



REPUBLIC OF KENYA



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**Rege v Otung (Civil Appeal E108 of 2021)
[2022] KEHC 16691 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E108 OF 2021**

KW KIARIE, J

DECEMBER 20, 2022

BETWEEN

JAMES KWANYA REGE APPELLANT

AND

JOSEPH YAYA OTUNG RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 95 of 2019 by Hon. Celesa Okore–Principal Magistrate)*

JUDGMENT

1. James Kwanya Rege, the appellant herein, was the defendant in Oyugis Principal Magistrate's SPMCC No 95 of 2019. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCD 988Z owned by the appellant. The accident was self-involving. The respondent who was a passenger sustained injuries. The learned trial magistrate delivered judgment dated November 18, 2021. She held the appellants 100% liable and awarded Kshs 500,000.00 in general damages and Kshs 11,300.00 special damages in favour of the respondent.
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 herself when she failed to consider the appellant's 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. That the learned magistrate erred in law and misdirected herself when she failed to consider the provisions set out in the [Insurance \(Motor Vehicle Third Party Risks\) \(Amendment\) Act, 2013](#) Cap 405.
 - d. The learned magistrate erred in law and fact in finding the defendant's/appellant's 100% liable in view of the evidence produced before the trial court and in particular that the defendant/appellant failed to prove his case on liability against the plaintiff/respondent.
 - e. The learned magistrate erred in law and fact in awarding the plaintiff /respondent kshs 500,000/- 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 as to 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 Nyatundo & Company Advocates. It was contended that the appeal lacked merits.
 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 v 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. The accident was self-involving. The respondent who was a passenger in the motor vehicle registration number KCD 988Z blamed the driver of the said motor vehicle. The evidence of PC Benard Kebaya (PW1) was that the driver of the bus was to blame for the accident and that he was charged with an offence of careless driving. This evidence was not controverted by the appellant. There was no evidence adduced to show that the respondent contributed to the accident in any way.
 6. I therefore find that the finding on liability by the learned trial magistrate cannot be faulted.
 7. The appellant has argued that the award in general damages was inordinately high. 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 v 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.
 8. The respondent sustained the following injuries:



- a. Blunt trauma to the neck ;
- b. Chest trauma;
- c. Blunt trauma to the back;
- d. Cut wound to the hands; and
- e. Bruises on the right lower limb.

Dr Morebu Peter Momanyi opined that the respondent sustained severe soft tissue injuries.

9. In the trial court the appellant proposed an award of Kshs 40,000.00 as adequate compensation in general damages. He cited several author where courts awarded damages for soft tissue injuries as follows:

- a. *Daniel Odhiambo Ngesa v Daniel Otieno Owino & another* [2020] eKLR was awarded Kshs 90,000.00 for :Blunt chest injury
 - * Sprain on the neck
 - * Dislocation of the right shoulder joint
 - * Blunt abdominal injury
 - * Friction lacerations on the left lower limb
 - * Dislocation at the ankle joint

- b. *Kipkere Limited vs. Peterson Ondieki Tai* [2016] eKLR Kshs 30,000.00 was awarded for the following injuries:Deep cut wound on the left legChest contusionBruises on the left shoulder

- c. In *George Mugo & another v A K M (Minor suing through next friend and mother of A M K* [2018] eKLR the respondent was awarded Kshs 90,000/= as general damages for the following injuries:

Blunt injury left shoulder.Blunt chest injury interior.Bruises of left wrist region.Blunt injury left arm

10. The respondent urged the trial court to award Kshs 1, 000, 000.00 relied on two decided 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.

11. In a more recent case of *Mara Tea Factory Limited v Lillian Bosibori Nyandika* [2021] eKLR the respondent was awarded Kshs 300,000.00 by Judge Rose Ougo. She sustained head injury, deep cut wound on the head, bruises on the frontal part of the head, tenderness on the chest, dislocation on the left wrist joint, dislocation on the left shoulder joint, multiple cut wounds in the upper limb and lower limbs.

12. 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.

13. From the foregoing, I am persuaded to interfere with the award of the learned trial magistrate. I set aside the award by the trial court and substitute it with an award of Kshs 150, 000.00 general damages. I will not disturb special damages.
14. The appeal therefore partially succeeds with half the costs.

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

KIARIE WAWERU KIARIE

JUDGE

