



**Ogembo & another v Arika (Civil Appeal 29 of 2021)
[2022] KEHC 12219 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 29 OF 2021
REA OUGO, J
JULY 28, 2022**

BETWEEN

SHABAN MOSETI OGEMBO 1ST APPELLANT

GEORGE KAMANDA OGEMBO 2ND APPELLANT

AND

RICHARD MOKUA ARIKA RESPONDENT

*(Appeal from the Judgment and Decree of Hon. D.O Mac'Andere (RM)
dated 12th March 2021, in the original KISII CMCC No 840 of 2019)*

JUDGMENT

1. The appeal before the court challenges the damages awarded by the trial court following a road traffic accident that occurred on 18th September 2019. The respondent was a pillion passenger on motor cycle registration number KMEE 156H when the driver of motor vehicle registration number KCL 537J lost control, veered off its lane and hit the motor cycle the respondent was travelling on thereby causing an accident.
2. As a result of the accident, the respondent claimed to have sustained the following injuries: a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee.
3. The appellants filed their statement of defence and the 1st appellant denied owning the motor vehicle. The appellants also denied occurrence of the accident. It was also pleaded without prejudice that the 1st and 2nd appellants were not vicariously liable for the accident and that the accident was as a result of the carelessness or recklessness of the respondent and the driver of motor cycle registration no. KMEE 156H.



4. On 2nd February 2021, the parties entered consent on liability in the ratio of 70:30 in favour of the respondent. The trial court at the conclusion of the hearing awarded the respondent Kshs 500,000/- less 30% contribution, special damages of Kshs 7,890/- and costs.
5. The appellants the instant appeal on the following grounds:
 1. That an award of both general damages made in favour of the respondent was manifestly and inordinately excessive in the circumstance.
 2. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
 3. That the learned trial magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
 4. That the learned trial magistrate erred in law and in fact when the same relied on extraneous issues as a basis for his determination on liability.
6. The appeal was disposed by way of written submissions. The appellant through the firm of M/s Otieno & Company Advocates filed their submissions on 14th December 2021 while firm of Ombuhi K. Mogire Advocates filed submissions dated 2nd February 2022 on behalf of the respondents.
7. In an appeal against quantum of damages awarded by the subordinate court, the court should not ordinarily interfere with the findings of a trial court unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This was the Court of Appeal's finding in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another* (No.2) [1987] KLR 30 where the court stated:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.
8. There was no contention as to the nature of injuries sustained by the respondent. The appellant contend that an award of Kshs 100,000/- was sufficient compensation for the injuries sustained by the respondent. They relied on the case of *Ndungu Dennis v Wangari Ndirangu & Another* [2016] eKLR in which the court awarded general damages of Kshs 100,000/- where the plaintiff had sustained blunt injuries to the head, chest and both hands. In *Maina Kilyungya v Notrex Transporters Ltd* [2019] eKLR the plaintiff sustained soft tissue injuries including blunt neck injury, blunt left shoulder injury and bruises on the left ear which injuries the appellants submitted were more similar to those suffered by the Respondent herein. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR the respondent therein sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/- on general damages and substituted it with an award of Kshs 140,000/-. The appellants submitted that the award of Kshs 500,000/- was inordinately high.
9. The respondent submitted that an award of Kshs. 500,000/- was not inordinately high to warrant interference by the court. The award for general damages was commensurate with the injuries suffered by the respondent.



10. I now turn to the award of general damages. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR held as follows:

“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. In the case of *Godwin Ireri v Franklin Gitonga* [2018] eKLR the plaintiff had sustained the following injuries: Contusion on the neck, left midleg and chest, blunt trauma to both shoulders and lower back, bruises on the right knee, left arm and hand and subluxation of left ankle. The plaintiff was awarded Kshs 90,000/-. In the Daniel Gatana Ndungu & another v Harrison Angore Katana case (*supra*) the respondent sustained a cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee and was awarded Kshs. 140,000/-. The respondent having sustained only soft tissue injuries without any fracture, the trial magistrate erred when it made an award Kshs. 500,000/-. In my view after considering awards made for comparable injuries I find that an award of Kshs 500,000/- for general damages was inordinately too high.
12. The upshot of the above is that the instant appeal succeeds on the award of general damages and the lower court’s award of general damages in the sum of Kshs 500,000 is hereby set aside and substituted with the award of Kshs 150,000 for general damages. This award is subject to contribution of 30%. The appellants are awarded cost of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY 2022.

R.E. OUGO

JUDGE

In the presence of:

Miss Wakiaga For the 1st and 2nd Appellant

Miss Ongwancha For the Respondent

Aphline/ Emily Court Assistant

