



REPUBLIC OF KENYA



**Marube & another v Nyamboga (Civil Appeal E011 of 2023)  
[2024] KEHC 3395 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3395 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E011 OF 2023  
JM CHIGITI, J  
MARCH 12, 2024**

**BETWEEN**

**HERBERT OTARE MARUBE ..... 1<sup>ST</sup> APPELLANT**

**HEZRON ARUNGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL OMARE NYAMBOGA ..... RESPONDENT**

*(Being an appeal from the judgment of Honourable P.K. Mutai  
(S.R.M.), delivered on 18.01.2023 in Kisii MCCC No. 114 of 2020)*

**JUDGMENT**

**Brief background**

1. The Cause of action herein is a road traffic accident that occurred on 21.11.2019 which left the Respondent with personal injuries.
2. In seeking legal remedy, the Respondent, through plaint dated 03.03.2020, filed civil suit, vide, Kisii MCCC No. 114 of 2020 [hereinafter referred to as ‘the primary suit’].
3. The primary suit proceeded to full hearing and the trial court rendered its judgment on 18.01.2023 in the following terms: -
  - i. Liability 100% jointly and severally as against the Defendants (- the Appellants herein);
  - ii. General damages of Ksh 350,000/=;
  - iii. Special damages of Ksh 29,050/=; and
  - iv. Costs and interest awarded to the Plaintiff (- the Respondent herein)



4. Aggrieved by the trial court's findings and awards on liability and quantum, the Appellant has lodged the instant Appeal.

### **Appellants' Case**

5. Through its submissions, the appellant seems to have abandoned the liability issue and is pursuing the issue of the quantum of damages awarded in respect of the injuries suffered by the Respondent.
6. It is the Appellant's case that The Respondent pleaded that he sustained the following injuries: -
  - a. Blunt trauma to the neck
  - b. Chest contusion
  - c. Bruises on the right upper limb
  - d. Bruises on the left upper limb
  - e. Bruises on the left lower limb
  - f. Bruises on the right lower limb
  - g. Cut wounds on the right lower limb
7. The Appellant herein being aggrieved by the Judgment of the Learned Trial Magistrate lodged the Appeal herein vide Memorandum of Appeal on grounds that the award of damages made by the Learned Trial Magistrate were inordinately excessive as compared to the damages awarded in other similar cases.
8. The Respondent had also failed to table any evidence during hearing of undergoing for further treatment.
9. In the submissions before the Trial Magistrate the Appellant had relied on the Decision of NDUGU DENNIS versus Wangari Ndirangu 8s Another (2015). eKLR in which the court awarded general damages of Kshs 100,000 where the Plaintiff had sustained blunt injuries to the head, chest and both hands.
10. The Appellant also relied on the recent case of Lilian Anyango Otieno vs Philip Mugoya Ogila (2022) eKLR where the plaintiff sustained soft tissue injuries including head injuries with dislocation of cervical spine of the neck, tissue injuries of both upper limbs with dislocated wrist and elbow joint, chest injury with damage of the rib cage and blunt abdominal injury dislocated pelvic farme which injuries are more severe than once sustained by the Plaintiff herein.
11. It is on the basis of the above two decisions above, the Appellant proposed an award of Kshs 100,000/=. Reliance is placed in the case of Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR where the Appellant mounted an appeal against the Kshs 350,000 which was awarded to the Respondent therein who had suffered the following injuries: -:  
cut on the head,  
blunt injury to the right knee,  
multiple bruises on the upper limbs  
bruises on the right knee



12. The appellant wants the court to find that the award of Kshs 100,000 would be sufficient and reasonable in the circumstances and that the award of Kshs 350,0000 was inordinately high.

### **Respondent's Case**

13. During the trial the Respondent called forth 3-witnesses.

#### **'PW-I' – Examining medical doctor (Dr. Morebu)**

14. He gave oral testimony on 16.02.2022. He is the one who examined the Respondent and prepared a medical report on the findings of the said examination. He is the one who also filled the P3 form in respect the Plaintiff's injuries arising out of the accident. He testified on the contents of the said medical report and P3 form.

He produced the following documents as exhibits in support of the Plaintiff's case; P3 form, medical report and receipts.

#### **PW-II' – Daniel Omare (The Respondent herein)**

15. He gave oral testimony on 21.11.2019. He adopted his written statement dated 03.03.2020 as part of his testimony. He states as follows:

“That he was on 21.11.2019, while riding s motor cycle hit by motor vehicle (Reg. No. KBU 353 U);

That he sustained the following injuries;

- Head injury;
- Deep cut wounds on the occipital region;
- Chest contusion;
- Blunt trauma to the back;
- Bruises on the right upper limb;
- Bruises on the left upper limb;
- Bruises on the left lower limb;
- Bruises on the right lower limb;
- Cut wounds on the right lower limb;

He produced the following documents as exhibits before the Trial Court: Motor vehicle records search certificate and bundle of receipts.

16. 'PW-III' – Police Officer (Saoke) - He gave his oral testimony on 09.05.2022. He is one PC Saoke then attached at Gesonso Police Station where the accident was reported and investigated. He testified on the contents of the occurrence book entries and police abstract regarding the accident.

He testified that;

- “i) That the said accident indeed occurred on 22.11.2019 at around 2015h;
- ii) That the accident occurred along Kisii – Migori;
- iii) That it involved accident i motor vehicle (Reg. No. KBU 353 U) and a motor cycle;



- iv) That the Plaintiff was riding the motor cycle;
  - v) That on reaching location of the accident, the driver of the motor vehicle (Reg. No. KBU 353 U) hit the said motor cycle from behind occasioning the accident;
  - vi) That the Plaintiff was injured in the said accident;”
17. He produced the police abstract as an exhibit in support of the Respondent’s case.
18. ‘PW-IV’ Dr. Moraa who works at Nyangena Hospital where the Respondent was admitted and treated. She gave oral testimony on 12.09.2022. She confirmed that the Respondent sustained and was treated for the following major injuries;
- Head injury;
  - Deep cut wounds on the occipital region;
  - Chest contusion;
  - Blunt trauma to the back;
  - Bruises on the right upper limb;
  - Bruises on the left upper limb;
  - Bruises on the left lower limb;
  - Bruises on the right lower limb;
  - Cut wounds on the right lower limb;
19. She produced the discharge summary and the clinical summary as an exhibit in support of the Respondent’s case. He gave his oral testimony on 09.05.2022 in a sister claim, vide, Kisii MCCC No. 114 of 2020. His evidence applies herein pursuant to the Court’s directions of 09.05.2022. He testified:
- That he could see the motor cycle right in front of him as they were heading in the same direction;
- He did not produce any document in support of his testimony.
20. It is his case that the Appellant cannot at the appellate stage blame the trial Court for not finding the third party liable and then not enjoin the said third party as parties to the instant appellate proceedings. If the appellant was dissatisfied by the trial Court’s failure to apportion liability as against the third party, then the appellant ought to have enjoined the said third party into the instant proceedings. An Appeal against the Respondent herein is no avenue in law to apportion liability against a third-party who is not even a party hereto.
21. Direct, circumstantial, oral and documentary evidence tendered before the trial Court elucidated an accident whose manner of occurrence manifests substantial and actionable negligence on the part of the Appellant’s driver/agent.
22. The Respondent’s pleaded injuries were confirmed by the evidence on record. The Appellant did not adduce any evidence to discount the said injuries. The trial court’s award on general damages was therefore in its entirety a just and fair compensation for the Respondent’s injuries. The award is not only commensurate with the nature of injuries suffered by the Respondent but also manifestly consistent with precedent awards made in similar cases.

‘PW-II’ testified:



- i. That the said accident indeed occurred on 22.11.2019 at around 2015h;
  - ii. That the accident occurred along Kisii – Migori;
  - iii. That it involved accident i motor vehicle (Reg. No. KBU 353 U) and a motor cycle;
  - iv. That the Plaintiff was riding the motor cycle;
  - v. That on reaching location of the accident, the driver of the motor vehicle (Reg. No. KBU 353 U) hit the said motor cycle from behind occasioning the accident;
  - vi. That the Plaintiff was injured in the said accident;
23. Facts and evidence on record bespeak unmistakable markings of gross negligence on the part of the driver of the motor vehicle (Reg. No. KBU 353 U).
  24. It was the legal and evidential burden of ‘DW-I’ to prove that he was at least a licensed driver – which burden he did not even attempt to discharge. Not a single piece of document of copy thereof was listed or adduced to prove that ‘DW-I’ is a licensed driver. The entirety of the Defendant’s evidence and case is composed of hollow narrations by ‘DW-I’ unsubstantiated by any material evidence. No explanation was given as to why no proof of qualification to drive was tendered by ‘DW-I’ and the conclusion is that ‘DW-I’ is not a licensed driver.
  25. It is his case that the Trial Court’s finding on liability is therefore an accurate off-shoot of the nature, weight and probative value commanded by the evidence placed on record.
  26. According to the Respondent, no evidence was tendered discounting controverting the nature and seriousness of the Respondent’s injuries as pleaded.
  27. The respondent relies on the case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR 55 where the Court of Appeal observes as follows: -
 

“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.
  28. The foregoing is reiterated by the Court of Appeal in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47: -
 

“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, whawardsether on the ground of excess or insufficiency.”
  29. The appellate court can only interfere with the award of damages where it finds that the trial court applied wrong principles of law by taking into account some irrelevant factor, leaving out of account some relevant ones and therefore arriving at an erroneous estimate of damages to be awarded.



30. The trial court in its judgment awarded general damages of Ksh 350,000/= which is commensurate with the nature of injuries suffered by the Respondent and consistent with other made in similar cases.
31. He relied on the case of Catherine Wanjiru King'ori and 3 Others v Gibson Theuri Gicubi [2005] eKLR where the plaintiff sustained injuries that are similar and comparable to the Respondent's injuries and where this Honourable Court awarded Ksh 350,000/=.
32. In Naomi Momanyi v G4S Security Services Kenya Limited & another [2018] eKLR the Honourable Court observes that: -
  - “9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).”

### **Analysis and determination**

33. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
34. In the case of Selle & Another vs Associated Motor Boat Co. Ltd [1968] EA the court held 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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
35. In the Court of Appeal case of Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No.284 of 2001 (2004) 2KLR 55 as quoted in Mumbi Ngumbi Kasamu (Suing as the legal representative of the Estate of Boniface Mulinge Mbithe (deceased v Mutua Mulaa & Another (2019) eKLR the Court stated as follows:

“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 difference 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 or leaving out of account some relevant one) or misapprehending the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”

The appellants abandoned the issue of liability.

In the circumstances, this court shall not re-evaluate the liability.

The Respondent remains 100 % liable for the accident and I so hold.

### **On the issue of general Damages**

36. The Respondent sustain the following injuries: -



- i. Head injury;
  - ii. Deep cut wounds on the occipital region;
  - iii. Chest contusion;
  - iv. Blunt trauma to the back;
  - v. Bruises on the right upper limb;
  - vi. Bruises on the left upper limb;
  - vii. Bruises on the left lower limb;
  - viii. Bruises on the right lower limb;
  - ix. Cut wounds on the right lower limb;
37. The appellant wants the court to find that the award of Kshs 100,000 would be sufficient and reasonable in the circumstances and that the award of Kshs 350,0000 was inordinately high.
38. In *Butt vs. Khan* [1977] 1 KLR the court of appeal held as follows: -
- “ An appellate court will not disturb an award for damages unless it is 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”.
39. I have referred to the following judgments wherein the injuries in issue were similar to the ones sustained by the Respondent in the instant suit before arriving at my finding; the case of *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR where the plaintiff sustained blunt injury to the chest; bruises to the lower abdomen; bruises of the right hip joint; bruises of the thigh and bruises on the knee and the High Court affirmed an award of Ksh 350,000/= as general damages.
40. In *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] eKLR where the plaintiff sustained: bruises on the scalp; bruises on the neck; bruises on the abdomen; bruises on the lower back; cut wound on the left thumb; cut wound on the left palm; and subluxation of the left shoulder joint. The court awarded Ksh 400,000/= as general damages.
41. In *Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa* [2020] eKLR where the plaintiff sustained: two deep cut wounds on the forehead horizontally; bruises and lacerations on the right cheek; blunt injury to the shoulder and chest; blunt injury to the pelvis; deep cut wounds on right and left legs. The High Court awarded of Ksh 300,000/= as general damages.
42. In *Kenya Power & Lighting Co. Ltd v Mary Akinyi*, HCCA No. 72 of 2007 wherein Korir J upheld an award of Ksh. 350,000/- as general damages for the following injuries: deep cut wound on the calf muscles of the left leg; laceration on the right knee and right shoulder; contusion on the chest.
43. Upon evaluating the pleadings, the medical report and the judgment I am satisfied that the trial court exercised its discretion within the applicable principles in the assessment of damages as highlighted in the above authorities.
44. Upon perusing the Appellant’s submissions, I note that he is relying on cases where the injuries are less severe than the ones sustained herein.



45. The amount awarded for damages by the trial court accords with amounts issued in the precedents bearing similar injuries and I so hold.

**Disposition;**

46. The Appellant is 100% liable for the accident. There is no justification to interfere with the Appeal.

**Orders;**

47. The appeal is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MARCH, 2024**

.....

**J. CHIGITI (SC)**

**JUDGE**

