



REPUBLIC OF KENYA



**Omari v Gichani (Civil Appeal E001 of 2023)
[2025] KEHC 4563 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E001 OF 2023**

WA OKWANY, J

APRIL 3, 2025

BETWEEN

CHRISTOPHER OMARI APPELLANT

AND

SAMWEL OMARI GICHANI RESPONDENT

(Being an Appeal from the Judgment delivered at the Principal Magistrate's Court in Keroka, PMCC No. 15 of 2018 by Hon. B.M. Kimtai, Principal Magistrate on 13th December 2021)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court where he sued the Appellant/Defendant seeking, *inter alia*, general damages for pain and suffering arising out of a road traffic accident that occurred on 22nd August 2017. The Respondent's case was that he was on the material day riding his motor cycle registration No. KMDD 299N along Kisii-Keroka road when at Keroka area, the Appellant's driver/agent drove the Appellant's motor vehicle registration No. KAT 359J so negligently and/or carelessly thereby allowing it to veer off its lane and hit the Respondent who was riding from the opposite direction. The Respondent stated that he suffered severe injuries as a result of the said accident.
2. The Defendant/Appellant filed his statement of defence in which he denied the allegations made in the Plaint. The trial court conducted a trial in which the Respondent testified and called two witnesses while the Appellant presented his evidence and called one witness.
3. At the end of the case, the trial court entered judgment for the Respondent in the following terms: -

Liability at 80:20 in favour of the Plaintiff

General Damages – Ksh. 600,000/=

Special Damages – Kshs. 203,364/=



Costs of the suit

Interest on the above.

4. Aggrieved by the trial court's verdict, the Appellant filed the instant appeal and listed the following grounds of appeal in his Memorandum of Appeal dated 9th January 2023: -
 1. The Learned Trial Magistrate erred in law and misdirected himself in fact and in law when he failed to consider the Appellant's submissions on both points of law and facts.
 2. The Learned Trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and had occasioned a miscarriage of justice.
 3. That the Learned Trial Magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the [Insurance Motor Vehicle Third Party Risks \(Amendment\) Act 2013, Cap 405](#).
 4. The Learned Trial Magistrate failed and/or neglected cumulatively and/or exhaustively to evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion contrary to and in contradiction of the evidence on record.
 5. The Learned Trial Magistrate erred in fact and in law in awarding the Respondent Special Damages in the sum of Kshs. 203,364/= which amount was not only manifestly excessive but lacked any justification or qualification as the same was not pleaded by the Respondent in his pleadings.
 6. The Learned Trial Magistrate erred in fact and in law in awarding the Respondent General Damages in the sum of Kshs. 600,000/= which amount was not only manifestly excessive but lacked any justification or qualification.
 7. The Learned Trial Magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the Appellant herein without assigning any plausible explanation and/or reason whatsoever. Consequently, the Appellant herein has been subjected to unfair treatment and hence suffered a miscarriage of justice.
 8. The Learned Trial Magistrate erred in law in apportioning liability in the ratio of 80:20 as against the Appellant when the facts and the evidence clearly showed that the Respondent was to blame for the accident.
 9. The judgment of the Learned Trial Magistrate is convoluted and the issues raised by the Learned Trial Magistrate are slanted and thereby camouflage the judicial mind of the trial court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgment of the Learned Trial Magistrate is a nullity.
 10. The Learned Trial Magistrate erred in law in disregarding and/or giving the Medical Report mounted and/or filed by the Appellant herein without giving any justification and/or ratio whatsoever for failing to consider the same.
 11. The Learned Trial Magistrate erred in law and fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of the case.



12. The Learned Principal Magistrate failed to address his judicial mind to the salient and pertinent issues, canvassed, and/or ventilated by the parties and in particular, by the Appellant and thus failed to itemize the issues for determination, the determination thereof and the reason for such determination. Consequently, the decision by the Learned Principal Magistrate has occasioned a miscarriage of justice and is thus a nullity.
5. The Appellant urged this court to set aside the judgement and decree of the trial court and instead substitute it with an order dismissing the suit in Keroka PMCC 15 of 2018; or in the alternative, that this Court be pleased to review, vary or reduce the award of damages in favour of the Respondent and award him the costs of the appeal and the case before the trial court.
6. The Appeal was canvassed by way of written submissions which I have considered.
7. The duty of the first appellate court was discussed in *Sembuya v. Alports Services Uganda Limited* [1999] LLR 109 (SCU), where it was 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).”

Analysis and Determination

8. Having considered the submissions and the record of appeal, I find that the main issues for determination are whether the trial court arrived at the correct verdict on the twin issues of liability and quantum.

i. Liability

9. In *Nkuba v. Nyamiro* [1983] KLR 403, the Court of Appeal outlined the principles that should govern an appellate court when considering whether or not to interfere with the findings of the trial court. The court held that:-

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

10. In the present case, I note that while the Respondent testified the Appellant’s vehicle hit him as the driver was attempting to overtake a lorry/trailer, the Respondent’s own witness PW3 No. [particulars withheld] Cpl. Josephine Wangida testified that Respondent hit the motor vehicle registration No. KAT 359J as it was heading to Kisii from Keroka. She stated that the rider of the motor cycle, the Respondent herein, was the one who was trying to overtake a trailer. On cross examination, PW3 testified that the Respondent was to blame for the accident even though he was not charged with any traffic offence. Her testimony was corroborated by the testimony of the Appellant’s driver, DW2 who stated that the motor cycle was overtaking at a corner. The Respondent, on his part, testified that it was the motor vehicle that was overtaking when it hit him.
11. From the above summary of the evidence by both parties, I find that the trial court should have paid a close attention to the evidence of the Respondent’s own witness who stated that the Respondent was to blame for the accident. My finding is that in the circumstances of this case and considering the fact that neither the Respondent nor the Appellant’s driver was charged with a traffic offence following the



accident, the trial court should have found the parties equally to blame for the accident and distributed liability at 50% to 50%.

ii. Quantum

12. The principles governing an appellate when faced with the issue of whether or not to interfere with the assessment of damages by a trial court were outlined by the Court of Appeal in the case of *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* CA 142/2003 (UR), when it held thus: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v. Musila* [1984] KLR 257).”

13. Similarly, in *Jane Chelagat Bor v. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that: -

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

14. In this case, the Respondent listed his injuries as follows: -

- a. Chest contusion
- b. Bruises on the right hand
- c. Bruises on the right knee
- d. Compound right tibia fracture
- e. Compound right fibular fracture
- f. Bruises on the left hand

15. The Respondent’s injuries were confirmed by the medical evidence from Dr. Morebu’s (P.Exh 1) and the P3 Form (P.Exh 3).

16. It is trite that comparable injuries should attract comparable awards. (see the Court of Appeal in *Odinga Jacktone Ouma v. Moureen Achieng Odera* [2016] eKLR).

17. Courts have also set out the principles that should guide them when assessing damages in personal injury cases. In *Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another* [2017] eKLR it was held that:-

- “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.”

18. I have considered the following past award where the claimants sustained injuries that are similar to the Respondent’s injuries in this case: -

- a. In *West Kenya Sugar Company Case v. Andrew Chiroyi Sunguti* [2021] eKLR, the plaintiff sustained two fractures on the left leg and was awarded Kshs. 500,000/= in general damages.
- b. In *Simon Kimote v. Agro Solutions Limited* [2021] eKLR, the court upheld an award of Kshs. 350,000/= where the Plaintiff suffered right femoral fracture at the lower 1/3, tibia fracture, blunt head and neck injury.
- c. In *Daniel Otieno Owino & another v. Elizabeth Atieno Owour* [2020] eKLR, the court reduced the award of Kshs. 600,000/= General Damages to Kshs. 400,000/= where victim sustained compound fractures of the tibia and fibula bones on the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, and blunt chest injury.
- d. In *Nahashon Nyabaro Nyandega v. Peter Nyakweba Omboga* [2021] eKLR, the court reduced an award of Kshs 900,000/= for General Damages to Kshs. 650,000/= where the claimant suffered bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg.
- e. In *Harun Muyoma Boge v. Daniel Otieno Agude* (2015) eKLR, the victim sustained blunt chest injuries, cut wound on the right wrist, deep cut wound on the right foot, fracture on the right tibia and fibula and soft tissue injuries with disability estimated at between 5%-25%. The court awarded Kshs. 300,000/= in general damages.

19. Taking a cue from the above cited cases, I find that the trial court’s award of Kshs. 600,000/= was reasonable and commensurate with the Respondent’s injuries. I find no reason to interfere with the trial court’s assessment of general damages.

20. Turning to special damages, I note the Respondent pleaded the particulars of special damages at paragraph 5 of the Plaint as follows:-

KRA Search – Kshs. 550
 Medical Report – Kshs. 6,500
 Medical Expenses – Kshs. 123,150/=
 Total – Kshs. 130,200/=

21. The trial record reveals that the Respondents attached several receipts whose figures amount to Kshs. 195,600.91/= for medical expenses. In *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at p. 717, and 721 the Court of Appeal held that: -

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....
 for they are not the direct natural or probable consequence of the act complained of and



may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

22. Having regard to the principle stated in the above cited case, I find that this court can only award the Respondent the amount that he pleaded and proved at the hearing being Kshs. 123,150/= for medical expenses, the cost for the motor vehicle search as shown in the receipt (P.Exh 6b) being Kshs. 550/= and Dr. Morebu’s Medical Report being Kshs. 6,500/=. I therefore award the said amounts and set aside the trial court’s award of Kshs. 203,364/= as special damages as the same was neither pleaded nor proved.
23. In the final analysis, I find that the instant Appeal is merited and I therefore allow it in the following terms: -

Liability at 50:50 in favour of the Respondent

General Damages – Ksh. 600,000/=

Special Damages – Kshs. 130,200/=

Sub Total Kshs, 730,200

Less 50% liability - (Kshs. 365,100/=)

Net Total - Kshs. 365,100/-

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

24. I award the Respondent the costs of the Appeal which I hereby assess at Kshs. 40,000/-.

25. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF APRIL 2025.

W. A. OKWANY

JUDGE

