



REPUBLIC OF KENYA



KENYA LAW
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**Oraro v Nyaigoti (Civil Appeal E015 of 2021)
[2022] KEHC 14296 (KLR) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 14296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E015 OF 2021**

JN NJAGI, J

MARCH 30, 2022

BETWEEN

FRANCIS ORARO APPELLANT

AND

HEMSON OCHOMBA NYAIGOTI RESPONDENT

*(Being an Appeal from the judgment and degree of the Hon. M. O. Wambani,
C. M. in Nyamira CMCC NO.99 of 2017 delivered on 10/12/2019)*

JUDGMENT

1. The respondent had sued the appellant at the lower court claiming general and special damages after the respondent was injured while travelling in a motor vehicle belonging to the appellant. The parties entered consent on liability in the ratio of 90:10 in favour of the respondent. The trial magistrate subsequently assessed general damages at Kshs 500,000/- subject to the respondent's liability of 10%. The appellant was aggrieved by the award on general damages and filed the instant appeal.
2. The grounds of appeal are that:
 1. That the learned Trial Magistrate Erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs 500,000/= that was overly in excess in the circumstances of the case.
 2. That the learned trial magistrate erred in law and in fact in failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.
 3. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.



Submissions

3. The appeal was canvassed by way of written submissions. The advocates for the appellant, Kimondo Gachoka & Co Advocates, submitted that the respondent had sustained soft tissue injuries in nature with no permanent incapacity. That the award of Kshs 500,000/- was so inordinately high, excessive, unjustified and not reflective of the injuries suffered. They relied on the following cases to support their submissions:
 1. [*George Mugo & another v AKM \(minor suing through next friend and mother of ANK\)*](#) (2018) eKLR where Kemei, J awarded Kshs 90,000/- for soft tissue injuries in the form of blunt injury left shoulder, blunt chest injury interior, bruises of left wrist region and blunt injury left arm.
 2. [*George Kinyanjui t/a Climax Coaches & another v Hussein Mahad Kuyula*](#) (2016) eKLR where the court awarded Kshs 100,000/- for injuries on the chest, neck and knees.
 3. [*Ndungu Dennis v Ann Wangari Ndirangu & another*](#) (2018) eKLR where Ngugi J. reduced an award for soft tissue injuries to the lower right leg and to the back from Ksh. 300,000/- to Kshs 100,000/-.
 4. [*PF \(Suing as next friend and father of SK \(Minor\) v Victor O. Kamadi & another*](#) (2018) eKLR where the court enhanced an award of Kshs 50,000/- to Kshs 100,000/- for cut wound to the head, multiple small abrasions to the face, blunt injury to the head leading to loss of consciousness for some time, abrasions to the dorsum of the right hand and cut wound to the right leg.
4. The advocates urged the court to disturb the award and make one that corresponds to the injuries sustained.
5. The advocates for the respondent, Ben K Gichana & Co Advocates, submitted that it is a well settled principle of law that an appellate court will not disturb an award of damages unless the same was inordinately high or low as to wholly represent an entirely erroneous estimate of damages. Further that for the court to do so it must be demonstrated that the trial court applied 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. It was submitted that assessment of damages is a judicial discretion based on comparables. That the exercise is not exact science and that the best that the court can do is to consider the extent and nature of injuries suffered by a person in a particular case in relation to awards made by courts in similar cases.
6. The advocates submitted that at the lower court they had relied on the case of [*Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi*](#) where the 3rd plaintiff was awarded Kshs 350,000/- for more or less similar injuries as those sustained by the respondent herein. In this appeal they cited the case of [*Patrick Kinoti Miguna v Peter Mburunga Muthama*](#) (2014) eKLR where the High Court upheld an award of Ksh. 350,000/- for bruise on the right parental region, two loose lower incisors, dislocation of the right shoulder, cut on the left leg and bruise on the leg and dorsum of the right hand.
7. The advocates also relied on the case of [*Francis Ochieng & another v Alice Kajinba*](#), Migori HCCA No 23 of 2015 where Kshs 350,000/= was made to a plaintiff who had sustained multiple soft tissue injuries.
8. The advocates submitted that there is no compelling reason to interfere with the award. They urged the court to dismiss the appeal with costs.



Analysis and determination

9. As a first appellate court, this court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mobamed Sholan* (1955) 22 EACA 270).

10. The respondent had sustained the following injuries: Cut wound on the left gluteal region, Cut wound on the left leg, and Contusion on the chest.
11. The respondent at the lower court had requested the court to award Kshs 500,000 in general damages. The court acceded and awarded the same amount. The appellant does not appear to have made any submissions at the lower court.
12. The principles upon which an appellate court can interfere with an award of damages are settled. In the case of *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v AMM Lubia & another* (1982-88) 1 KAR 777 the Court of Appeal stated as follows:

“.....the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

13. In the case of *Butt v Khan* (1977) KAR 1 the Court said that:

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 at a figure which as either inordinately high or low.

14. It is also a principle of law that comparable injuries ought to attract similar awards.
15. I have considered the injuries sustained by the respondent in this matter. They were soft tissue injuries that healed without any complications. For the trial court to have awarded of Ksh. 500,000/- in general damages was inordinately high and represented an entirely erroneous estimate of the award. Normally soft tissue injuries do not attract such high awards unless the injuries are really serious. The trial magistrate did not give any reason for giving such a high award for soft tissue injuries. The magistrate did not interrogate the authority cited by the respondent and possibly compare the award therein with



other awards made by courts on similar injuries. Had she done so she would have found that the award of Ksh. 500,000/- was inordinately high. There is every reason for this court to interfere with the award made by the lower court and award a reasonable amount.

16. I have considered the authorities cited by the parties in this appeal. The injuries in the case of Patrick Kinoti Miguna (*supra*) that was relied on by the respondent involved, *inter alia*, a dislocation of the right shoulder. In the instant case there was no dislocation. The injuries in the cited case were therefore more serious than those suffered by the respondent in the instant case.
17. The other case relied on by the respondent was *Francis Ochieng & another v Alice Kajinba*, Migori HCCA No 23 of 2015. There were no copies of the said judgment attached and I could not find it in Kenya Law.
18. I have considered the injuries in the cases cited by the appellant as indicated above. The injuries therein were soft tissue in nature and compared well with the injuries sustained by the respondent in the instant case. The awards made ranged between Kshs 90,000/- and 100,000/-, The injuries suffered by the respondent herein were soft tissue in nature in the form of two cut wounds and contusion to the chest. I consider an award of Kshs 100,000/- to be reasonable.
19. The upshot is that the award made by the lower court was inordinately high and an erroneous estimate of the award that befitted the respondent. I therefore set aside the award and substitute it with an award of Kshs 100,000/- (subject to 10% liability).

Orders accordingly. The appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NYERI THIS 30TH DAY OF MARCH 2022.

J. N. NJAGI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Court Assistant – Mwangi

30 days Right of Appeal

