



**Omote & another v Ogutu (Civil Appeal E005 of 2021)  
[2022] KEHC 11097 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E005 OF 2021**

**F GIKONYO, J  
MAY 26, 2022**

**BETWEEN**

**EVANS ONERA OMOTE ..... 1<sup>ST</sup> APPELLANT**

**MARY ARIRI EVANS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID OGINGA OGUTU ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. G.N. Wakabiu (C.  
M) Delivered on 28th April 2021 in Narok CMCC No. 62 of 2020)*

**JUDGMENT**

1. The Memorandum of Appeal dated 30<sup>th</sup> April 2021 challenges quantum of damages awarded in the judgment of the trial court delivered on the 28<sup>th</sup> April 2021. Specific orders that were made by the trial court are: -

- i. The defendants are 100% liable for the accident
- ii. General damages Kshs. 400,000/=
- iii. Special damages Kshs. 5,750/=

Total Kshs. 405,750/=

Plus, costs of this suit

**Submissions**

2. The appeal was canvassed by way of written submissions.



### **Appellant's submissions**

3. The appellants submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding Kshs. 400,000/= in general damages.
4. According to the appellants, an award of Kshs. 100,000/= would be adequate compensation for the injuries suffered.
5. Thus, the appellants urged this court to allow the appeal with costs of the appeal to them on the basis of Section 27(1) of the C.P.A.; set aside the judgment of the trial court and reassess the quantum based on their submissions herein and in the trial court.
6. The appellants relied on the following authorities;
  - i. *Kemfro Africa Limited t/a Meru Express Services [1976]' & Another Vs Lubia & Another (No. 2)* [1985] eKLR.
  - ii. *Catholic Diocese of Kisumu Vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 as quoted in *Mumbi Ngumbi Kasamu (Suing as the legal representative of the estate of Boniface Mulinge Mbithe (Deceased v Mutua Mulaa & Another* [2019] eKLR
  - iii. *Kim Pho Choo vs Camden & Islington Area Health Authority* (1979) 1 All ER 332 Cited in The Case of *Nancy Oseko v Board Of Governors Masai Girls High School* [2011] eKLR
  - iv. *Maimuna Kilungya v Motrex Transporters Ltd* [2019] eKLR
  - v. *Daniel Gatana Ndungu & Another V Harrison Angore Katana* [2020] eKLR
  - vi. *PF (Suing as The Next Friend and Father of SK (Minor) v Victor O Kamadi & Another* [2018] eKLR

### **Respondent's submissions**

7. The respondent submitted that the record of appeal before this court is incomplete, incompetent and fatally defective and ought to be struck out for lack of certified copy of the decree, order and /or judgment appealed against.
8. According to the respondent, damages awarded by the trial magistrate is not excessive and / or manifestly high taking into consideration the nature of the injuries sustained by the respondent.
9. They took the view that the learned trial magistrate took into consideration all relevant factors and applied the applicable principles in awarding the respondent Kshs. 200,000/= general damages and special damages of Kshs. 5,750/=; general damages are commensurate to the injuries sustained.
10. To the respondent, the appeal lacks merit, is incompetent and should be dismissed and / or struck out with costs to the respondent.
11. The respondent relied on the following authorities;
  - i. Nairobi Supreme Court Petition No. 15 of 2014 *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2others*
  - ii. Nairobi CA No. 12 of 1987 *Chege v Suleiman*
  - iii. Voi HCCA No. 16 of 2017 *Kilonzo David t/a Silver Bullet Bus Company vs Kyalo Kiliku & Another.*



- iv. Nyeri HCCA No. 51 of 2013 *Ndegwa Kamau t/a Sideview Garage Vs Fredrick Isika Kalumbo*
- v. Kiambu HCCA No. 31 of 2018 *Rachael Wambui Nganga & Another vs Rahab Wairimu Kamau*
- vi. Order 42 C.P.R.
- vii. Order 42 Rule 13 (4) (f) C.P.R.
- viii. Mombasa Ca No. 148 of 2010, *Jackson Murerwa vs Jaimbe Enterprises* [2011] eKLR
- ix. *Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia & Another (No.2)* [1982-88] KAR 727
- x. *Asal v Muge & Another* [2001] eKLR

### **Analysis and Determination**

Duty of court

12. As first appellate court, I will re-evaluate the evidence and come to own conclusions, except, giving allowance of the fact that I neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court (*Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123).

Issues

13. Issues for determination are: -
  - i. Of record of appeal; Whether incompetent and ought to be struck out;
  - ii. Of liability; who is to blame for the accident?
  - iii. Of Damages: Whether the trial court adopted wrong principles in assessment of damages.

Of the Record of Appeal

14. The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

16. Order 42 Rule 2 of the Civil Procedure Rules provides as follows: -

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

17. Order 42, Rule 13(4)(f) of the *Civil Procedure Rules*, 2010 provides;



- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
- (a) The memorandum of appeal;
  - (b) The pleadings;
  - (c) The notes of the trial magistrate made at the hearing;
  - (d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
- Provided that—
- (i) A translation into English shall be provided of any document not in that language;
  - (ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”
18. According to this rule, at part f (ii) thereof before allowing the appeal to go for hearing the judge has discretion to dispense with certain documents but such discretion does not extend to dispensation of the memorandum of appeal, the pleadings and the judgment, the order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.
19. In this case, the request to strike out the Record of Appeal is on grounds that the Appellant failed to attach a certified copy of judgment, order and decree appealed from.
20. A perusal of the Record of Appeal shows that the appellant attached a copy of certified proceedings, judgment and all documents filed in the trial court. the original trial court’s file and record with all documents filed and evidence tendered before the trial court is before the court. accordingly, I do not find any merit in this objection. And, as a matter of emphasis, this is the era of serving substantive justice by hearing parties rather than summary dismissal of cases (art. 50 and 159 of *the Constitution*). So, failure to include a certified copy of the decree in the Record of Appeal should not invalidate an appeal as; i) the court may extend time for its filing; ii) or it is in the trial court’s file.
21. I therefore reject the invitation to strike out the appeal on the said ground.

### **Liability**

22. The accident involved two motor vehicles registration numbers KBU 199K and KCF 325T. The respondent was a passenger in motor vehicle registration no. KBU 199K. Where does the blame lie?
23. PW1 testified that the police officers from Narok police station visited the scene and documented the same. He stated that motor vehicle KBU 199K driven by the 1<sup>st</sup> appellant was to blame. The said vehicle was blamed for causing the accident, for it was coming from oasis filing station while KCF 325 T was from Bomet direction facing Narok town and the driver of KBU 199K failed to give way. The police abstract P EXH 2 indicated that motor vehicle registration no. KBU 199K is to blame for the accident under the traffic law and regulations. PW2, the respondent confirmed the position stated by PW1.



24. The appellants did not call any witness to challenge or dispute the respondent's evidence in the manner the accident occurred. The evidence is therefore uncontroverted.
25. Drawing upon the evidence adduced, I find that the respondent proved his case on a balance of probabilities as required by law; more specifically, that the appellant was 100% to blame for the accident as a result of its driver's negligence to which the appellants as joint owners of KBU 199K are vicariously held liable. I so find and hold.

### **Quantum**

26. 'An appellate court will not disturb an award for general 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 was either inordinately high or low...' (Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR)

### **Applying the test**

27. The final order show that the trial magistrate entered judgment for the respondent, inter alia, a sum of Kshs. 400,000/= in general damages. The appellants regard it to be inordinately high. The respondent states that the award is commensurate to the injuries sustained.
28. The amount of damages is assessed by the court after evaluation of the nature and extent of injuries; and of course being guided by comparable awards in earlier decisions (*Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR)
29. The respondent herein sustained the following injuries: deep cut wound on the right periorbital region of the face leading to soft tissue injuries, deep cut wound on the neck leading to soft tissue injuries, and deep cut wound on the right knee joint leading to soft tissue injuries.
30. PW3, Dr. Obed Omuyoma testified and confirmed the injuries as per the plaint. The appellants closed their case without calling any witnesses. Therefore, the medical evidence is uncontroverted.
31. From the authorities cited by the appellants, the awards therein for similar injuries range from Kshs. 100,000/= to Kshs. 140,000/=. I have noted that the cases cited are for the 2018,2019 and 2020. I have perused the trial court record and the judgment delivered on 28<sup>th</sup> April 2021, the trial court assessed general damages in the sum of Kshs. 200,000/= as follows;
 

“From the foregoing it is my view that an award of Kshs 200,000/= would be sufficient and adequate”
33. The trial court also made a finding that the plaintiff had proved Kshs. 6,050/= as special damages and recorded: -
 

‘...also a perusal to the plaintiffs’ documentation evidence. I find that the plaintiff have proved Kshs. 6,050/= as under  
Payment of medical report Kshs. 5,000Payment of eye clinic Kshs. 500Payment of vehicle inquiry Kshs. 550”
34. Upon consideration of authorities cited by the parties, the award by the trial magistrate of the sum of Kshs. 200,000 in general damages is a commensurate and fair award in view of the injuries sustained by the respondent. Although the injuries were soft tissue, they involved deep cuts and wounds on the



head, neck and knee joint. When you also consider inflationary trends, the award is not excessive. The trial court did not commit any error of principle or make excessive award. I dismiss, the appeal.

35. I have, however, noted the apparent mix up of the findings and final orders in the judgment by the trial court. For clarity, therefore, judgment is entered for the respondent against the appellants jointly and severally as follows: -

- i. The appellants are held 100% liable for the accident.
  - ii. General damages Kshs. 200,000/=
  - iii. Special damages kshs.5, 750/= as pleaded although Kshs. 6,050 was proved.
- Total Kshs. 205,750/=
- Costs and interest.

36. Each party shall bear its own costs of this appeal. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
26TH DAY OF MAY 2022**

.....

**F. GIKONYO M**

**JUDGE**

**In the presence of:**

M/s Chichi for the Appellant

Obae for the Respondent

Mr. Kasaso CA

