



REPUBLIC OF KENYA



KENYA LAW
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**Rege v Otiemo (Civil Appeal E115 of 2021)
[2022] KEHC 16636 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E115 OF 2021**

KW KIARIE, J

DECEMBER 20, 2022

BETWEEN

JAMES KWANYA REGE APPELLANT

AND

BILLY OTIEMO RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 90 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 90 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 400,000.00 in general damages and Kshs 6,605.00 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 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. 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 defendants/appellants 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 400,000/- 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.
 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. 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 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."
 8. The respondent sustained the following injuries:
 - a. Bruises on the right ear;



- b. Deep cut wound on the left hand; and
- c. Bruises on the left hand.

These injuries were classified by Dr Morebu Peter Momanyi as 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 authorities where courts awarded damages for soft tissue injuries as follows:
- a. *Daniel Odhiambo Ngesa vs Daniel Otieno Owino & another* [2020] eKLR Kshs 90,000.00 for :Blunt chest injurySprain on the neckDislocation of the right shoulder jointBlunt abdominal injuryFriction lacerations on the left lower limbDislocation 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 800, 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. 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."
12. Certainly the authorities cited varied in the awards for injuries that were equally varied. I am persuaded to interfere with the said award. I set aside the award by the trial court and substitute it with an award of Kshs 150, 000.00 general damages.
13. 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

