



REPUBLIC OF KENYA



KENYA LAW
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**Ombati v Omwoyo & another (Civil Appeal E100 of 2024)
[2025] KEHC 1629 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E100 OF 2024
DKN MAGARE, J
FEBRUARY 24, 2025**

BETWEEN

CATHERINE KOKI OMBATI APPELLANT

AND

DAVID OBARE OMWOYO 1ST RESPONDENT

RICHARD BANTU OBARE 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. P. K. Mutai -
PM in Kisii CMCC No. E474 of 2023 delivered on 20.5.2024)*

JUDGMENT

1. This is an appeal from the Judgment of Hon. P. K. MUTAI - PM in Kisii CMCC No. E474 of 2023, delivered on 20.5.2024. The Appellant was the Plaintiff in the suit in the lower court.
2. The Appellant filed suit on 22.06.2023, claiming damages for injuries arising from an accident on 7.2.2023. The Appellant was a pillion passenger on motorcycle registration number KMEK 008Z TVS along Igare-Sameta road at Gesinga area when motor vehicle registration No. KCJ 086R Nissan van lost control and hit them. Particulars of negligence were pleaded.
3. The Appellant pleaded special damages of Ksh. 7,050/= and suffered the following injuries:
 - a. Facial bruising
 - b. Pelvic contusion with resultant stable pelvic fracture
 - c. Bruising of forearms bilaterally
 - d. Right knee contusion



4. The court heard the matter and delivered judgment on 20.5.2024 in the following terms:-

Liability - 100%

Special damages – Ksh. 7,050/=

General damages – Kshs. 200,000/=

Total - Kshs. 207,050/=

5. The Appellant was aggrieved and appealed to this court, setting out four grounds of appeal as follows:-

1. The learned trial magistrate erred in law and fact in awarding the Appellant sum of Kshs. 200,000/= which is too much on the lower side in view of the injuries suffered by the Appellant, that has presented a miscarriage of justice.
 2. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions and judicial authorities on quantum which were uploaded via CTS on 28th March 2024, thereby arriving at an erroneous figure on quantum.
 3. That the learned trial magistrate erred in law and fact by over-relying on legal authority which, have no relevance to the suit and without addressing his mind to the circumstances of the case.
 4. That the learned trial magistrate erred in law and fact by not evaluating and analyzing the entire evidence on record adequately.
 5. That the learned trial magistrate erred in law and in fact, when making his award by failing to consider the passage of time and incidence of inflation.
 6. The learned trial magistrate's decision, albeit a discretionary one, was plainly wrong.
6. The appeal raises only one issue: whether the award of damages was too low to be an erroneous estimate of damages. The court does not consider the issue of disregarding submissions a serious one, as submissions are not evidence. The Court of Appeal was succinct in that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

Evidence

7. The appellant testified on 20.3.2024 and produced exhibits as per the list of documents dated 19.6.2023. The appellant stated that she was injured as pleaded. The injuries on the P3 that she tendered in evidence were classified as grievous harm. She was not cross-examined on issues of injuries. The parties produced the P3, treatment notes, and medical reports by consent.
8. The defence witness testified on issues related to the accident's occurrence. The defence evidence was adopted from CC 73 of 2023.



Submissions

9. The Appellant relied on the case of George Njenga & another v Daniel Wachira Mwangi [2017] eKLR. In the case Kasango J awarded Ksh 800,000/= for pelvic fracture, unstable left knee joint, unstable left ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterolateral aspect of the left leg.
10. The Respondent relied on a 20-year-old case of Joshua Mwaniki Nduati –V- Samuel Muchiri Njuguna [2005] eKLR where Justice M.A. Ang’awa gave an award of Ksh. 250,000/= for fracture of pelvis, right acetabulum and fracture right side three ribs. They also relied on a 21-year-old decision in the case of Joyce Wanjiru Kamau –V- Kenya Cannery Ltd & Another (2004) eKLR, where Ksh.100,000/= was awarded for fracture of the collar bone and multiple fractures of the pelvis.

Analysis

11. This being a first appeal, this court must reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

12. The first Appellate court is not necessarily bound to accept the findings of fact by the court below, in particular, where he failed to take into consideration the evidence on record. In the case of Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, Law JA the court stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.



14. In *Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005, the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5th ed.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

15. It is a strong thing for an appellate court to differ from the findings on a question of fact of the court who had the advantage of seeing and hearing the witnesses. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

16. In this case, the question is whether the award is too low or too high as to amount to an erroneous estimate of damages. That question was addressed in the case of *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, where Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

17. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injured public must be at the back of the mind of the trial Court. In deciding whether to disturb the quantum given by the Lower Court, the Court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The court of appeal succinctly pronounced these principles in *Kemfro Africa Ltd Vs. Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

18. The foregoing was settled in the case of *Butler Vs Butler* Civil Appeal No. 43 of 1983 (1984) KLR where Keller JA, stated the following in regard to award of damages.

“This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders* [1971]EA(CA-K); *Tayab and Ahmed Yakub & amp; Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & amp;



Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also *Hancox JA in Tayab* (1983 KLR, 114).

19. Therefore, for me to interfere with the award it is not enough to show that the award is high or low or that had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high or low as to amount to an erroneous assessment of damages.
- c. The award is simply not justified from evidence.

20. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

21. Final submission is a way by which advocates or parties crystallize the substance of the case, the evidence and the law relating to that case. They are not ways of proving a case. In the case of *Ngang'a & Another vs. Owiti & Another* [2008] 1 KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

22. Therefore, strictly speaking, submissions cannot take the place of evidence. There must be evidence upon which the court will base its decision. This is more dire in cases where there are issues of demeanor of witnesses. The Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR posited as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course



only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

23. There was no dispute as to the injuries suffered. The court found that the injuries were largely soft tissue injuries. The question herein is thus whether pelvic contusion with resultant pelvic fractures were soft tissue injuries. The P3 showed that the Appellant suffered an inferior pubic ramus fracture. This was confirmed by the medical report dated 4.4.2023 and X-rays. Indeed, she required prolonged orthopedic follow up to ensure proper pelvic fracture healing.
24. In *Peter Gakere Ndiangu v Sarah Wangari Maina* [2021] eKLR, the plaintiff suffered a healing bilateral superior and inferior pubic rami fracture and a permanent degree of incapacity at 15%. The court, J.K. Sergon reduced the award from 1,000,000/= to 500,000/= on 21.5.2021.
25. In *Gakuo v Mugo (Civil Appeal 57 of 2018)* [2023] KEHC 874 (KLR) (15 February 2023) (Judgment), the court, Kariuki J, awarded 750,000/= for fracture of the pelvis, soft tissue injuries of the right temporo-parietal region, soft tissue injuries of the chest and soft tissue injuries of the hip joint.
26. I am not oblivious to the fact that in the assessment of damages, the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the level of awards in similar cases. Lord Morris had occasion to comment on the above concept in the case of *H. West and Son Ltd v. Shepherd* (1964) AC.326 and stated thus:

"...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional...."

27. For the court to set aside award of damages, it must be shown that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect. The court remembers that it is the magistrate who heard the evidence. What then happens where the court did not hear evidence? in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 the Court of Appeal held:-

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 at a figure which was either inordinately high or low

28. It must be recalled that the question as to the quantum of damage is one of fact for the trial court, and as such, the principles of law enunciated in the decided cases are only guides. In *Bash Hauliers Limited v Anastacia Ndinda Kimonye* [2020] eKLR, Justice G V Odunga, stated as doth: -

"49. That was the position in *Woodruff vs. Dupont* [1964] EA 404 where it was held by the East African Court of Appeal that:

"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they



must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them... The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself”. The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

29. In the circumstances, I find that the court below misdirected itself that these were soft tissue injuries. This resulted in the award not being a proper award. It should be set aside. In lieu thereof, a sum of Kshs. 500,000/= will suffice. Consequently, I set aside the award of Kshs. 200,000/=. In lieu thereof, I award a sum of Kshs. 500,000/=.
30. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
31. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.



32. The Appeal is thus allowed, the award of damages is set aside, and in lieu thereof, I substitute with a sum of Kshs. 500,000/=. Costs of Kshs. 75,000/= to the Appellant for the appeal.

Determination

33. The upshot of the foregoing is that I make the following orders:

- a. The Appeal is thus allowed, the award of damages is set aside, and in lieu thereof, I substitute with a sum of Kshs. 500,000/=.
- b. Costs of Kshs. 75,000/= to the Appellant for the appeal.
- c. 30 days stay.
- d. The file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 24TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Nyandoro for the Appellant

Mr. Nganga for the Respondent

Court Assistant – Michael

