



**Oriental Construction Company Limited v Kiogora (Civil Appeal  
E018 of 2024) [2025] KEHC 11583 (KLR) (28 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11583 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL E018 OF 2024**

**RL KORIR, J  
JULY 28, 2025**

**BETWEEN**

**ORIENTAL CONSTRUCTION COMPANY LIMITED ..... APPELLANT**

**AND**

**NEWTON KIOGORA ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. D.A Ocharo Senior Principal  
Magistrate in Chuka MCCC No. E218 of 2021 delivered on 23rd May, 2023)*

**JUDGMENT**

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for General and special Damages that arose from a Road Traffic Accident involving the Plaintiff's Motor Cycle Registration No. KMFA 564 Y and the Defendant's Motor Vehicle Registration No.KCT 626 Z. The Plaintiff claimed that the Defendant's motor vehicle which was negligently driven at high speed lost control and hit his motorcycle from the back injuring both himself and a pillion passenger.
2. At the conclusion of the trial, the trial court (Hon. Ocharo SPM) entered Judgement in favour of the Plaintiff and awarded General and special damages of Kshs.2,000,000 and Kshs.7,000 respectively. He found the Defendant 100% liable.
3. Aggrieved by the Judgement, the Defendant/Appellant filed the present Appeal. In their Memorandum of Appeal dated 19<sup>th</sup> June 2024, the Appellant raised the Ground that "the learned magistrate erred in law and fact in making an award in general damages that was manifestly excessive and inordinately high in comparison to other judicial award involving similar injuries."



4. My duty as a first appellate court is to re-analyse the evidence and come to my findings and conclusions. The duty was aptly stated in *Selle Vs. Associated Motor Boat Company Ltd* [1968] E.A thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses.”

### **The Plaintiff’s Case**

5. The Plaintiff/Respondent filed his Complaint dated 11<sup>th</sup> November 2021. He stated that on or about 12<sup>th</sup> February 2020, he was riding a Motor Cycle Registration KMEA 564 Z along Meru-Chuka road near Kiriani area when the driver of motor vehicle registration KCT 626 Z one Martin Kimathi Kanyoru lost control and hit the motorcycle from the back injuring him and his pillion passenger.
6. The Plaintiff particularized the negligence attributable to the Defendant at paragraph 4 of the Complaint. He particularized the injuries at paragraph 5 as follows:-
- i. Tharoco-lumba junction kyphosis
  - ii. Anterior wedge compression fracture of L2 vertebral body with retropulsion.
  - iii. Resultant spinal canal stenosis with terminal nerve root compression.
  - iv. L2 vertebral body bone marrow oedema.
  - v. L1/L2 disc space width is obliterated.
  - vi. Anterior para-vertebral hematoma extending from T12/L1-L3/L4.
  - vii. Tear of the anterior spinal ligament at L1/L2 level.
7. In support of his case, the Plaintiff testified as PW2 and called two other witnesses. He produced Exhibits.

### **The Defendant’s/Appellant’s Case**

8. The Defendant entered appearance and filed their Statement of Defence dated 21<sup>st</sup> December, 2021. They denied the occurrence of the accident and any liability and in the alternative attributed liability to the Plaintiff which they particularized at paragraph 5 of the Statement of Defence.
9. The Defendant closed their case without calling any witness. They did not file submissions either.
10. As already stated the trial court rendered Judgement on 23<sup>rd</sup> May, 2024 which triggered the present Appeal.
11. Parties took directions to canvass the Appeal through written submissions.



### **The Appellant's Submissions**

12. The Appellant filed submissions dated 3<sup>rd</sup> October, 2024 and a list of Authorities namely *Selle & Another Vs. Associated Motor Boat Co. Ltd (1968) E.A 123*; *Charles Oriwo Odeyo Vs. Appollo Justus Andabwa & Another [2017] eKLR* awarded 800,000/- *Dorcas Mututho Ileve Vs. Muithya Lydia [2018] eKLR* awarded 600,000 eKLR and *Abdi Abdi Haji Grellied Vs. Auto Selection (K) Ltd & Another [2015]eKLR* awarded Kshs.925,000/-
13. The Appellant submitted that the award was inordinately high in view of the injuries sustained by the Plaintiff and current comparable awards for similar injuries.
14. The Appellant relied on the case of *Dorcas Mututho Ileve Vs. Muithya Lydia [2018] eKLR* where the court awarded Kshs.600,000 for head injury and multiple fractures; and the case of *Abdi Abdi Haji Gulleid Vs. Auto Selection (K) Ltd & Another [2015] eKLR* where the court awarded Kshs.750,000 for grievous injuries to the spine and upper limbs and wedge compression of the back.
15. The Appellant submitted that an award of Ksh.650,000 would suffice.

### **The Respondent's Submissions:**

16. The Respondent filed submissions dated 13<sup>th</sup> February, 2025. They submitted that the court ought not to interfere with the award unless it can be proved that the trial court applied the wrong principles or misapprehended the evidence. They pointed out that the Record of Appeal did not contain the Respondent's Statement which was adopted as evidence in chief and did not also contain the exhibits produced by the Respondent in the trial.
17. The Respondent relied on the following cases as being comparable to the present case. *Nancy Oseko Vs. Board of Governors Maasai Girls High School [2011] eKLR* where the Court awarded general damages of Kshs.2,500,000; *Nicholas Njue Njuki Vs. Eliud Mbugua Kahuro [2014] eKLR* where the court awarded general damages of Kshs.3,800,000; for pain and suffering and *Board of Trustees Anglican Church of Kenya Diocese of Marsabit Vs. Chukulisa Roba Harakhe [2019] eKLR* where the court awarded kshs.2,000,000.

### **Analysis and Determination**

18. This Appeal is on the general damages only. The Appellant has not challenged liability but only urged that the award be reduced.
19. The applicable principles were set by the Court of Appeal in the case of *Kemfro Africa Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982-88 ) 1 KAR 727 at P. 730*, where Kneller J.A held thus:-

“the principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.”



20. It is a further principle of law that assessment of damages is an exercise of discretion by the trial court. In the case of Fredrick Masaghwe Mukasa vs Director of Public Prosecutions & 3 Others (2-19) eKLR the Court of Appeal stated thus:-

“In doing so, we shall be guided by the well-established principles as set out in Mbogo & Another –v- Shah (1968) EA 93, where the predecessor of this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

In order for this Appeal to succeed, the appellant must bring himself within the ambit of the principles set out in Mbogo Vs Shah (supra). He must demonstrate to the satisfaction of this Court that the trial Court exercised its discretion wrongly in making the conclusions that it did.”

21. The burden of proof lay with the Respondent/Plaintiff to show the injuries he suffered and justify an award of damages.

Section 107 of the *Evidence Act* provides:

1. “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
22. In this case, the Respondent pleaded the injuries he suffered in the Plaintiff. At trial he testified and produced the following Exhibits; Police Abstract (Exhibit 1), Treatment Notes, Discharge Summary, Radiology Report, P3 and Medical Report.
23. I have looked at the Medical Report dated 24<sup>th</sup> August, 2020 prepared by Dr. Njiru. It lists the injuries sustained as:-Thoraco- lumba junction kyphosisAnterior wedge compression fracture of L2 vertebral body with retropulsion.Resultant spinal canal stenosis with terminal nerve root compressionL2 vertebral body bone marrow oedemaL1/L2 disc space width is obliteratedAnterior para-vertebral hematoma extending from T12/L1-L3/L4Tear of the anterior spinal ligament at L1/L2 level.
24. I note that the medical Reports were produced by the Plaintiff who was not the maker of the said documents. I however observe that there was no objection by the Defendant and the Documents were admitted into evidence by the trial court. Infact the Defendant’s Counsel did not cross-examine the witness on the injuries.
25. The Plaintiff’s testimony and Exhibits were therefore not controverted by the Defendant. As earlier stated, the Defendant closed their case without calling any witness or producing any Documentary evidence. It is my finding that the Plaintiff proved the injuries he suffered on a balance of probability. The injuries were as listed in the Medical Report and already listed at paragraph 23 of this Judgment.



26. It is sound judicial practice that similar injuries are compensated with comparable awards. In the case of Stanley Maore vs Geoffrey Mwenda NYR CA Civil Appeal No.147 of 2002 (2004) eKLR, the Court of Appeal stated that:-

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

27. I have considered the submissions of the parties and the authorities they have cited on the general damages. I have looked at the injuries suffered by the claimants in the authorities proposed by the Appellant. They are fairly comparable to the ones suffered by the Plaintiff. However, these authorities cited by the Appellant while showing comparable injuries were fairly old hence the low awards.

28. The claimants in the authorities suggested by the Respondent had sustained more extensive injuries than those suffered by the Plaintiff in the present case.

29. Taking into consideration all factors, I consider an award of Ksh.1.5 million fair compensation for the injuries suffered by the Respondent.

30. Special damages must be specifically pleaded and proved. In Hahn Vs. Singh [1985] KLR 716 the court 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 the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

31. The Plaintiff pleaded special damages as follows:-

- a. Medical report charges----- Kshs.7,000/-
- b. Doctor’s court attendance fees----- Kshs.8000/-
- c. Reasonable miscellaneous expenses to attend 2<sup>nd</sup> medical opinion ..... Kshs.3,000/-
- d. Treatment expenses --- to be stated at or prior to trial.

32. The Plaintiff supplied a receipt for Kshs.7000/- for the medical report. The other items were not proved. I therefore award Kshs.7000/-.

33. In the result, the Appeal succeeds to the extent only that the award for general damages is reduced from Kshs.2,000,000 to 1,500,000. Special damages remain Kshs.7,000 making the total Award Kshs one million, five hundred and seven thousand, (Ksh1,507,000) only.

34. Each party shall bear their costs in this Appeal while costs in the suit remain as awarded by the trial court.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 28<sup>TH</sup> DAY OF JULY, 2025.**

.....

**R. LAGAT-KORIR**



## **JUDGE**

Judgement delivered in the absence of Appellant, Mr. Ogweni for the Respondent, and Muriuki Court Assistant.

