



REPUBLIC OF KENYA



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**Ogao v Masorori (Civil Appeal E007 of 2021)
[2025] KEHC 3031 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E007 OF 2021
DKN MAGARE, J
MARCH 4, 2025**

BETWEEN

NAFTALI ORENGA OGAO APPELLANT

AND

JAMES ORAGUCHU MASORORI RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 25.9.2020 in Kisii CMCC No. 726 of 2020 by Hon. Dorcas Mac'Andere, RM. Liability was settled at 65:35 in favour of the Respondent. The Appellant was the defendant in the lower court.
2. The lower court entered judgment as follows:
 - i. General damages –Ksh. 1,200,000/=
 - ii. Special damages of Ksh. 119,000/=
 - iii. Liability at 65:35 as against the defendant
3. The Appellant, being aggrieved, preferred 5 grounds in the Memorandum of Appeal. I have perused the 5-paragraph memorandum of appeal. It raises only one issue, that is the quantum of damages being inordinately excessive.
4. In the plaint dated 16.9.2019, the Respondent sought general damages, special damages and costs and interest. The claim arose from an accident on 3.7.2019 when the Respondent was walking within Kisii township when the Appellant's motor vehicle Registration No. KCL 126Z was so negligently driven that it knocked down and caused the Respondent severe personal injuries.
5. The following injuries were pleaded:
 - i. Contusion to the head



- ii. Chest contusion
 - iii. Fracture of the ribs
 - iv. Contusion to the pelvis
 - v. Fracture of the pelvic
 - vi. Dislocation of the left knee joint
 - vii. Contusion to the left leg
 - viii. Fracture of the left tibia/fibula bones
 - ix. Abrasion to both knees: anteriorly
 - x. Abrasion to both hand palms
6. The Appellant entered appearance and filed a defence dated 8.9.2019 denying the averments in the plaint and blaming the Respondent. This is not now the subject of this appeal.

Evidence

7. PW1 was Dr. Morebu Peter. He relied on the Respondent's medical report which he produced in evidence. He then testified that the Respondent suffered a fractured tibia, right radius, right ulna and soft tissue injuries. On cross-examination, he stated that he examined the Respondent on 31.1.2019. He was not the treating doctor.

Submissions

8. The Appellant submitted that the Respondent did not prove the Ksh. 119,000/= on a 100% basis, which the learned trial magistrate awarded to the Respondent. The appellant led evidence relevant only to quantum, and the second medical report on the respondent by Dr. J.A.S Kumuenda. It was submitted that Ksh. 400,000/- would have been adequate compensation.
9. The Appellant referred to the case of Christopher Njoroge Ngugi & Stella Kathure v Cosmas Kithusi Nzioka [2018] eKLR, which had similar injuries and was decided 7 years ago. The claimant therein suffered a fracture of the pelvis on the left side, a comminuted fracture of the lower femur, and bruising of the iliac fossa. An amount of Ksh 550,000/= was awarded.
10. Though mostly undated, the authorities submitted by the appellant were near the case herein. The case of Civicon Limited v Richard Njomo Omwanja & 2 others [2019] KEHC 8373 (KLR), related to several bruises and a pelvic fracture without permanent disability.
11. They also relied on the case of John Njenga Maina v Humphrey Kinyua Rukeria [2016] KEELRC 657 (KLR), where a sum of or the Ksh.750,000/- was awarded in 2016 for compound fractures of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains.
12. The case of Mwavita Jonathan v Silvia Onunga [2017] eKLR was decided 8 years ago. The claimant had an 85% disability. This matter turned on its own peculiar facts. The court could not comprehend the concept of a 200% disability. In that matter, the court awarded 750,000/= for compound fracture of the tibia and fibula, fracture of the distal 1/3 of the tibia and fibula, and friction burns on the elbow, among other things. This award was made in 2016.



13. The Respondent filed submissions dated 30.08.2022. They stated that the court can't set aside judgment unless the court proceeded on wrong principles or misapprehended evidence. Reliance was placed on the case of *Texcal House Service Station Ltd & Another v Jappien & Another* (Nairobi [*CA No. 134 of 1998*](#)), submitting that the award of Ksh.. 1,200,000/= was not inordinately high.
14. He stated that both Dr. Daniel Nyameino and Dr. Kumenda produced their reports at the trial. He cited a plethora of authorities to support this position. These were related to various injuries and for amounts ranging from 300,000/= to Ksh. 1,400,000/=. He relied on *Veronica Mkanjala v Patrick Nyasinga Amenity* [2021] eKLR where the court upheld an award of Kshs 300,000/= as general damages for a plaintiff who had suffered both soft tissue injuries and dislocation.
15. The Respondent relied on *Dennis Matagaro v NKO (Minor suing through next friend and father WOO)* [2021] eKLR where the court upheld an award of Kshs. 700,000/- where it had been established that the plaintiff sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the left tibia and fibula. They also relied on the case of *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo* [2019] eKLR. In the matter, a claimant, sustained pelvic injuries with a fracture of the right pubic ramus and diastasis of the symphysis pubis.
16. I have perused the cases relied on by the Appellant, which had less severe injuries. They did not take into account the fact that the Respondent herein suffered fractures on the pelvis, tibia, fibula, and ribs. On the other hand, the authorities submitted by the Respondent are irrelevant. It appears that the Respondent was finding one authority per injury instead of the cumulative nature of the injuries.

Analysis

17. 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.
18. In the case of *Mbogo and Another v Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
19. On quantum, the lower court awarded Ksh. 1,200,000/= in general damages but without citing any supporting authority. In this case, the only medical report produced was one by Dr. Daniel Nyameino. The same showed that the Respondent suffered the following injuries:
 - a. Contusion to the head
 - b. Chest contusion
 - c. Fracture of the ribs
 - d. Contusion to the pelvis
 - e. Fracture of the pelvic
 - f. Dislocation of the left knee joint



- g. Contusion to the left leg
 - h. Fracture of the left tibia/fibula bones
 - i. Abrasion to both knees: anteriorly
 - j. Abrasion to both hand palms
20. The court has to assess the effect of the injuries on the Appellant. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report dated 31.1.2019 and viewed in line with the lower court's finding. Without any contrary medical evidence, I find no reason to fault the lower court's finding and uphold the injuries suffered as the injuries pleaded and proved on evidence.
21. 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 as stated in *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019]eKLR, 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.”
22. 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 must be at the back of the mind of the trial court.
23. In *Butler v Butler Civil Appeal No. 43 of 1983* [1984] KLR, Keller JA stated the following regarding the 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 & Sons v Anna May Kinanu Civil Appeal 29 of 1982* (Law, Potter & 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).
24. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being 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.



25. The court of appeal pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Service v 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.

26. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

27. Therefore, for me to interfere with the award it is not enough to show that the award is high or 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 the quantum of damages:

- i. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- ii. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
- iii. To ascertain whether the award is simply not justified from evidence.

28. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

29. The duty of the first appellate court remains as set out in the *Court of Appeal for Eastern Africa in Pandya v Republic* [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

30. Therefore, this court has to establish similar fact scenarios, though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be a disparity in awards made by different courts for similar injuries as established in *Southern Engineering Company Ltd. v Musingi Mutia Civil*



Appeal No 46 of 1983 [1985]eKLR. However, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”

31. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
- 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.
32. This court has to consider that the actual injury suffered is the objective part of the assessment, in establishing whether the lower court erred in its assessment. In the case of *Kilda Osbourne v George Bamed and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* [1963] 2 ALL ER 625 Sykes J stated as follows:
- “The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”
33. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v Shepherd* [1964] AC.326 (supra) where it was stated that:
- ...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.....”
34. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so.



35. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

36. Awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. The words of Lord Denning were reiterated by Nyarangi, JA in Kigaragari v Aya [1985] eKLR thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

37. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Dennis Matagaro v NKO (Minor suing through next friend and father WOO) [2021] eKLR the plaintiff had sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the tibia and fibula and had been awarded Ksh.. 700,000/=.

38. The injuries suffered by the Appellant in the appeal herein are largely similar to the above case. Therefore, I am guided that the award of Ksh. 1,200,000/- granted by the lower court were inordinately high and an erroneous estimate of damages. An award of Ksh 800,000/= will suffice. I set aside the award of Ksh 1,200,000/= as inordinately high. In lieu thereof, I enter judgment for Ksh 800,000/= as general damages.

Special damages

39. Under this head, special damages of a sum of Ksh. 119,600/= were pleaded. Special damages must be pleaded particularly and specifically proved. In the case of David Bagine v Martin Bundi [1997] eKLR, the court of appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi (1982-88) IKAR 681 at page 684: “....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the



head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it."

40. A sum of Ksh. 200/= for police abstract was not explicitly proved. A bill for 112,400/= was produced at page 28 of the record. The receipt for specials shows that a sum of Ksh 112,500/= was paid in cash, and a change of Kshs. 100/= was given. This document was not objected to. The amount of 112,400/= was proved. In respect to Ksh 6,500/=, a receipt was produced. However, there was no search. Consequently, a sum of 112,400/= and Ksh 6,500/= was proved, totaling to Kshs. 118,900/= . A sum of Ksh. 119,000/= was thus erroneous. It is accordingly set aside and substituted with a sum of 118,900/=.
41. 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.
42. 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.

43. The changes are minimal, especially on specials. In the circumstances, each party will bear its own costs.

Determination

44. The upshot of the foregoing is that the appeal is allowed to a limited extent as follows:



- a. The award of general damages is set aside, and in lieu thereof, I enter judgment for the Respondent for Ksh 800,000/=.
- b. I set aside the award of special damages for Ksh. 119,000/= and, in lieu thereof, enter judgment for special damages of Ksh. 118,900/=.
- c. Special damages shall attract interest from the date of filing.
- d. Each party to bear their own costs.
- e. 30 days stay of execution.
- f. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 4TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael

