



Bungoma Minto Savings & Cooperative Society v Onyancha (Civil Appeal E026 of 2022) [2022] KEHC 15774 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E026 OF 2022
KW KIARIE, J
NOVEMBER 30, 2022**

BETWEEN

BUNGOMA MINTO SAVINGS & COOPERATIVE SOCIETY APPELLANT

AND

CHARLES MAGOTI ONYANCHA RESPONDENT

(Being an Appeal from the judgment in Oyugis Principal Magistrate's PMCC No. 157 of 2019 by Hon. B. Omwansa—Senior Principal Magistrate)

JUDGMENT

1. Bungoma Minto Savings & Cooperative Society, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No. 157 of 2019. This was a claim that arose from a road traffic accident involving motor vehicles registration number KCN 194T Toyota Matatu in which the respondent was a passenger. The respondent sustained injuries. In the judgment that was delivered on 30th May 2022, the appellant was held 100% liable for the injuries. The respondent was awarded Kshs. 2,200,000.00 general damages and Kshs.6,820.00
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Kimondo Gachoka & Company Advocates. He raised grounds of appeal as follows:
 - a. The learned magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.
 - b. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - c. The learned magistrate erred in law and fact in finding the appellant 100% liable.



- d. The learned magistrate erred in law and fact in failing to find the third party 100% liable for the accident in view of the evidence produced before the trial court and in particular the following;
 - e. The learned trial magistrate erred in law and fact in awarding the plaintiff/respondent kshs.220,000/- for general damages hence arriving at a wrong finding as regards the nature of injuries sustained by the plaintiff;
 - f. The learned trial magistrate erred in law and fact by awarding the plaintiff an inordinately high quantum as damages in the circumstances of this case.
 - g. The learned magistrate erred in law and fact in awarding the plaintiff a sum that was excessive an amount that is erroneous as to the estimate of general damages suffered by the plaintiff.
 - h. The learned magistrate erred in fact and in law in failing to consider the appellant's submissions on quantum and liability and legal authorities relied upon in support thereof;
 - i. The learned magistrate erred in law and fact by overly relying on the respondent's submissions which were not relevant and without addressing his mind to the circumstance of the case.
 - j. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
3. The appeal was opposed by the respondent through the firm of Sonye J. Ondari & Company Advocates. It was argued that the finding on liability was based on the evidence on record and that the award was reasonable in the circumstances of this case.
 4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 5. Charles Magoti Onyancha, the respondent herein contended that he was a fare paying passenger in motor vehicles registration number KCN 194T Toyota Matatu. He blamed the driver for the accident. The driver did not testify to explain how the respondent may have contributed to the accident as pleaded in the defence. The respondent therefore discharged his onus as to who caused the accident. Since accidents do not just happen, the learned trial magistrate cannot therefore be faulted for finding the appellant's driver 100% liable.
 6. The appellant contended that the award in general damages was inordinately high. According to the medical report by Dr. Murebu Peter Momanyi the respondent sustained the following injuries:
 - a. Chest contusion;
 - b. Tenderness to the chest;
 - c. Blunt trauma to the left shoulder;
 - d. Tenderness on the left shoulder;
 - e. Blunt trauma on the left hip; and
 - f. Tenderness on the left hip.
 7. The respondent had been treated by antibiotics and analgesics. The doctor opined that he sustained soft tissue injuries.



8. At the trial, the appellant proposed an award of Kshs. 50,000/= in general damages. The following cases were cited and relied upon for the proposal:
- a. [*HB \(Minor suing through mother & next friend DKM\) vs. Jasper Nchonga Magari & another*](#) [2021] eKLR
 - b. [*Eva Karemi & 5 others vs. Koskei Kieng & another*](#) [2020] eKLR
9. The respondent on the other hand made a proposal of Kshs. 400,000/= general damages and relied on the following authorities:
- a. [*Moiz Motors Limited & another vs. Harun Ngethe Wanjiru*](#) [2021] eKLR.
 - b. [*Francis Njunge Karanu vs. Rose Ndinda Kitema*](#) [2021] eKLR.
10. In the case of *HB (Minor suing through mother & next friend DKM) vs. Jasper Nchonga Magari & another* [2021] eKLR, the claimant sustained blunt object injury to the head and neck, thorax, abdomen and limbs. On routine examination Dr. Adede opined that the injuries suffered amounted to soft tissue injuries. The appellant that the award of Ksh.60, 000/=. In the case of *Francis Njunge Karanu vs. Rose Ndinda Kitema* [2021] eKLR there were six claimants. They were awarded as follows:
- a) The 1st appellant was awarded Kshs. 70,000/-. She sustained injuries to her right thigh and bruises on her lower and upper limbs.
 - b) The 2nd appellant was awarded Kshs. 40,000/- for injuries on the right shoulder pain and cut wound on her mouth.
 - c) The 3rd appellant was awarded Kshs. 45,000/- for injuries on and pain on her back and right shoulder pain.
 - d) The 4th appellant was awarded Kshs. 40,000/- for cuts on the chin and right shoulder tenderness.
 - e) The 5th appellant was awarded Kshs. 60,000/ for injuries sustained; 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint).
 - f) The 6th appellant was awarded Kshs. 65,000/- for injuries sustained being bruising on the forehead, hip and left ankle.
11. In the case of *Moiz Motors Limited & another vs. Harun Ngethe Wanjiru* [2021] eKLR medical examination showed that the respondent suffered the following injuries:
- Multiple scars on the face, and the skull x-ray showed depressed fracture of the frontal bone; on chest palpation he found tenderness on the right side, and the Chest X-ray did not show any fracture, haemothorax or pneumothorax; on the lower limbs he found multiple healed bruises on both hip joints and knee joints.
- An award of kshs.500, 000/= was made.
12. The court in *Francis Njunge Karanu vs. Rose Ndinda Kitema* [2021] eKLR awarded Kshs. 500,000/= general damages for pain and suffering. The claimant had sustained multiple soft tissue injuries and per vaginal bleeding.
13. In order for an appellate court to interfere with the trial court's discretion quantum of damages, certain conditions must be met. These conditions were outlined in the case of [*Kemfro Africa Limited t/a*](#)



“Meru Express Services (1976)” & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984
[1985] eKLR 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.

In the instant appeal, I find that there is no reason to compel me to interfere with the quantum of damages. I therefore dismiss the appeal with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF NOVEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

