



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Odak (Civil Appeal E026 of 2021)
[2022] KEHC 16771 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E026 OF 2021
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

JOSEPH MAINA APPELLANT

AND

STEVEN ARINGO ODAK RESPONDENT

*(Being an appeal against the Judgment delivered by the Honourable D.
Milimu RM, on 5th March 2021 in Eldoret CMCC No. 1190 of 2016)*

RULING

1. This appeal hereof arises from the Judgment of the trial Court where after a full hearing, the appellant was held 100% liable for the accident and general damages was assessed at Kshs 190,000 and 6,000 as special damages.
2. From the plaint filed in the trial court on November 19, 2010, the Respondent averred that on or about October 27, 2018, the plaintiff was lawfully riding Motor cycle registration number KMDN 431N along Eldoret-Webuye Road when the Defendant's driver, servant, agent and or employee negligently drove , managed and or controlled Motor vehicle Registration No KAT 400M that he caused the aforesaid motor vehicle to knock down the Motor cycle Registration no. KMDN 431N and as a result of which the plaintiff sustained severe injuries.
3. The Respondent testified as PW1 and called two witnesses in furtherance of his case. PW2 was a clinical officer based at Huruma Sub-county hospital and averred that the Respondent suffered soft tissue injuries being blunt trauma to the neck, left hand, right elbow and left thigh. PW3 was a police officer attached to Eldoret Police station who confirmed the occurrence of the accident and blamed the driver of motor vehicle registration no. KAT 400M r the accident



4. The appellant called his driver , Vincent Cheruiyot who testified as DW1.DW1 blamed the respondent for the accident and stated that the respondent was riding on the wrong side of the road and overtook from the left side.
5. After the court heard both parties its rendered its judgment where the appellant was dissatisfied by the decision of the trial Court and filed this appeal vide a Memorandum of appeal dated March 19, 2021 on the following grounds;
 - a. The learned Trial Magistrate erred in Law and in fact in the assessment of quantum by awarding Kshs 196,000 an award which was excessive and an erroneous estimate of the damages awardable
 - b. The learned magistrate in law (sic) and misdirected herself when she failed to consider the Appellant’s submissions on both points of law and facts.
 - c. The trial magistrate erred in fact and in law in failing to consider the defendant’s evidence ,submissions and authorities supplied on the issue of quantum
 - d. The learned magistrate erred in fat and in law in failing to consider the evidence that was tendered on liability, injuries sustained and quantum during.....(sic)
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 as was observed in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123, where the court held;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect...”
7. I have evaluated the evidence of the rival at length. From the evidence of the police officer who testified as PW3, it is not dispute that an accident occurred on October 27, 2018 involving Motor Vehicle Registration No KAT 400M which vehicle was being driven by DW1 and Motor cycle registration No KMDN 431N where PW1 was the rider.
8. The plaintiff who testified as PW1 narrated how the accident occurred and blamed DW1 for the accident. DW1. On his part blamed the plaintiff for the occurrence of the accident.
9. PW3, the police officer who investigated the traffic case, in his testimony averred that DW1 was driving along Eldoret -Webuye road and as he was trying to overtake a series of motor vehicles, he collided with the motor cycle and as a result the rider, the plaintiff in this case, sustained serious soft tissue injuries. PW3 blamed DW1, the Appellant’s driver for the accident.
10. It was on this basis that the trial court found the defendant to be 100% liable for the accident and awarded the plaintiff Kshs 190,000 as general damages and Kshs 6,000 as special damages.
11. The parties agreed to canvass the appeal by way of written submissions. The Respondent filed his submissions on March 25, 2022 whereas the Appellant filed his on April 21, 2022.
12. From the said submissions, and particularly the Appellant’s submissions, the appeal is on quantum of damages only.



13. According to the Appellant, the injuries sustained by the Respondent which were to wit;- blunt injury to the back, blunt injury to the left elbow, blunt injury to the right elbow and blunt injury to the left thigh, did not warrant the award of Kshs 190,000.
14. It was submitted that the sum between Kshs 30,000 to Kshs 60,000 is sufficient and adequate compensation for the injuries sustained by the Respondent. To buttress this position, the cases of *JK(A minor suing through father & next friend NKM v Jasper Nchonga Magari & another* (2021)eKLR and *HB(Minor suing through mother & next friend DKM)V Jasper Nchonga Magari & another*(2021)eKLR were cited where the court awarded Kshs 30,000 and 60,000 respectively for soft tissue injuries.
15. The court was thus urged to substitute the award of Kshs 190,000 with the sum of between Kshs 30,000 to Kshs 60,000.
16. The Respondent in support of the Learned trial Magistrate court sufficed as just and adequate compensation for the injuries he sustained.
17. Counsel for the Respondent cited the case of *Jyoti Structures Ltd & Anor vs Charles Ogada Ochola*, Eldoret HCCA No 32 of 2017, where the Respondent sustained blunt injury o the neck,head,chest and right shoulder and the court upheld an award of Kshs 300,000; *Catherine W Kinyori & 3 others Vs Gibson T Gichubi* in Nyeri HCCC No 320 of 1998 where the 3rd plaintiff sustained multiple soft tissue injuries on the left elbow joint and injuries on both ankles and was awarded general damages of Kshs 350,000 and *Martin Mugi vs Attorney General* in Nairobi HCCA No 791 of 1999 where an award of Kshs 300,000 was made to the plaintiff who had sustained a deep extensive cut on the face, mild concussion and generalized soft tissue injuries.
18. Counsel for the Respondent urged the court to dismiss the appeal with costs.
19. In determining the issue at hand, it is important to note that in the case of *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini vs A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

“The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is 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 high that it must be wholly erroneous estimate of the damages”
20. Similarly, in the case of *Butt v Khan* 1982 -1988 1 KAR the court observed as follows;

“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 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.”
21. In the present appeal, the Plaintiff/Respondent as mentioned earlier suffered the following injuries;
 - a. blunt injury to the back
 - b. blunt injury to the left elbow
 - c. blunt injury to the right elbow



- d. blunt injury to the left thigh
22. The trial court in its judgment observed that upon consideration of the submissions as well as the nature of injuries sustained by the plaintiff as evidenced by the treatment documents and the medical report, an award of Kshs 190,000 was just and reasonable as general damages.
23. Was the trial court's award excessive taking into account the nature of the injuries sustained by the respondent as to warrant this court to interfere?
24. In the case of *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of Ksh 120,000/- and this was affirmed by the High Court.
25. In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR for a Respondent that had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs 250,000/=. For the Respondent that had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs 200,000/=. On appeal, the court set aside both awards and substituted them with Ksh 125,000/= each.
26. Being persuaded by the above authorities and considering that the plaintiff suffered almost the same injuries as plaintiffs in the said authorities this court is inclined to interfere with the discretion of the learned trial magistrate by setting aside the award of Ksh 190,000/- as general damages and substituting it with an award of Ksh 130,000/- taking into account the cited comparable awards. In the end, this appeal succeeds and Judgment is entered for the Respondent against the Appellants' at Ksh 130, 000/- and interest at court rates from the date of the judgment of the subordinate court.
27. The Appellants' shall have the costs of the appeal.
28. 30 days stay of execution.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Matekwa for the respondent
2. Njuguna for the appellant

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka & CO. Adv

M/S Mwinamo Lugonzo & CO. Adv

