



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyambane & another v Ombasa (Civil Appeal E012 of 2021)  
[2022] KEHC 14432 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 14432 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E012 OF 2021**

**JN NJAGI, J**

**JUNE 30, 2022**

**BETWEEN**

**BENARD NYAMBANE ..... 1<sup>ST</sup> APPELLANT**

**FRIDAH MOKEIR A NYAMIKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENARD OGOTI OMBASA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. B. M. Kimtai, PM,  
in Keroka PM's Court Civil Suit No. 101 of 2018 delivered on 2/9/2020)*

**JUDGMENT**

1. The respondent herein who was the plaintiff at the lower court had sued the appellants seeking for general and special damages on claims that he had been hit by the appellants' motor vehicle Registration No KBM 955Z Toyota Hiace while travelling as a pillion passenger on a motor cycle along Keumbu - Igare road whereupon he received injuries. The respondent blamed the appellant for causing the accident through careless driving. After a full hearing the trial magistrate found the appellant to have been wholly liable for the accident and awarded the respondent Ksh 600,000/= in general damages and Ksh 6,500/= in special damages. The appellant was aggrieved by the award and filed the instant appeal.
2. The grounds of appeal are that:
  1. The learned trial magistrate erred in law and in fact in awarding liability 100% in favour of the Plaintiff as against the Defendants.
  2. The learned trial magistrate erred in law and in fact in awarding Ksh 606,500/= as damages which amount was excessive and lacked basis.



3. The learned trial magistrate erred in law and fact in awarding as general damages which amount was excessive, unjustified and contrary' -to the evidence on record.
4. The learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at any excessive and unjustified award.
5. The trial magistrate erred in law and fact by failing to consider the Appellants' evidence and submissions on record.

#### **The evidence -**

3. It was the evidence of the respondent (PW 1) that he was travelling on motor cycle when the motor cycle was hit from behind by the appellants' motor vehicle. The respondent sustained injuries. He blamed the driver of the motor vehicle for causing the accident.
4. The appellants in their written statement of defence denied causing the accident and blamed it on the respondent. They however did not call any witness in the case. The trial court consequently held that the defence was unsubstantiated and found the appellants wholly to blame for the accident.

The appeal was on both liability and quantum of damages. I will proceed to consider the appeal on the two sub-headings.

#### **Liability-**

5. The appeal was canvassed by way of written submissions. The submissions for the appellants did not touch on the issue of liability and were only limited to quantum. The respondent on the other hand submitted that the evidence of the respondent on how the accident occurred was not challenged. They sided with the trial magistrate who cited the case of *John Wainaina Kagwe v Hussein Dairy Ltd* (2013) eKLR where it was held that:

The respondent never called any witness with regard to occurrence of the accident, meaning that the allegations in his defence with regard to blameworthiness of the accident on the Appellants either wholly or substantially remained just that; mere allegations.

6. The respondent urged this court to find that the trial court was right in holding the appellant wholly liable for the accident.
7. This being a first appeal, the duty of the court is to analyze and re-evaluate the evidence adduced before the trial court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify — see *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA123.
8. The standard of proof in civil cases is on a balance of probabilities. In *Monarch Insurance Company Ltd v Warucia Mwangi* [2020] eKLR it was held as follows:

The duty of the plaintiff is to prove his claim against the defendant on a balance of probabilities. What amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 where the Court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%



as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that is probable than not that the allegations that he made occurred.”

9. Section 107 of the *Evidence Act* requires -
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
10. There is also the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See *Isca Adhiambo Okayo v Kenya Women's Finance Trust* KSM CA Civil Appeal No 19 of 2015 [2016] eKLR). That is captured in sections 109 and 112 of the *Act* as follows:
  - “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
11. In the instant case, the respondent adduced evidence that it is the driver of the appellants who was to blame for the accident for hitting the motor cycle the respondent was travelling on from behind. The appellants did not challenge this evidence by adducing evidence to the contrary. The evidence of the respondent therefore remained unchallenged. In the premises, the trial court was correct in finding the appellants wholly liable for the accident.

## Quantum

12. According to the medical report of Dr Morebu, the respondent sustained the following injuries:
  - Facial bruises
  - Blunt trauma on the chest
  - Contusion on both forearms
  - Cut wound on the left foreleg
  - Compound fracture of the left tibia and fibula
  - Fracture on the proximal (left proximal femur)
13. The doctor examined the respondent on the 22/5/2018 which was about five months after the accident during which time the doctor noted that the injuries were in the process of healing. He opined that recovery was expected to take a long time and assessed permanent disability at 30%.
14. The respondent was examined for a second medical report on 4/2/2019 by Dr Jenipher Kahuthu on behalf of the appellants. The report of the said doctor confirmed a compound fracture on the left distal tibia/fibular. The doctor was however of the view that Dr Morebu was wrong in awarding the respondent 30% disability as the patient was expected to make full recovery after the necessary surgical intervention to; fix the fracture. Further to this, the doctor discounted the findings of Dr Morebu that the respondent sustained fracture of the femur on the ground that the same was only queried in the



treatment notes and there was no x-ray availed to confirm the diagnosis. That a check left hip x-ray done on 4/2/2019 did not show any evidence of a fracture having been sustained.

15. The advocates for the appellant, Kimondo Gachoka & Co. Advocates, submitted that the examination by Dr Kahuthu led to the conclusion that the respondent was expected to make a full recovery after necessary surgical intervention. That the award of Ksh 600,000/= in general damages is too high as to an erroneous estimate of the damages and ought to be reduced. That an award of Ksh 250,000/= would be sufficient given the nature of injuries suffered by the respondent. The appellant relied on the following authorities:
- i. *Zachariah Mwangi Njeru v Joseph Wachira Kanoga*, Nyeri HCCA No 9 of 2012 (2014) eKLR where the court substituted an award of Ksh800.000/= with one of Ksh 400,000/= in a case where the plaintiff had sustained comminuted fracture of the tibia and fibula.
  - ii. *Harun Muyoma Boge v Dr Daniel Otieno Agula*, Migori HCCA No 86 of 2012 (as quoted in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother)* (2019) eKLR) where the appellate court substituted an award of Ksh 150,000/= with one of Ksh 300,000/= where the plaintiff had sustained multiple injuries and fractures of right tibia and fibula.
  - iii. *Mbiti Muinde William v Rose Mutheu Mulatia* (2019) where the award was reduced from Ksh 700,000/= to Ksh 400,000/= where the respondent had sustained a swollen left, wrist and left leg, fracture of the left 5<sup>th</sup> metacarpal bone and fracture of the right tibia.
  - iv. *Naom Momanyi v G4S Security Services Kenya Limited* (2018) eKLR where the appellant sustained a fracture of the left- right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. The injuries had left the appellant with a deformed and wasted right leg with 30% disability. On appeal the award was enhanced from Ksh 200,000/= to Ksh 300,000/=.
  - v. *Isaac Mwenda Micheni v Mutegi Murango* NRB HCCC 335 of 2004 (2004) eKLR (as quoted in *Jitan Nagra v R D O* (2018) eKLR) where an award of Kshs 300,000 was awarded to a Plaintiff who had suffered a fracture of the left tibia and fibula coupled with soft tissue including a wound on the scalp, cut wound on the knee and bruised right forearm.
  - vi. *Gogni Construction Company Limited v Francis Ojuok Olewe* HB HCCA No 1 of 2014 (2015) eKLR (as quoted in *Jitan Nagra v R D O* (2018) eKLR) where the claimant had sustained a fracture of the left distal radius and ulna and dislocation of the left elbow, hospitalized for 6 weeks and was awarded Ksh 300,000/=.
  - vii. *Gladys Lyaka Mwombe v Francis Namatsi & 2 Others* (2019) eKLR where the appellant had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck of the lower tibia and fibula and a cut wound on the face and the High Court upheld an award of Ksh 300,000/=.
16. The appellant submitted that the injuries suffered by the respondent were in line with the ones they have offered in support of the appeal. That there was no permanent incapacity expected as per the re-examination. That the figure they have proposed is therefore sufficient.
17. The respondent on the other hand submitted that the defence doctor confirmed the injuries sustained by the respondent vide her report dated 4/2/2019. That the doctor confirmed that the Respondent will require surgical intervention (ORIF) to fix the tibia- fibula fractures which had not united well. That based on the injuries sustained by the respondent, the award of Ksh 600,000/= was adequate and



should be upheld. The advocates for the respondent did not however cite any authorities on quantum in this appeal.

18. The principles upon which an appellate court will interfere with an award of damages made by a lower court are as was stated in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) 1 KAR 777: -

“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 wholly erroneous estimate of the damages.”

19. The same was reiterated in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to /which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A 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 was either inordinately high or low.”

20. I have considered the medical reports of both Dr Morebu and Dr Kahuthu. Dr Kahuthu was of the opinion that the only injury sustained by the respondent was the left tibia/ fibula fracture as it was confirmed by x-ray. That the femur injury alluded to by Dr Morebu was not confirmed by x-ray and therefore that no such injury was sustained.
21. The respondent did not counter the opinion of Dr Kahuthu that there was no femur fracture. The burden of proof was on the respondent to prove that the femur fracture was indeed sustained. The best way of proving a fracture is by production of an x-ray. The respondent did not produce any x-ray to prove the femur fracture. In the premises, I can only conclude that there was no femur fracture and therefore that the only fracture sustained by the respondent was the tibia/ fibula fracture. The trial court failed to consider the issue on whether or not the femur fracture "was sustained despite submissions by the appellant to that trial court erred in that respect. The award of in general damages was thereby excessive in that it was arrived at by inclusion of an injury that was not sustained.
22. Dr Morebu observed that the respondent was not in a position to walk without support and assessed permanent incapacity at 30%. Dr Kahuthu opined that full recovery was expected after surgical intervention. There was however no evidence that such an intervention was done. I therefore uphold the 30% disability as assessed by Dr Morebu.



23. The appellant cited authorities where awards ranging from Ksh 300,000/= to 400,000/= were made for tibia and/or fibula fractures. The respondent herein had sustained a compound fracture of the left tibia and fibula. In the case of Zachariah Mwangi Njeru v Joseph Wachira Kanoga (supra) that was relied on by the advocates for the appellant, the court awarded a sum of Ksh 400,000/= for comminuted fracture of the tibia and fibula. The injuries therein were comparable to those sustained by the respondent herein except that the respondent herein had in addition suffered 30% permanent incapacity. Taking into consideration the permanent incapacity visited on the respondent, I am of the view that an award of Ksh 500,000/= would be adequate compensation for the injuries sustained.
24. The upshot is that the finding on liability by the trial court at 100% is upheld. The award on general damages in the sum of Ksh 600,000/= is however set aside and substituted with an award of Ksh 500,000/=. Each party to bear its own costs to the appeal.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**J. N. NJANGI**

**JUDGE**

**In the Presence of: -**

Mr. Ndolo holding brief for Mr. Njuguna for Appellant

Miss Sagwa for Respondent

Court Assistant

30 days Right of Appeal.

