



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**CIVIL APPEAL NO. E015 OF 2020**

**BETWEEN**

**WILTON ASUBA MALIKA.....1<sup>ST</sup> APPELLANT**

**OPPORTUNITY INTERNATIONAL WEDCO LTD.....2<sup>ND</sup> APPELLANT**

**AND**

**KEVIN OTIENO.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's*

*PMCC No. 142 of 2019 by Hon. Celesa Okore – Senior Resident Magistrate).*

**JUDGMENT**

1. Wilton Asuba Malika and Opportunity International Wedco Ltd, the appellants, were the defendants in Oyugis Principal Magistrate's PMCC No. 142 of 2019 where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KCC 897P. The respondent was a passenger therein and sustained injuries. The respondent was awarded Kshs. 2,400,000/= general damages and Kshs. 24,100/=.

2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Okongó Wandago & 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 her superficially and consequentially coming to a wrong conclusion on the same.
- b) That the learned trial magistrate erred in fact and in law in finding that the respondent was entitled to general damages that were too high in view of the injuries suffered by the plaintiff.
- c) That the learned trial magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
- d) That the learned trial magistrate erred in fact and law in awarding the respondent kshs.2,400,000/- for pain and suffering, which award was arbitrary, inordinately high, unmerited, disproportionate, excessive and unreasonable considering the injuries sustained.

3. The appeal was opposed by the respondent through the firm of Nyatundo & Company Advocates. The respondent contended that the decision was well founded on evidence and the law.

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] E.A. 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 appellants were not satisfied with the award of Kshs. 2,400, 000/= general damages. Parties had agreed on liability. The respondent was to bear 20% contributory negligence and recorded a consent to that effect.

6. At the trial, the respondent submitted that for the injuries he sustained, he was entitled to Kshs. 2,500,000/= general damages. The respondents on the other hand submitted that Kshs. 500,000/= would be adequate compensation. Each party cited authorities they were relying on to urge their case.

7. A medical report prepared by Dr. Morebu Peter Momanyi tabulated the injuries suffered by the respondent as follows:

- a) Right femur fracture;
- b) Right tibia compound fracture;
- c) Right fibula compound fracture;
- d) Deep cut wound on the right hand; and
- e) Multiple bruises on the right hand.

8. At the time of examination, the respondent was walking on clutches. He was of the opinion that recovery was expected to take a very long time. He further opined that the respondent was going to require both physio and occupational therapy and would require to undergo an operation to correct the right femur fracture with metal implant at an approximately cost of Kshs. 300,000/=.

9. 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.**

10. I have perused the cases relied on by the parties in the trial court. These cases taken together with the injuries sustained by the respondent herein and the prognosis given by the doctor and the expected expenditure on the future treatment, persuade me to make a finding that the award was not inordinately high. I therefore dismiss the appeal with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF NOVEMBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**