



REPUBLIC OF KENYA



KENYA LAW
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**Were v Ombet (Civil Appeal E012 of 2023)
[2025] KEHC 329 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E012 OF 2023**

DK KEMEL, J

JANUARY 22, 2025

BETWEEN

KEVIN ODHIAMBO WERE APPELLANT

AND

TEDDY ODHIAMBO OMBET RESPONDENT

(Being an appeal from the judgment of Hon. Limo Benjamin (PM) in Siaya Chief Magistrate's Court Civil Suit No 78 of 2021 delivered on 9th day of May 2023)

JUDGMENT

1. The appeal arises from the judgment of Hon. Limo Benjamin (PM) in Siaya CMCC No. 78 of 2021 delivered on 9th May 2023 wherein he apportioned liability between the parties at 50% to 50 % and awarded general damages of Ksh 1,000,000/= to the Appellant as well as special damages of Kshs 62,050/= plus costs of the suit.
2. The Appellant was aggrieved by the said judgment and who filed a Memorandum of Appeal dated 15/5/2023 wherein he raised the following grounds of appeal namely: -
 1. The learned magistrate erred in law and fact in the manner he apportioned liability which was against the weight of the evidence.
 2. The learned magistrate erred in law and fact in apportioning liability at 50%:50% between the Appellant and Respondent which was against the weight of the evidence.
 3. The learned trial magistrate exercised his discretion in making his finding on liability wrongly by acting contrary to the weight of the evidence that was before the court.
 4. The learned magistrate erred and misdirected himself by relying on wrong principles when assessing damages that were awarded to the Appellant.



5. The learned magistrate erred and misdirected himself and failed to apply recent precedents and or authorities and placing reliance on authorities that have since aged but still made a lesser award without regard to inflation and the weakening power of the Kenyan shilling.
6. The learned trial magistrate erred and misdirected himself by awarding a sum in respect of damages which was inordinately low and not commensurate to injuries sustained by the Appellant thus occasioning a miscarriage of justice.
7. The learned magistrate erred in law and fact by failing to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
8. The learned magistrate erred and misdirected himself by ignoring the Appellant's submissions on record hence arriving at a wrong decision in awarding damages.
9. The learned magistrate erred and misdirected himself by ignoring the evidence of witnesses on record hence arriving at wrong decision in awarding damages.

The Appellant therefore prayed for setting aside the said judgment and that this court do re-evaluate the evidence and make its own judgment on both liability and quantum. The Appellant also seeks for costs of the appeal.

3. This being the first appellate court, its role is well spelt out namely to re-evaluate the evidence tendered before the lower court and arrive at its own independent conclusion as to whether or not to uphold the judgment of the trial court. In doing this, the court is alive to the fact that, unlike the trial court, it did not have the opportunity to see and hear the witnesses testify. See *Selle Vs. Associated Motor Boat Co. Ltd* (1968) EA 123.
4. PW1 Kevin Odhiambo Were adopted his witness statement dated 17/11/2021 as his evidence in chief and which was essentially that on 23/2/2021 at 1930 hours he was carefully riding his motor cycle along Siaya Luanda road when at Julian School the Respondent's motor vehicle registration Number KBL 303 N was driven carelessly and recklessly and which came to his lane and hit him. That he sustained several injuries on the head, chest, back, both hands, left knee, fracture of lower right limb which led to amputation. He blamed the driver or owner of the said vehicle for the accident. He identified documents contained in his list of documents some of which he produced while the others were produced by the makers. He produced copies of his ID card, demand letter, search certificate, receipts of payment, discharge summary while the P3 form, X-ray report, medical report, police abstract were marked for identification.

On cross examination, he stated that he was the rider of the motor cycle and that he had attended a driving school in Bondo. That he did not file the driving licence as part of his documents. That the vehicle hit him while it was over taking. That he was hit on his left side of the road. That the rider of the motor vehicle was charged with a traffic case. That he does not have the charge sheet.

5. PW2 Kennedy Opiyo Omondi stated that he is a clinical officer attached formerly of Siaya County Referral Hospital. That he filled the P3 form and also treated the patient who was later discharged. The patient had been involved in a road traffic accident. At the time of the examination the patient walked in crutches since the right leg had been amputated. That the injury was compound fracture of the right tibia and fibula bones. He said that the injury restricted movement also on the left leg. The approximate age of injuries was 8 weeks and that probable weapon was blunt object. He produced the discharge summary, receipts of payment, Xray film, medical report. The injuries according to the doctor was grievous harm and the decree of permanent disability was 70 %.



On cross examination, he stated that the right leg was amputated while the left leg had injuries on the knee. That the amputated leg had fracture of fibula and tibia bones. That he did not witness the accident.

6. PW3 No. 104626, Pc Belvin Simiyu attached at Siaya Police Station. He stated that he has police abstract for an accident which took place on 23/2/2021 along Siaya Luanda road at a place called St. Julian's. the accident involved motor vehicle KBL 303 N Toyota Matatu and a motor cycle driven by Kevin Odhiambo Were. The case was investigated by Pc Kipkemoi and that he wished to produce the abstract on his behalf. The same was produced as Exhibit 7. He stated that the driver of the motor vehicle was to blame for the accident.

On cross examination, he stated that he did not investigate the case.

7. That marks the close of Appellant's case.
8. The Respondent called DW1 No. 154626 Pc Belvin Simiyu stationed at Siaya Police Station. He stated that the motor vehicle was heading to Siaya while the motor cycle was heading to Luanda. That the rider of the motor cycle was then overtaking another motor cycle when he crashed onto the side of the matatu and in the process they collided head on. He produced the OB extract as Dex-1. That he blames the rider of the motor cycle since he was not on his lane and that he is the one who caused the accident. That the rider was improperly overtaking before ensuring that the road was clear. That the motor cycle was carrying two pillion passengers. The driver of the matatu was not charged.

On cross examination, he stated that he is not the investigator. That the driver of the matatu was the reportee. That he is not aware of the scene of the accident. That he is not aware if the rider was charged. That he does not have the sketch maps or the police file. That the matter is still under investigation. That he is the one who earlier testified and produced the police abstract.

9. DW2 Teddy Odhiambo stated that he is the driver of the matatu which was involved in an accident with the motor cycle. He adopted his statement dated 22/2/2022 as his evidence in chief. He produced his driving licence as Dex-2. He blamed the rider of the motor cycle for the accident since he came to his lane. He sought for the dismissal of the suit.

On cross examination, he stated that he and the rider was driving on the opposite direction. That those injured ran away. That he did not see the registration No. of the motor bike. That the police did not visit the scene.

10. The Respondent closed its case.
11. This appeal was canvassed by way of written submissions. Both parties duly complied.
12. I have considered the evidence tendered before the trial court as well as the submissions filed herein. I find the issues for determination are as follows:
 - i. Whether the apportionment of liability by the learned trial magistrate was appropriate.
 - ii. Whether the award of general damages was appropriate.

13. As regards the first issue, it is noted that both parties blame each other for the accident. It is also noted that the police did not visit the scene and no sketch maps were drawn or presented for consideration by the court. It is also noted that the parties relied on the evidence of the police officer who was called to testify PC Belvin Simiyu whose evidence was ambivalent in that whereas the said officer came in to support the Appellant's case against the Respondent, he again turned around and agreed to be a witness for the Respondent. Since the occurrence of the accident could have been best explained by



the driver of the matatu and the rider, their respective standpoints became weakened when there was no independent eye witness. It was the story of the Appellant as against the Respondent. In view of the discredited evidence of the police officer who was not even the investigating officer and who did not visit the scene. The conduct of the said police officer in trying to support each party worsened the situation for the parties. The issue of liability therefore is crucial in determining the degree of negligence by the parties. Each of the parties as motorists were bound by the High Way Code of Traffic and to ensure that they stick to their lanes as they use the highway since the evidence has been shown that there was a collision between the vehicle and the motor cycle, the conventional view that is widely held is that both motorist must shoulder the blame equally. Hence, the apportionment of liability the learned trial magistrate at 50%:50% was quite appropriate in the circumstance. In the case of Christopher Njoroge Ngugi & Stella Kathure Vs. Cosmas Kithusi Nzioka 2018 eKLR, the court held that the parties they jointly responsible in negligence and that apportioned liability at 50:50 between the parties. The Respondent failed to ensure that the road was clear to enable him to overtake another motor cycle while on the other hand, the Appellant ought to have had proper look out and to slow, swerve or any other measures to avoid coming into contact with the Respondent's motor cycle. Indeed, both motorists endangered the lives of their passengers and therefore, they must jointly shoulder the aspect of liability. It is instructive that the parties herein failed to call independent witnesses who were present at the accident scene and further failed to take the police to the scene who were expected to draw sketch maps which would then show which of the parties was at fault. The choice of the parties in calling the same police officer to testify on their behalf and who gave contradictory evidence put paid the parties claims. It is surprising that the said police officer who presented contradictory evidence was not charged for perjury. This then explains why the issue of liability came about to be shared equally. Consequently, the finding on liability by the learned trial magistrate, was quite sound and must be upheld.

14. As regards the second issue, it is noted that the trial court awarded the Appellant general damages of Kshs1,000,000/= for pain, suffering and loss of amenities. The Appellant claim that he suffered injuries inter alia; tenderness of the chest, injury on the head, tenderness on the back, bruises on the left and right hands, cut wounds on the right left knee, injury to the right lower limb with crush fracture leading to amputation. The Appellant was admitted for 14 days in the hospital and that his doctor noted that he had suffered permanent disability of 70%. The Respondent's doctor assessed the disability at 50 %.
15. It is trite law that assessment of general damages is the discretion of the trial court and therefore the Appellate Court should be slow to interfere with the assessment of damages by the lower court unless the same were found to be inordinately low or inordinately high so as to represent an erroneous estimate of damages. The Court of Appeal in the case of *Kemfro Africa Ltd T/a Meru Express & Another v. A.M. Lubia & Another (No. 2) (1987) KLR*, held 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 the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”

16. Looking at the injuries sustained by the Appellant and the assessment by the respective doctors, it is clear that he sustained serious injuries in which permanent disability has been assessed in the region of a minimum of 50 %. This leaves no doubt that the injuries were severe. It is instructive that the amputation of the Appellant's leg has caused a lot of trouble for him in terms of movement and daily chores of life. In the case of *Rai Cement Limited v. Michael Ochieng Otieno (2022) eKLR*, the court made an award of Ksh2,500,000/= for a plaintiff who had sustained an amputation of the lower limb below the knee and who had a permanent disability of 35 %. Again, in the case of Solomon



Muriithi Manyarah v. SMK (Minor suing through her next friend AKK) (2021) eKLR, the court upheld an award of Kshs2,500,000/= for pain and suffering. As well as Kshs1,500,000/= for loss of future learning capacity for a minor who was amputated in the lower limb with permanent disability of 50 %.

The Appellant injuries appear to be on all fours with the Plaintiff's in the above cases. The Appellant is likely to have challenges in trying to fend for himself and his family. I find the circumstances the award by the learned trial magistrate of Kshs1,000,000/= is rather low and hence the need to interfere with it. I am of the considered view, that the sum of Kshs2,800,000/= could be adequate as general damages for pain, suffering and loss of amenities. The award made by the lower court was therefore inordinately low warranting this court to interfere with it.

17. On special Damages, it is noted that the Appellant and the Respondent have not raised any issues. Hence, the sum of Kshs62050/= shall remain undisturbed.

18. In view of the foregoing observations, it is my finding that the Appellant's appeal partly succeeds. The judgment of the lower court dated 9th May, 2023 is hereby set aside and substituted with judgment as follows: -

a. Liability as between

The Appellant and Respondent.....50%:50%

b. General Damages.....Ksh2,800,000/=

c. Special Damages.....Kshs 62,050/=

Total Ksh2,862,050/=

Less 50% contribution Ksh1,431,025/=

Net Ksh1,431,025 / =

d. Costs of the Suit

The Appellant is awarded half costs of the Appeal.

DATED AND DELIVERED THIS 22ND DAY OF JANUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

..... for Appellant

.....for Respondent

.....Court Assistant

