



REPUBLIC OF KENYA



KENYA LAW
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**Nyabuto & another v Ogoncho (Civil Appeal 117 of 2021)
[2022] KEHC 17145 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 117 OF 2021
REA OUGO, J
NOVEMBER 22, 2022**

BETWEEN

JOASH OUKO NYABUTO 1ST APPELLANT

ANTHONY OCHIENG' OKELLO 2ND APPELLANT

AND

CLINTON MOTIEKA OGONCHO RESPONDENT

*(Being an Appeal from the judgment delivered by the Honourable
N.S Lutta Chief Magistrate on 22nd September 2021)*

JUDGMENT

1. The respondent instituted his suit by plaint filed on October 25, 2019 before the subordinate court. The main issue in the suit was that the respondent traffic accident, he sustained injuries and blamed the appellants for causing the accident. The appellants were the owner of motor vehicle registration no KCD 152F and according to the respondent, on June 1, 2019 the appellant's vehicle was driven in a negligent manner thus hitting the motor cycle in which he was a passenger. The respondent claimed that as a result of the accident he sustained the following injuries: head injury with loss of consciousness; blunt trauma to the nerve; left shoulder and left knee; bruises on the hand and multiple bruises on the face; deep cut wound on the right parietal region and fractured two upper canines. The appellants' denied the occurrence of the accident and pleaded in the alternative that if the accident did occur, it was due to the negligence of the respondent.



2. The trial magistrate after conducting a hearing found that the respondent had proved his case on a balance of probabilities and found the respondent 100%. On damages the trial magistrate found as follows:

“In my considered view and with the guidance of *Reamic Investment Limited v Joaz Ameyia Samuel* [2021] eKLR, an award of Kshs 350,000/- would be adequate compensation to the plaintiff as general damages. The special damages proved are Kshs 5,000/-.”

3. The appellants dissatisfied with the finding of the trial magistrate has lodged the instant appeal on the following grounds:

1. That the learned trial magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.
 2. That the learned magistrate erred in law and in fact in failing to apportion liability against the plaintiff despite overwhelming evidence to the contrary.
 3. That the learned magistrate erred in law and in fact in injudiciously, arbitrarily and exorbitantly apportioning and awarding the respondent a sum of Kenya Shillings Three Hundred and Fifty Thousand to the plaintiff as general damages for injuries suffered which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of damage suffered.
 4. That 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 an excessive and unjustified award.
 5. That the trial magistrate erred in law and fact by failing to consider the appellant’s evidence and submissions on record.
4. This being the first Appellate Court there is need to look at the evidence adduced before the lower court afresh bearing in mind that did not have the benefit of seeing or hearing the witnesses as they testified. (See the case of *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126).
 5. The appellants are aggrieved by the trial court’s finding on negligence. In order to consider the question of liability, I must first outline the evidence of the witnesses that testified before the trial court.
 6. Clinton Motieka Ongoncho (Pw3) testified that the vehicle veered off from the left to the right-side lane as one faces Gesonso from Kisii Town and knocked him from behind. He explained that the vehicle was trying to avoid hitting another vehicle. He sustained injuries and was treated at Kisii Teaching and Referral Hospital. He blamed the appellants and their driver as the appellants’ vehicle was driven in a careless manner. No 88300 PC Moses Kasera (Pw1) attached to the Kisii Traffic base testified that Pw1 was involved in a road traffic accident on June 1, 2019. He produced an abstract in respect thereof. He testified that the accident involved a Toyota KCE 152F Noah and a Toyota Auris KCU 792X and a motorcycle. The Toyota Noah was headed towards Migori and at the scene it hit the motorcycle from behind and also rammed the other vehicle as the driver was trying to escape from the scene. On cross examination Pw1 testified that he visited the scene and the matter was reported to the police. Dr. Momanyi Peter Morebu (Pw2) produced the medical report and testified that the respondent sustained a head injury with loss of consciousness, blunt injury to the left shoulder and knee, bruises, a deep cut wound on the head and two fracture canine teeth.



7. The appellants on the other hand relied on the testimony of Dr. Ruth Ichamwenge (Dw1). She produced a medical report prepared by Dr. Jenipher Kahutha. According to the report, the respondent had healed well and had one broken upper incisor.
8. The appellant in their submissions argued that the respondent was the only eye witness and his evidence was not corroborated. They urged the court to set aside the trial court's finding on liability and apportion liability at 50:50. They also submitted that the evidence of Pw1 and Pw3 were contradictory. The respondent on the other hand submitted that the appellant did not challenge his evidence either by cross-examination or otherwise and that the trial court correctly held that the appellants were solely liable for the accident.
9. The only person who witnessed the accident was Pw3 and therefore his testimony is crucial in the determination of the issue of liability. Pw3 testified that the appellants' vehicle hit him from behind while trying to avoid hitting another vehicle. The appellants' vehicle veered off from the left to the right-side lane and did not take into account other road users such as the motor cycle when it hit it. The manner in which the appellants' driver controlled the vehicle was negligent. The appellants' witness Dw1 only testified in regard to the injuries sustained by the respondent. The plaintiff's case on liability therefore remained unchallenged by the appellants. The trial magistrate cannot therefore be faulted for apportioning the appellant liability at 100%.
10. I now turn to consider whether the damages awarded were excessive. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

‘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..’
11. The appellants submits that the sum of Kshs 50,000/- to Kshs 100,000/- will be sufficient and adequate compensation for injuries sustained by the respondent. Although the appellants in their medical report noted that the initial treatment notes did not cover loss of teeth, they noted that the respondent had one broken upper incisor. It is not clear whether this was as a result of the accident as the same was not captured in the treatment notes of Kisii Teaching and Referral Hospital. They cited the cases of *HB (Minor suing through mother & next of friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR; *Eva Karemi & 5 Others v Koskei Kieng & another* [2020] eKLR; Nyamira Civil Appeal No E015 of 2021 *Francis Oraro v Hemson Ochomba Nyaigori*; and Nyamira Civil Appeal No E004 of 2021 *Samuel Nyakundi Kimori v Justus Mangare*. In the cases, the plaintiffs sustained soft tissue injuries and were awarded damages ranging from Kshs 40,000/- to Kshs 100,000/-.
12. The respondent relied on the case of *Francis Ochieng & another v Alice Kajimba* (2015) eKLR where the plaintiff was awarded Kshs 350,000/-, the plaintiff in this case had a mild head injury with soft tissue injuries, his injuries were more serious than the respondent in this case.
13. In this case the respondent sustained soft tissue injuries. According to the treatment notes from Kisii Teaching and referral hospital the respondent on examination had pain on the left knee joint and injury to the skin of the head. He had laceration on the head. The doctor formed an impression that he had soft tissue injuries following a road traffic accident.



14. Having considered the evidence submissions and cases relied on, I set aside the award of general damages of Kshs 350,000.00 and substitute the same with an award of Kshs 100,000.00 The award of special damages is sustained. The appellant is awarded half the cost of the appeal.

DATED, SIGNED, AND DELIVERED AT KISII THIS 22ND DAY OF NOVEMBER 2022.

R.E. OUGO

JUDGE

In the presence of:

Miss Cheruiyot For the Appellants

Respondent Absent

Ms. Aphline Court Assistant

