



**Odhiambo v Adede (Civil Appeal E033 of 2022)
[2023] KEHC 26629 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E033 OF 2022
KW KIARIE, J
DECEMBER 20, 2023**

BETWEEN

BENARD OTIENO ODHIAMBO APPELLANT

AND

LENIN OMONDI ADEDE RESPONDENT

JUDGMENT

1. Benard Otieno Odhiambo, the appellant herein, was the defendant in Homa Bay Chief Magistrate’s CMCC No. E013 of 2021 where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KBL 545J Toyota Mark X and a motorcycle where the respondent was a pillion passenger. He sustained injuries and filed a suit for damages. The respondent was awarded Kshs.500,000/= general damages before factoring in contributory negligence and costs.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Wachira Wekhomba AIM & Associates Advocates. He raised the following grounds of appeal:
 - a. That the learned magistrate erred in fact and in law in awarding general damage inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the respondent considering the injuries suffered by him.
 - b. That the learned magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions filed by the appellant.
 - c. That the learned magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent and failed to apply precedents and tenets of the law applicable.
 - d. That the learned magistrate failed to adequately evaluate the evidence and exhibits thereby arriving at an erroneous decision.



3. The respondent, represented by Everlyne Kuke & Company Advocates, opposed the appeal. He argued that the decision made by the learned magistrate regarding liability and quantum of damages was based on sound evidence and the law.
4. As the first appellate court, I understand my responsibility to thoroughly examine all the evidence available, considering that I did not have the opportunity to observe the witnesses during their testimony. The case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123 sets the precedent that the first appellate court must review and assess the evidence presented in the trial court, and make its conclusions accordingly.
5. When this matter came up for hearing on the 19th day of August 2021, the parties recorded a consent on liability at 80% in favour of the plaintiff. The learned trial magistrate had only one issue for determination; the quantum of damages payable to the respondent.
6. At the trial, the appellant submitted that for the injuries the respondent sustained, he was entitled to Kshs. 100,000/= general damages. In urging his case, he relied on the following cases:
 - a. *Ndungu Dennis v Ann Wangari & another [2018]* eKLR. The respondent sustained injuries as follows: minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg. It was concluded that the injuries were soft tissue injuries. He was awarded Kshs. 100,000/= general damages.
 - b. *George Mugo & another v (Minor suing through next friend and mother of A M K [2018]* eKLR. The respondent was given an award for Kshs. 90,000/= in general damages for the following injuries:
 - i) Blunt injury left shoulder.
 - ii) Blunt chest injury interior.
 - iii) Bruises of left wrist region.
 - iv) Blunt injury on the left arm.
7. The respondent on the other hand submitted that Kshs. 2,000,000/= would be adequate compensation. He relied on the decision in *Zachary Kariithi vs. Jason Otieno Ochola [2016]* eKLR to urge his case. The respondent was awarded Kshs. 1,500, 000 for the following injuries;Chest painsInjuries to the waistCompound fractures of the right tibia/fibulaCompound fracture of the left femur bone mid shaftFracture of the right femur boneFracture of the 3rd, 4th 5th ribs of the right sideInjuries to the foreheadInjuries to the hip jointInjuries to the big left toe.
8. A medical examination report that was produced indicates the injuries suffered by the respondent as follows:
 - a. Fracture of the left 5th rib;
 - b. Blunt chest injury; and
 - c. Swollen chest wall.
9. There was a second opinion prepared by Doctor Malik who examined the respondent on the 15th day of October 2021. He formed an opinion that the respondent suffered minor soft tissue injuries. He also indicated that the X-ray did not show any fracture of the fifth rib or any rib. His examination was conducted over a year after the accident. This doctor was not called to shed light on the issue of failure to notice a fracture on X-ray after the evidence of PW2 that a fracture may not show after a



long process of healing. Dr. Malik's examination was over a year after the accident. I therefore do not find his report helpful.

10. 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 v Khan* [1981] KLR 349 on 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.

11. I have reviewed the cases cited by both parties during the trial. In this case, after looking at the injuries suffered by the respondent, I believe the compensation awarded was higher than necessary. Therefore, I am overturning the previous award and replacing it with a general damage amount of Kshs. 300,000, before considering the effect of the respondent's contributory negligence. The appellant will be eligible for half of the costs in this court.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE

