Division. He produced a Police Abstract confirming the occurrence of the accident and identity of the motor vehicle involved as KAE 291B Toyota Matatu. He stated that the vehicle was being driven from Maili Nne to Eldoret when it lost control, overturned and several passengers including the Respondent sustained injuries. In cross-examination, he stated that the circumstances were captured in the Occurrence Book (OB).
8. PW3 was Dr. Paul Rono who produced various Treatment Notes and Receipts from Moi Teaching & Referral Hospital showing that the Respondent was treated at the Hospital after the accident.
9. PW4 was the Respondent. She adopted her Witness Statement and stated that on 14/05/2019 she was heading to work, boarded the motor vehicle KAE 291B but were involved in an accident, the vehicle rolled, she blamed the owner, she got injured on the chest, left knee and pelvis, she reported to the police and produced a demand letter. In cross-examination, she stated that she could not remember whether she had a safety belt on.

Judgment of the trial Court

10. After the hearing, the trial Court delivered its Judgment on 23/07/2021. The same was in favour of the Respondent and was in the following terms:
 - a) Liability 100%
 - b) General damages Kshs 300,000/-
 - c) Special damages Kshs 6,600/-
 - d) Total Kshs 306,600/-
 - e) Plus costs and interest
11. Aggrieved by the trial Court's said decision, the Appellant filed this Appeal on 6/08/2021. In the Memorandum of Appeal, the following 6 grounds were cited:
 - i. That the learned trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - ii. That the learned trial Magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the *Insurance (Motor Vehicle Third Party Risks) (Amendment) Act*, 2013, Cap. 405.
 - iii. The learned trial Magistrate erred in law and in fact in awarding quantum of damages inconsistent with injuries pleaded and provided to have been sustained by the Plaintiff.
 - iv. The learned trial Magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.



- v. The learned trial Magistrate erred in assessing an award, hereunder, both on liability and quantum, which was ordinally high and wholly erroneous estimate of the loss and damages suffered by Plaintiff.
 - vi. That the learned trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
12. As will be noted, ground 6 is a word by word duplicate of ground 1.

Hearing of the Appeal

13. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on 31/01/2023 and the Respondent filed on 10/01/2023.

Appellant's Submissions

14. The Appellant's Counsel submitted that the Respondent sustained soft tissue injuries and faulted the lower Court awarded Kshs 300,000/- which was high considering the injuries, he submits that this Court awards a sum of Kshs 60,000/- which is sufficient and reasonable. On the principles for determining whether this appellate Court should interfere with the award or not, Counsel referred to the case of *Power Lighting Company Limited & another v Zakayo Saitoti Nangola & Another* (2008) eKLR cited in the case of *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR.
15. On quantum, Counsel cited the case of *Ndungu Dennis v Ann Ndirangu & Another* [2018] eKLR in which he submitted that the Court reduced an award of Kshs 300,000/- to Kshs 100,000/-. He also cited the decision of Nyakundi J in *HB (minor suing through mother and next friend DKM) v Jasper Nchonga Magari & Another* [2021] eKLR in which he submitted that the Court upheld an award of Kshs 60,000/-. He also relied on the decision of Majanja J in *Nyasambi Nyaswabu Erick v Toyota Kenya Limited & 2 Others* [2019] eKLR in which he submitted that the Court increased an award of Kshs 55,000/- to Kshs 90,000/-.
16. Counsel therefore urges this appellate Court to set aside the Judgment of the trial Court and reassess the quantum. Finally, he prays that the Appeal be allowed as prayed and the Appellant be awarded the costs of the Appeal

Respondents' Submissions

17. The Respondents' Counsel opposed the appeal and submitted that it is not in dispute that the accident occurred, the evidence of the Respondent and the police officer was key in determining liability, the Respondent was merely a passenger and did not therefore in any way contribute to the accident, the Appellant did not call any evidence to controvert the testimony as tendered by the Respondent and her witnesses, the version of the Respondent was confirmed by the police officer, in the absence of any evidence on the part of the Appellant the trial Magistrate properly found the Appellant 100% liable for the accident, the Appellant and/or his driver drove the motor vehicle at an excessive speed, did not take evasive action so as to avoid the accident and caused the vehicle to veer off the road and overturn.
18. On quantum, Counsel submitted that the amount awarded is not inordinately too high so as to amount to a wholly erroneous estimate and the Appellate Court should not therefore disturb the award, the trial magistrate followed the proper principles in making the award, in view of the injuries sustained the award of Kshs 300,000/- sufficed as just and adequate compensation.



19. Counsel relied on the case of *Jyoti Structures Ltd & Another v Charles Ogada Ochola*, Eldoret HCCA No. 32 of 2017 in which he submitted that Nyakundi J awarded a sum of Kshs 300,000/- in the year 2022, *Catherine W. Kingori & 3 Others v Gibson T. Gichubi*, Nyeri HCCC No. 320 of 1998 in which he submitted that Khamoni J awarded Kshs 350,000/- in the year 2005 and *Martin M. Mugi v Attorney General*, Nairobi HCCA No. 791 of 1999 in which he submitted that Kasanga Mulwa J awarded Kshs 300,000/- in the year 2000.
20. He prayed that the Appeal be dismissed with costs.

Analysis & determination

21. The duty of an appellate Court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where 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 re-analyze 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.”

22. As aforesaid, in the Memorandum of Appeal, the Appeal is framed as being against both determination of liability and assessment of quantum. However, from the Appellant’s Submissions, it is clear that only quantum has been challenged. In the circumstances, I presume that the Appellant has abandoned the portion of the Appeal challenging liability.
23. In any event, it is not disputed that the accident occurred. Having therefore not called any witness to rebut the evidence, the basis under which the Appellant would challenge findings of fact on how the accident occurred and accounts given by the Respondent’s witnesses was severely weakened. Further, the Respondent having been a mere passenger in the Appellant’s vehicle, any blame alleged against her for causing or contributing to the accident would be “built on quicksand”.
24. The only issue that therefore remains is “whether the trial Court’s assessment and award of general damages at Kshs 300,000/- was excessive and/or inordinately high”.
25. I now proceed to analyse and determine the said issue.
26. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal pronounced itself as follows:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

27. An appellate Court will not therefore 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 trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.



28. Kneller, JA in the Court of Appeal decision in *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR also gave the following guidelines:
- “The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.
1. Each case depends on its own facts;
 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
 3. comparable injuries should attract comparable awards.
 4. inflation should be taken into account; and
 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”
29. From the above, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries. Indeed, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”
30. From the Medical Report of Dr. Joseph C. Sokobe dated 19/07/2019 and treatment notes produced in evidence, the Respondent suffered multiple soft tissue injuries with no resulting disability. She has also substantially healed from the injuries sustained.
31. I have perused various previous cases involving similar or comparable injuries and analyzed the awards therein. I find that most awards for multiple soft injuries range at between Kshs 100,000/- and Kshs 200,000/- each depending on the severity of the injuries.
32. For instance, in *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR, Joel Ngugi J reduced an award of Kshs 300,000/- to Kshs 100,000/-. The decision was delivered on 1/2/2018.
33. In *JFM (Minor suing through Mother and next friend MWM) v INM & another* [2020] eKLR, R. Nyakundi J increased an award of Kshs 60,000/- to Kshs 100,000/-. The decision was delivered on 30/12/2020.
34. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, R. Nyakundi J reduced an award of Kshs 350,000/- to Kshs 140,000/-. The decision was delivered on 15/04/2020.
35. In *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD)* [2021] eKLR, E. Maina J reduced an award of Kshs 230,000/- to Kshs 180,000/-. The decision was delivered in 28/10/2021.
36. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must be avoided. The Court must therefore ensure that awards result in fair compensation
37. In light of the said comparable awards and the principles referred to, I find the sum of Kshs 300,000/- for general damages as awarded by the trial Magistrate to be considerably high and substantially excessive to justify interference by this Court. Accordingly, I set aside the award of Kshs 300,000/- awarded in general damages and substitute it with an award of Kshs 180,000/-.



Final Orders

38. In the premises, I make the following orders:

- i. This Appeal succeeds only to the extent that the amount of Kshs 300,000/- awarded to the Respondent as general damages is set aside and substituted with an award of of Kshs 180,000/-.
- ii. The rest of the findings by the trial Court, including on liability, special damages, costs of the lower Court case and interest, remain undisturbed.
- iii. Since the Appeal has only partly succeeded, each party shall bear its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE

