



REPUBLIC OF KENYA



KENYA LAW
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**Ondicho v Mosigisi (Civil Appeal E054 of 2023)
[2025] KEHC 5140 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E054 OF 2023**

**WA OKWANY, J
APRIL 24, 2025**

BETWEEN

WILSON MBOGA ONDICHO APPELLANT

AND

HARISON NYANG'AU MOSIGISI RESPONDENT

*(Being an Appeal from the Judgment and Decree at the Chief
Magistrate's Court in Nyamira, CMCC No. 59 o 2018 delivered
by Hon. W.K. Chepseba, Chief Magistrate on 3rd November 2023)*

JUDGMENT

1. The Respondent sued the Appellant before the trial court seeking special and general damages arising out of a road traffic accident that took place on 3rd January 2018. The Respondent's case was that he was on the material day travelling as a lawful passenger on the Appellant's motor vehicle registration No. KBC 935Y when an accident occurred in which he sustained serious bodily injuries. The Respondent attributed the accident to the negligence and/or recklessness of the Appellant's driver/agent.
2. The Appellant filed a Defence dated 30th July 2018 in which he denied the allegations made in the Plaintiff and attributed the accident to the negligence of the Respondent.
3. The trial court conducted a trial in which the Respondent presented the evidence of 4 witnesses while the Appellant called one witness.
4. At the close of the Defence case, the trial court entered judgment in favour of the Respondent as follows: -

Liability at 100% in favour of the Plaintiff against the Defendant

General Damages – Kshs. 300,000/=



Special Damages – Kshs. 8,150/=

Total – Kshs. 308,150/=

Costs and interests.

5. Aggrieved by the said judgment, the Appellant filed the instant appeal in which he listed the following grounds of appeal: -
 1. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on General Damages of Kshs. 300,000/= that was overly excess in the circumstances of the case.
 2. That the Learned Trial Magistrate erred in law and in fact in finding a soft tissue injury to the head as head injury hence arriving at an award which was overly excessive.
 3. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to the decisions filed alongside the Defendant’s submission that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
 4. That the Learned Trial Magistrate’s exercise of discretion in the assessment of quantum was injudicious.
6. The Appellant now seeks orders to set aside the decision of the trial court on quantum and the court’s reassessment of quantum. He also prays for the costs of the appeal and of the court below. The appeal was canvassed by way of written submissions which I have considered.

The Appellant’s Submissions

7. The Appellant submitted that the medical evidence tendered by the Respondent did not support the injuries listed in the Plaint. He noted that the Respondent sustained only soft tissue injuries as shown in the second medical report by Dr. Kahuthu in (D.Exh1). It was submitted that the medical reports were informed by the initial treatment notes. The Appellant urged this court to be wary of fraudulent cases in which injuries listed in the Plaint may have been in respect to other cases involving other accidents.
8. The Appellant proposed an award of Kshs. 80,000/=. Reference was made to the cases of *HB (Minor suing through Mother & Next of Friend DKM) vs. Jasper Nchonga Magari & Another* (2021) eKLR; *Eva Karemi & 5 Others vs. Koskei Kieng’ & Another* (2020) eKLR and *Joash Ouko Nyabuto & Ano vs. Clinton Motieka Ogoncho (UR)* in which the claimants who suffered similar injuries were awarded damages ranging between Kshs. 30,000 and Kshs. 70,000/=. He also urged the Court to award the Appellant costs.

The Respondent’s Submissions

9. The Respondent referred to the principles governing the assessment of damages and the circumstances under which an appellate court may interfere with the trial court’s award of damages as was stated in the cases of *Paul Kipsang Koech & Another vs. Titus Osule Osore* (2013) eKLR and *Kiwanjani Hardware Ltd & Another vs. Nicholas Mule Mutinda* (2008) eKLR.
10. It was submitted that the award made by the trial court was fair and reasonable when considered against the injuries that the Respondent sustained in the accident. The Respondent argued that the trial court had the advantage of seeing witnesses testify first-hand and arrived at a well-reasoned decision. He urged this court to uphold the award made by the trial court.



11. The duty of a first appellate court was discussed in the case of *Sembuya vs. Alports Services Uganda Limited* [1999] LLR 109 (SCU), where Tsekooko JSC said at 11 held thus: -

“I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).”

12. I have carefully considered the record of appeal and the parties’ rival submissions. I find that the main issue for determination is whether the trial court arrived at the correct finding on quantum.

13. It is trite that the assessment of damages is at the discretion of the trial court. In *Catholic Diocese of Kisumu vs. Sophia Achieng Tete*, Civil Appeal No. 284 of 2001 [2004] 2 KLR 55, the Court of Appeal held thus:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

14. The Court of Appeal also set out principles to be considered when assessing damages in personal injury matters. In *Derrick Munroe vs. Gordon Robertson* {2015} JMCA CIV 38 it was held thus: -

“There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum Judges are not entitled to simply phial a figure from the air. Regard must therefore be had to comparable cases in which complainants have suffered similar injuries.”

15. The Respondent listed the following injuries at paragraph 5 of the Plaint: -

- i. Cut wound on the left parietal region
- ii. Right Tibia Fracture
- iii. Head Injury

16. I note that during cross-examination, the Respondent (PW1) testified that an X-Ray examination of his right leg did not reveal any fracture. On re-examination, he stated that he did not sustain any fractures but that he only suffered pain.

17. PW2 Dr. Protus Makori testified that the right tibia had a crack but on cross-examination said that no fracture was noted.

18. PW3 Dr. Morebu testified that he relied on the Respondent’s treatment notes and Discharge Summary to prepare his report but did not assess any permanent disability.

19. The Respondent was further examined by Dr. Kahuthu on 28th June 2018 who noted that he suffered soft tissue injuries and that the X-Ray did not reveal any fractures.



20. I have considered the medical evidence that was produced by both parties and I find that it did not support the claim that the Respondent sustained any fractures in the accident. I therefore find that the Respondent did not prove that he sustained a fracture, as stated in the Plaintiff, on a balance of probabilities.
21. I have also considered the head injury listed in the Plaintiff and I note that, as stated in the Discharge summary, the head injury was in reference to a cut wound on the left parietal region of the head. It is therefore my finding that the Respondent sustained soft tissue injuries on the leg and a cut wound to the head.
22. The Appellants took issue with the award of general damages of Kshs. 300,000 and argued that the said award was inordinately high considering the Respondent's injuries. In the case of *Butt vs. Khan* [1981] KLR 349 the court laid out the principles that should govern an appellate court when considering whether or not to disturb the trial court's award of damages thus: -
- “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.”
23. It is trite that courts are guided by comparable past awards when considering the kind of award to make for general damages. As I have already noted in this judgment, the Respondent suffered soft tissue injuries to the head and leg.
24. I have considered the following similar decided cases: -
- a. In *Philip Musyoka Mutua vs. Mercy Ngina Syovo* [2018] eKLR the court awarded of Kshs. 120,000/= general damages to the claimant who sustained blunt injury to the head, both shoulders, ribs, back, deep cut wounds both ankle joints and cut wound on the right knee.
 - b. In *Ephraim Wagura Muthui 2 others vs. Toyota Kenya Limited & 2 others* [2019] eKLR, Majanja J enhanced the trial court's award of Kshs. 55,000/= to Kshs. 100,000/= for a cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back.
 - c. In *Nyambati Nyaswabu Erick vs. Toyota Kenya Limited & 2 others* [2019] eKLR the court set aside an award of Kshs. 55,000/= and substituted it with one of Kshs. 90,000/= in respect to a claimant who sustained a deep cut on the scalp, blunt injury to the left side of the chest, contusion on the back and contusion on both legs.
25. In the instant case, I note that the injuries that the Respondent suffered were less severe when compared with the injuries of the claimants in the above cited cases. I therefore find that the Appellant's proposal to reduce the trial court's award to Kshs. 80,000/= is merited.
26. In the final analysis, I find that the Appeal is merited, albeit in part, and I therefore allow it and set aside the trial court's award substitute it with the following award: -

Liability at 100% against the Appellant

General Damages at Kshs. 80,000/=

Special Damages – Kshs. 8,150/=

Total – Kshs. 88,150/=



I award the Respondent interest on the above sum at court rates till payment in full.

27. Each party shall bear his own costs of the appeal.

28. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA
MICROSOFT TEAMS THIS 24TH DAY OF APRIL 2025.**

W. A. OKWANY

JUDGE

