



**Otieno v South Sioux Farms Ltd (Civil Appeal E084 of 2022)
[2023] KEHC 21083 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E084 OF 2022**

**KW KIARIE, J
JULY 31, 2023**

BETWEEN

SYMON OSMAN OTIENO APPELLANT

AND

SOUTH SIOUX FARMS LTD RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No.E68 of 2020= by Hon. B. Omwansa–Senior Principal Magistrate))*

JUDGMENT

1. Symon Osman Otieno, the appellant herein, was the plaintiff in Oyugis Senior Principal Magistrate's SPMCC No E68 of 2020. This was a claim that arose from a road traffic accident that involved motor vehicles registration number KCG 050V & ZV 1785prime mover and trailer and motor vehicle registration number KCY 427P in which the appellant was a passenger. As a result of the collision, the appellant sustained injuries. The learned trial magistrate delivered judgment dated October 19, 2022. He made a finding that the respondent was 100% liable.
2. The learned trial magistrate made an award of Kshs 950,000.00 in general damages and special damages Kshs 359, 100.00 in favour of the appellant.
3. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Ochillo & Company Advocates. The following grounds of appeal were raised:
 - a. The learned trial magistrate erred in law and fact in assessing general damages in the sum of Ksh 950, 000 which was inordinately low as to present a miscarriage of justice.
 - b. The learned trial magistrate applied wrong principles in law in assessing general damages at Kshs 950, 000/- which was inordinately low.



- c. The award of Kshs 950, 000/- as general damages was erroneous estimate of damages and severe injuries suffered by the appellant.
 - d. The award of Kshs950, 000/- as general damages was inordinately low as to present a miscarriage.
 - e. The learned trial magistrate erred in law and fact in failing to consider that the injuries as pleaded and testified on by the appellant were unchallenged and/or uncontroverted by the respondent.
4. The respondent was represented by the firm of Wachira Wekhomba AIM & Associates. He opposed the appeal and contended that the appeal lacks merit.
 5. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 6. The appeal is basically on the quantum of damages awarded. 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 vs Khan* [1981] KLR 349 at 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.
 7. The appellant complained that the award of Ksh 950, 000/= was inordinately low. The appellant, as a result of the accident sustained the following injuries:
 - a. Compound right tibia fracture;
 - b. Compound right fibula fracture;
 - c. Left ulna fracture;
 - d. Left radius fracture;
 - e. Chest contusion; and
 - f. Blunt trauma to the back.
 8. Dr. Morebu Peter Momanyi concluded that the appellant could not walk without support. He opined that recovery was going to take a long time and assessed permanent disability at 40%.
 9. At the trial, the appellant proposed an award of Kshs 3 million as general damages and relied on several authorities. The respondent did not file submissions or not make any proposal on quantum of damages.
 10. It is very important for the trial court to indicate why a quantum of damages has been arrived at. This guides an appellate court to evaluate and make a finding if all the relevant factors were considered. In the instant case, the trial magistrate did not indicate whether he compared the injuries sustained by the appellant with others in decided cases. This notwithstanding, I will look at other decided cases on



similar injuries to find if the trial court arrived at a fair award or whether it was inordinately low as complained by the appellant.

11. The respondent in urging for the dismissal of this appeal relied on the following cases:
- a. *George Raini Atungu v Moffat Onsare Aunga* [2021] eKLR the respondent was awarded Kshs 650,000/= general damages for the following injuries:
 - i) Chest contusion;
 - ii) Fracture of the left radius and ulna;
 - iii) Pelvic contusion;
 - iv) Contusion to the right leg; and
 - v) Fracture of the right tibia/fibula bones.
 - b. *Martin Ireri Namu & another v Alicalinda Igoki Kiringa* [2019] eKLR the respondent suffered dislocation of the left and fractures to the right tibia fibula and left radius ulna. He was awarded Kshs 800,000/=
 - c. *Third Engineering Bureau China City Construction Group Ltd v Evalyne Kerubo Rangi* [2020] eKLR where the appellant was awarded Kshs800,000/= for the following injuries:
 - a) Chest contusion;
 - b) Compound right radio fracture;
 - c) Compound right ulna fracture;
 - d) Bruises on the hands;
 - e) Bruises on the right elbow;
 - f) Bruises on the buttock;
 - g) Right tibia fracture; and
 - h) Right fibula fracture.
12. On his part, while pleading for enhancement of the award, the appellant cited the following cases:
- i. *Alex Wachira Njagua v Gathuthi Tea Factory & another* [2010] eKLR. In this case the plaintiff suffered the following injuries:
 - a. Blunt injury of the head with a contusion;
 - b. Fracture of the left tibia;
 - c. Fracture of the right fibula;
 - d. Cut wound of the forehead;
 - e. Bruised elbow; and
 - f. Bruised knee.

The court awarded Kshs 3,000,000/= general damages for pain and suffering.



- ii. *Duncan Maina VS Anthony Macharia Mburugu* NBI H.C.C.C. No. 2289 of 1996 Kshs 3,000,000/= was awarded for pain and suffering for near similar injuries as in *Alex Wachira Njagua v Gathuthi Tea Factory & another case*.
 - iii. *Gabriel Mwashuma v Mohammed Sajjad & another* [2015] eKLR the plaintiff was awarded Kshs 3,000,000/= for the following injuries:
 - a. Segmental left femur fracture
 - b. Compound fracture left patella and femoral condyle
 - c. Comminuted left distal tibia/fibula (pilon) fracture
 - d. Fracture right fibula
 - e. Soft tissue injuries right knee.
 - iv. *Joshua Ouma Ouko v Raymond Olendo* [2021] eKLR the appellant was awarded Kshs 3,000,000/= general damages for the following injuries:
 - a) Fracture of the right femur (comminuted);
 - b) Fracture of the right ulna;
 - c) Right maxillary sinusitis;
 - d) Fracture of the left radius; and
 - e) Contusion on the neck.
13. Part of Dr Murebu's prognosis in respect of the appellant herein reads in part:
- Recovery is expected to take a very long time. He requires physiotherapy with occupational therapy. ... He has features which would fit the criteria for depression, post-traumatic stress disorder and anxiety problems.
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- He is due for surgery for the fractured bones to be corrected with metal implants...
14. Had the trial magistrate considered the prognosis, he could have arrived at a different figure in quantum of general damages. I have taken note that the decisions relied upon by the respondent though addressing similar injuries, were decided without considering the earlier cases on similar injuries. I am therefore persuaded to interfere with the award by the learned trial magistrate. I set aside the award of Kshs 950,000/= and substitute it thereof with an award of Kshs 3,000,000/=
15. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

