



REPUBLIC OF KENYA



KENYA LAW
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**Momanyi & 2 others v Otworl (Civil Appeal 72 of 2021)
[2022] KEHC 16607 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 72 OF 2021
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

JOSEPHAT MIRERA MOMANYI 1ST APPELLANT

CHINA OGETO ENOCK 2ND APPELLANT

EQUITY BANK LIMITED 3RD APPELLANT

AND

FRANCIS MOGIRE OTWORl RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. 125 of 2019 by Hon. Celesa Okore –Principal Magistrate)

JUDGMENT

1. Josephat Mirera Momanyi, China Ogeto Enock and Equity Bank limited, the appellants herein, were defendants in Oyugis Senior Principal Magistrate's SPMCC No 125 of 2019. They were sued in a claim for general damages and special damages following a road traffic accident involving motor vehicle xxxx in which the respondent was travelling on January 10, 2019. He was a fare paying passenger. The accident was self-involving. The said motor vehicle at the time of the accident was driven by the first appellant while the second and the third appellants were the owners of the said motor vehicle. As a result of the accident the respondent sustained injuries. The appellants were held 100% liable for the accident. The respondent was awarded Kshs 800, 000/= general damages and Kshs 6,600/= special damages.
2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Kimondo Gachoka & Company Advocates. They raised the following grounds of appeal:



- a. That the learned trial magistrate grossly misdirected herself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.
 - b. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.
 - c. The learned trial 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.
 - d. The learned trial magistrate erred in law and fact in relying on extraneous circumstances which were not supported by the evidence on record, hence arriving at a wrong finding as regards the nature of the plaintiff's injuries.
 - e. The learned trial magistrate erred in fact and in law by basing her judgment on the testimony of the plaintiff only having ruled for the close of the defence case without witnesses.
 - f. The learned trial magistrate erred in fact and in law by awarding the plaintiff inordinately high quantum as damages in the circumstance of this case.
 - g. The learned trial magistrate erred in assessing an award of kshs 800, 000/- hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by the plaintiff.
 - h. The learned trial magistrate erred in awarding an excessive sum for the injuries suffered in the fact of the evidence adduced which was not sufficient to warrant the amount.
 - i. The learned trial magistrate erred in fact and in law in awarding damages to a claimant/ plaintiff for injuries not pleaded by the respondent herein.
 - j. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
3. The appeal was opposed by the respondent through the firm of Nyatundo & Company Advocates who urged the court to find that the appeal was not merited.
 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] EA 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. There are two issues that emerge in this appeal; the issue of liability and that of quantum of damages payable.
 6. The respondent blamed the first appellant for driving the motor vehicle in issue on high speed and thus caused the complained of accident. This contention was not contradicted. This, in my view, meant that the respondent discharged his onus of proof. This is buttressed by the decision in *Civil Appeal No 7 of 2019 Isaac K Chemjor & Another vs Laban Kiptoo (2019) eKLR*. It was observed as follows:
 There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believe the explanation for the accident as given by the respondent, and there was in it no reasonable hypothesis that another vehicle



or person was involved in the cause of the accident. The respondent had discharged his burden of proof under sections 107 and 108 of the *Evidence Act* in showing that the accident was occasioned by the 2nd appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person the Court finds on a balance of probabilities that the events as related by the respondent are more probable than not.

7. I therefore find that the learned trial magistrate finding on liability was based on facts on record.
8. The appellants have complained against the award of the general damages. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs Khan [1981] KLR 349* at page 356 Law JA stated:

'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 a figure which was either inordinately high or low.'

9. According to the medical report prepared by Dr Ombati Timothy Mokuu, the respondent sustained the following injuries:
 - a. Bruises on the temporal region of the head with a soft tissue inflammation;
 - b. Soft tissue injuries to both the right and left ribcage;
 - c. Multiple bruises to both the right and left wrists; and
 - d. Multiple cut wounds on both right and left lower limbs around the fibula region.

The doctor classified the injuries as soft tissue.

10. In the trial court, the appellants proposed general damages of Kshs 50, 000.00 whereas the respondent proposal was an award of Kshs 1, 000, 00.00. Each party cited decided cases to support own proposal.
11. The appellants relied on the decision in the case of *Donald Mwangi & Waguthu Farmers Ltd vs Ndungu Mungai Kamau [2006] eKLR* an award of Kshs 25,000/= was given January 25, 2006 for strain and contusion of the neck.
12. The respondent relied on the following cases:
 - a. In *Lucy Ntibuka v Bernard Mutwiri & others [2007] eKLR* the plaintiff who suffered head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm (elbow) was awarded Kshs 500, 000.00.
 - b. In *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR* was awarded Kshs 100,000.00 where she suffered injury on the back. In the same case the 3rd Plaintiff who suffered multiple soft tissue injuries, injury on the left elbow joint, and injuries on both ankles was awarded Kshs 350,000.00

13. When assessing general damages for injuries sustained, courts ought to be guided by the trend in the previous, recent and comparable awards. The Court of Appeal in the case of *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No 147 of 2002 [2004] eKLR* held:

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.

14. From the foregoing, I find that the award by the trial court was on the higher side. I therefore set aside the award of Kshs 800,000/= general damages and substitute it with an award of Kshs 400,000/=.

15. Since the appeal has partially succeeded, the appellants will have half the costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022.

KIARIE WAWERU KIARIE

JUDGE

