



**Otieno v Musimbi (Civil Appeal 27 of 2017)
[2022] KEHC 11705 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 27 OF 2017
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

GEORGE OTIENO APPELLANT

AND

LILIAN ADOLWA MUSIMBI RESPONDENT

JUDGMENT

1. What is before this court is an appeal against the decision and judgment of Honourable Obulutsa Chief Magistrate in Eldoret CMCC 347 of 2015 where the plaintiff/respondent sued the defendant/appellant for general and special damages. The cause of action was that on 18th April 2015 the plaintiff was traveling in vehicle motor registration KAR 670B along Eldoret – Kitale road when the defendant negligently and recklessly drove motor vehicle KAR 670B causing the same to be involved in an accident and as a result the plaintiff sustained severe injuries.
 1. The trial court upon considering all the submissions, testimony and evidence found the appellant liable and awarded the respondent kshs 303,532/- in damages. The appellant being dissatisfied with the decision of the court filed the present appeal vide a memorandum of appeal. the appeal was based on 11 grounds including;
 2. That the learned trial magistrate erred in law and in fact in failing to dismiss the respondent’s suit on quantum in the lower court as she had not proved here case on a balance of probability.
 3. That the learned trial magistrate erred in law and in fact by failing to evaluate evidence and the injuries sustained by the respondent as evidence in the medical documents.
 4. That the learned trial magistrate erred in law and in fact in awarding the respondent a sum of kshs. 3,532/- as special damages that were not proved to the required standard of law.



5. That the learned trial magistrate erred in law and in fact by awarding the respondent a sum of kshs. 300,000/- as general damages for pain and suffering that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.
 6. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and legal authorities relied upon in support of the defence thereof.
 7. That the learned trial magistrate erred in law and in fact in disregarding the relevant evidence on record hence resulting to a wrong decision.
 8. That the learned trial magistrate erred in law and in fact by not applying the basic principles of the law of tort in analysing the evidence before him in this suit during trial.
 9. That the learned trial magistrate completely and wholly misdirected himself on law applicable and arrived at an erroneous decision.
 10. That the learned trial magistrate erred in law and in fact by overly relying on the respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.
2. There are no submissions on record for the appellant.
 3. The respondent submitted that he was merely a passenger and did not in any way contribute to the accident. The appellants witness statement was adopted in evidence and he stated that Motor vehicle KAR 670B swerved to the right side of the road to avoid hitting motor vehicle KAQ 989A. the court's finding on liability was proper in the circumstances as the respondent was a passenger and the appellant's driver did not take any evasive action so as to avoid the accident. Further, the driver did not brake or otherwise exercise adequate control of the vehicle so as to prevent the same from being involved in an accident.
 4. From the medical documents, the respondent sustained blunt trauma to the neck and chest which was tender, a cut wound on the right ring finger which was tender, both legs were swollen and tender with bruises. The sum of kshs. 300,000/- as general damages as awarded by the court sufficed as adequate compensation. He cited the cases of Nyeri HCCC 320 of 1998 – *Catherine W. King'ori vs Gibson T Gichubi* and Nairobi HCCA No. 791 of 1999 – *Martin M Mugi v Attorney General* in support of his submissions for the quantum on general damages. the appeal lacks merit and it should be dismissed.
 5. Upon perusing the pleadings, record and submissions of the parties, I have identified the following issues for determination;
 1. Whether the trial court erred in its finding on liability
 2. Whether the award for damages was excessive
 - Whether The Trial Court Erred In Its Finding On Liability
 6. This Court being the first appellate Court is under a duty to re-evaluate the evidence adduced before the trial court and come up with its findings and conclusions.



7. In the case of *Abok James Odera t/an A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated the following with regard to the duty of a first appellate court: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority v Kusthon (Kenya) Limited* [2009] 2EA 212 wherein the Court of Appeal held, inter alia, that: -

On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

8. The defence witness, the turnboy stated that there was a third vehicle, registration number KAQ 986A that caused the accident but the plaintiff did not bother to enjoin said motor vehicle as a third party.
9. Upon examining the judgment, proceedings and the record of appeal, I have found no reason to interfere with the decision of the court with regards to liability.

Whether the award for damages was excessive

10. It is trite law that when assessing general damages, courts should be guided by comparable awards in similar cases. In *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

11. The injuries sustained by the respondent as per the medical report and the pleadings were; Blunt trauma to the neck which was tender, Blunt trauma to the chest which was tender, cut wound on the right ring finger which was tender, both legs were swollen and tender with bruises.
12. In *Ben Mengesa v Edith Makungu Land* [2013] eKLR the respondent had the following injuries; Blunt injury to the head, both shoulders, Blunt injury to the back Numbness of the lower limbs, Tender lumbo sacral spine, Post traumatic osteoarthritis of the lumbar spine, Injury to both legs, Injury to the chest
13. In *Joseph Kimani Gathaga & another v Dickson Ndungu Njoroge* [2019] eKLR the court awarded kshs. 240,000/- after setting aside the trial court’s award of kshs. 500,000/- where the respondent had the following injuries; Head concussion, Swollen, tender face, Bruises on peri –orbital region, Bruises – left hand, Blunt injuries – left leg, Blunt injury – back and chest, Swollen, tender left knee, cut would and swelling – left elbow.
14. While I note that the trial court did not expressly state the authorities it relied on in arriving at the quantum, I find that the same is within the comparable award for general damages for similar injuries.
15. I find that the appeal is unmerited and is hereby dismissed with costs to the respondent.



DELIVERED, SIGNED AND DATED AT ELDORET VIA EMAIL THIS 20TH DAY OF MAY 2022.

R. NYAKUNDI

JUDGE

