



REPUBLIC OF KENYA



**KENYA LAW**  
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**N.K Brothers Limited & another v Okollo (Commercial Appeal E168 of 2023)  
[2025] KEHC 439 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E168 OF 2023  
PM MULWA, J  
JANUARY 23, 2025**

**BETWEEN**

**N.K BROTHERS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**KIPYEGON ARAP TOWETI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSHUA SESULA OKOLLO ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the judgment of Hon. Ruguru, Resident Magistrate, delivered on 5<sup>th</sup> May 2023 in Milimani CMCC No. 5349 of 2020. The appeal is on the quantum of damages only.
2. The backdrop to the appeal is that the Respondent instituted a negligence claim against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants before the lower court through a plaint amended on 22<sup>nd</sup> June 2021. His case was that on 22<sup>nd</sup> August 2020, while riding motorcycle number KMDV 211F as a pillion passenger, he sustained injuries from a road accident when motor vehicle registration number KBS 909K knocked him down. The said motor vehicle was owned by the 1<sup>st</sup> Appellant and was being driven by the 2<sup>nd</sup> Appellant when the accident occurred.
3. The particulars of negligence were among others that the 2<sup>nd</sup> Appellant was driving at an excess speed in the circumstances, overtaking when it was not safe, failing to keep a safe distance, suddenly and without warning turning into the plaintiff's pillion passenger and knocking him and failing to maintain a proper look out.
4. The Respondent sustained injuries to the periorbital swelling of the left eye, a cut wound on the left eyebrow, bruises on the left side of the abdomen, swollen left cheek, cracked left lower molar tooth, head, pelvis, injuries to the left tibia and fibula and he had to receive a blood transfusion.



5. The Respondent therefore sought special damages of Kshs. 9,050.00, general damages, costs of the suit and interest.
6. The Appellants denied that they were negligent in their defence.
7. The trial court entered judgment in favour of the Respondent. It accorded 100% liability to the Appellant and awarded the Respondent general damages of Kshs. 500,000/- and special damages of Kshs. 9,050/-.
8. Unhappy with the decision, the Appellant filed the present appeal before this Court through a memorandum of appeal dated 26<sup>th</sup> July 2023, on the grounds that:
  - i. The Learned Trial Magistrate erred in law and fact on the manner that he assessed damages for pain and suffering.
  - ii. The Learned Trial Magistrate erred in law and fact in awarding the plaintiff damages for pain and suffering in the sum of Kshs. 500,000/- which was manifestly excessive as to amount to an erroneous estimate of damages for the injuries suffered by the Plaintiff.
9. The Appellant prays that its appeal be allowed that the judgment of the learned trial Magistrate be set aside; that this Court assesses damages for pain and suffering and that it is awarded costs of the appeal.
10. The appeal was admitted to hearing on 9<sup>th</sup> July 2024 and the Court directed that it be canvassed through written submissions.
11. The Appellant filed written submissions dated 8<sup>th</sup> July 2024 and those by the Respondent are dated 21<sup>st</sup> August 2024.

### **Analysis and determination**

12. I have considered the record and the parties' respective submissions. As mentioned earlier, this appeal is only on quantum. It is well established that an appellate court cannot interfere with the trial court's discretion to assess damages unless certain conditions are met. The Court of Appeal laid out these conditions in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) Civil Appeal No 21 of 1984 [1985] KECA 137 (KLR)*, as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage...This Court follows the same principles.”
13. Therefore, the issue is whether the general damages awarded by the trial court were excessive.
14. The Appellants submitted that the general damages awarded were excessive in light of the injuries allegedly sustained by the Respondent. They faulted the trial court for relying on the Respondent's submissions highlighting the discrepancies between the 13 and 8 injuries in the amended plaint. They also set out the additional purported injuries not in the medical report, as follows:
  - i. Injury to the head whereby he experiences occasional headaches.
  - ii. Injury to the pelvis.



- iii. Injury to the left tibia and fibula.
  - iv. He received blood transfusion.
  - v. Respondent had a cracked left lower molar tooth.
15. The Appellants faulted the trial court for awarding damages based on the above-stated unsupported and exaggerated injuries. They urged this Court to find that the Respondent will be fully compensated by an award of Kshs. 80,000.00/-.
16. The Respondent submitted that given the multiple nature of the injuries some of which were grievous like the cracked tooth and the eye injury, the sum awarded by the trial court was reasonable and the award should not be disturbed. The Respondent had prayed for Kshs. 800,000/- based on the precedent in Civil Appeal No. E016 of 2022 – Elizabeth Mokaya Bongongo v Frederick Omondi Ouna. The Respondent pointed out that no submissions were filed by the Appellant in the trial court to counter the Respondent’s submissions.
17. The Court in Charles Oriwo Odeyo v Appollo Justus Andabwa & another (Civil Appeal Number 99 of 2014) [2017] eKLR, stated that:
- “The assessment of damages in personal injury case by court is guided by the following principles:
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - 2) The award should be commensurable with the injuries sustained.
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - 5) The awards should not be inordinately low or high (See Boniface Waiti & another v Michael Kariuki Kamau (2007) eKLR.”
18. Guided by the above, I have looked at the record. The amended plaint as well as the treatment notes from Kenyatta National Hospital, P3 form and medical report by Dr. Roger Kayo produced by the Respondent. They all list the Respondent’s injuries as follows:
- i. Periorbital swelling in the left eye
  - ii. Cut wound on the left eyebrow
  - iii. Bruises on the left side of the abdomen
  - iv. Swollen left cheek
  - v. Cracked left molar tooth
  - vi. Blood loss
  - vii. Soft tissue injuries
19. I note that in the Respondent’s submissions, there were additional injuries listed which were not listed in the amended plaint or the Medical Report relied on. These are:-



- i. Injuries to the pelvis.
  - ii. Perceived blood transfusion.
  - iii. He now experiences headaches.
  - iv. Has been left with hyper-pigmented scars on the left supra-orbital region and the left lumbar region which are cosmetically significant.
20. As earlier noted, the Appellant faulted the trial court for awarding damages based on the above-stated unsupported and exaggerated injuries. They also faulted the trial court for relying on the Respondent's submissions.
21. From my reading of the impugned judgment, I note that the trial court considered the injuries listed in the amended plaint and the evidence, not the contested additional injuries in the Respondent's submissions. After noting the said injuries sustained, the trial court found as follows:
- “The plaintiff's counsel filed submissions and proposed an award of Kshs. 800,000/- citing our (sic) authority which I was (sic) considered. It's worth citing that the defendants did not file any submissions. That as it may, I have considered, the injuries sustained by the plaintiff, the law applicable, rate of inflation and note that, the injuries were classified as harm. As such, I find the proposal by the plaintiff of Kshs. 800,000/- to be on the higher side. The cited authority of Elizabeth Mukaya Bogonko Vs Frederick Omondi Ouna (2022) eKLR is an outlier as the plaintiff therein sustained a fracture and other severe soft tissue injuries. It does not form a good guide in assessing damages under this legal (sic).
- I have consciously considered the case in Paul Kipsang Koech & Anor Vs Titus Usule Osore (2013) eKLR where justice Gikonyo on 9/05/2013 awarded Kshs. 200,000/- general damages for fracture of right upper incisor tooth, loosening of two teeth, pains on the elbow and abdomen, being so guide (sic) and citing it is almost 10n years since this case was decided, I find an award of Kshs. 500,000/- for pain and suffering sufficient compensation.”
22. It is clear from the foregoing that the trial court did not find the authority cited by the Respondent to be a good guide as it was on the higher side. Therefore, I do not find merit in the Appellant's complaint in this regard.
23. The trial court relied on the decision in Paul Kipsang Koech & Anor v Titus Usule Osore [2013] eKLR to award the Respondent Kshs. 500,000/- compensation factoring inflation. In that case, the injuries suffered were: Bruised lower lip, Fracture of the right upper lateral incisor tooth, Loosening of the right upper canine tooth, Loosening of the right upper medial incisor tooth, Blunt injury to the neck, Bruised right cheek, Blunt injury to the abdomen, Bruised left elbow and Bruised left knee.
24. The Appellants urged this Court to find that the Respondent will be fully compensated by an award of Kshs. 80,000.00/-. They relied on Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi [2013] eKLR where the Court set aside the trial court's judgment by substituting the sum of Kshs. 130,000/- awarded with Kshs. 70,000/- as general damages.
25. They also relied on Kenblest Kenya Limited v Musyoka Kitema Kiambu (HCCA No. 136 of 2016) [2020] eKLR where the Court set aside the trial court's award of Kshs. 1,920,000/- under the head of 'loss of earnings and future earning capacity' which was found to be erroneous as the two awards are separate and distinct and that the head of 'loss of earnings' was never pleaded by the respondent. This distinguishable from the present case.



26. The Appellants also relied on *Daniel Gatana Ndungu & Anor v Harrison Angore Katana (Malindi HCCA No. 72 of 2019)* [2020] eKLR where the Court set aside the award of Kshs.350,000.00/- by substituting it with Kshs.140,000.00/-, taking into account the salvage of inflation as an additional factor. The Court noted that there is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low-level soft tissue injuries. The injuries were non-skeletal injuries to the head, right knee and upper limbs. In my view, this case is not a good guide as the injuries sustained by the Respondent were slightly more considering that he had a broken left molar tooth and a cut on the left eyebrow.
27. As highlighted above, to maintain stability, previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts and factors such as inflation should be taken into account.
28. In *Peter Njuguna v Francis Njuguna Njoroge (Civil Appeal Number 165 of 2010)* [2015] KEHC 727 (KLR), the injuries sustained were: Bruises on the occipital region of the scalp, Deep cut on the forehead, Bruises on the chest and lower back, Bruises on the right elbow, Bruises on both hands, Tender left knee joint and Broken tooth.
29. The Court set aside the award of Kshs.350,000.00/- by substituting it with Kshs.230,000/- upon finding that it was on the higher side.
30. From the above, although the trial court was right in relying on the decision in *Paul Kipsang Koech & Anor v Titus Usule Osore* [supra], it is my considered view that the assessment of Kshs. 500,000/- is on the higher side.
31. In the upshot, the appeal is allowed. The award of Kshs. 500,000/- is set aside and substituted with Kshs. 350,000/- taking into account inflation.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**P.M MULWA**

**JUDGE**

In the presence of:

Ms. Mwaura for Appellants

N/A for Respondent

Court Assistant: Carlos

