



**Nyamete & another v Ogotu (Civil Appeal E669 of 2021)  
[2024] KEHC 2639 (KLR) (Civ) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2639 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL**

**CIVIL APPEAL E669 OF 2021**

**DAS MAJANJA, J**

**MARCH 12, 2024**

**BETWEEN**

**JOHN MOMANYI NYAMETE ..... 1<sup>ST</sup> APPELLANT**

**NYAMIRA LUXURY EXPRESS CO. LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN OPIYO OGUTU ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E. Wanjala, PM dated 9th May 2019 at the Magistrates Court at Nairobi in Milimani CMCC No. 4430 of 2018)*

**JUDGMENT**

1. The Respondent sued the Appellants in the Subordinate Court for damages sustained by him in a road traffic accident that occurred along Waiyaki Way near Kianda school on 02.12.2017. The Respondent was a passenger in motor vehicle KBR xxP Scania bus owned by the Appellants. The Respondent suffered the following injuries as outlined in the Plaint dated 08.05.2018; blunt injury to the chest and back, blunt head injury, blunt injury on the left hip and neck and a disc prolapse at L4/L5 compressing the nerve root.
2. The Subordinate Court heard the case, considered the evidence and found the Appellants fully liable for the accident and awarded the Respondent Kshs 1,450,000.00 as general damages for pain and suffering. The Appellants are aggrieved by that award and appeal against it in the memorandum of appeal dated 13.10.2021. The Appellants contend that the award of general damages is inordinately high and excessive in the circumstances. They aver that the trial court failed to consider the evidence and judicial authorities thus reaching an erroneous finding.



3. In making the award, the trial court observed that the injuries suffered by the Respondent were supported by treatment notes from Kenyatta National Hospital, Tanaka Nursing Home, Avenue Hospital, St. Luke's Orthopedic and trauma hospital, P3 from the medical reports of Dr. G.K. Mwaura dated 10.03.2018 and Dr. Jenipher Kathuthu dated 28.08.2018. Regarding the variance in the degree of permanent disability by the two doctors, the trial court observed that whereas the medical report by Dr. Jenipher Kathuthu captured the injuries suffered by the Respondent, it did not state whether the Respondent had recovered fully or how long the Respondent would take to recover. That at the time of the 2<sup>nd</sup> medical report, the Respondent was still complaining of back pain and weakness of lower limbs. The trial court thus observed that on a balance of probability, the Respondent proved his case and that the 10% permanent incapacity was justified.
4. The trial court thus proceeded to consider two cases cited by the Respondent in support of their case. *Sammy Machoka Oira v Josphat Mwangi Kithuro & another* [2008] eKLR where the court awarded Kshs 1,750,000.00 for the following injuries; tenderness and fluctuant swelling scalp top of head to occipital area, tenderness over cervical spine with limitation in range of movement in all planes, tenderness over 3<sup>rd</sup> through 5<sup>th</sup> lumber area associated left side sciatica with posture straight leg rising at 45 left side, tenderness and bruising over interior abdominal left side, swollen tender right wrist with associated restriction of movement, soft tissue swelling haematoma of the skull but no swelling, lost lordosis of the cervical spine but no fracture. The final observation of the doctor was that the plaintiff in the said case suffered multiple injuries on the head, neck, abdomen, right wrist and lumber spinal cord. A medical examination done on the plaintiff 4 years later revealed that the plaintiff had not fully recovered especially from the back injuries; that the back would remain weaker and would be a source of pain for a long time. Thus, the doctor assessed permanent disability at 12% as opposed to the 40% that had been assessed earlier. The Respondent also relied on *Crispinus Buluma Nyongesa v Urgent Cargo Handling Ltd* [2015] eKLR where the plaintiff suffered a fracture of the back bone and permanent disability was assessed at 40%. The court awarded him Kshs 1,300,000.00 for pain, suffering and loss of amenities.
5. The Appellants on their part quoted the case of *Mumias Sugar Company Limited v. Mohammed Kweyu Shaban* [2018] eKLR where the court awarded Kshs 800,000.00 in which the Respondent suffered prolapse disc at L4/L5 thus affecting his lower limbs because of nerve compression as a result of which he had recurrent lower back pain. The doctor opined that this would affect him throughout his life and awarded 15% permanent total disability. In deciding the case the aforesaid case Njagi J., quoted the case of *Sammy Machoka Oira v Josphat Mwangi Kithuro & another* (Supra) as the most comparable authority.
6. This court can only disturb the quantum of damages awarded by the trial court if it is shown that the court took into account an irrelevant factor, or left out of account a relevant one, or the amount is inordinately low or inordinately high that it was wholly erroneous estimate of the damages (see *Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another* [1982-88] 1 KAR 777).
7. I have considered the Respondent's injuries vis-à-vis those in the cases cited by the parties. At this stage I note that though the Appellants filed written submissions, the court did not make any reference to them or the authorities cited therein. That notwithstanding, at this appeal level the duty of the court is determine, as the Appellants urge, whether the amount awarded is excessive and not in line with the decisions cited as the trial court should make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see *Maore v Geoffrey Mwenda* [2004] eKLR).
8. The nature and extent of the injuries sustained by the Respondent is not disputed, what appears to be in contention is the extent of disability which influenced the trial magistrate to make the award.



Dr Mwaura in the report dated 10.03.2018, awarded 10% incapacity on ground that the Respondent would suffer chronic back pain. Dr Kahuthu, who examined the Respondent on 28.08.2018 did not find any disability on the basis that she did not find any physical impairment. The Sammy Machoka Oira Case (Supra) and Mumias Sugar Company Case (Supra) both relate to similar injuries. Although the learned judge in the latter case appears to be guided by the former case, he awarded a lesser sum. In Crispinus Buluma Nyongesa (Supra), the court awarded Kshs 1,300,000.00 where the level of disability was assessed at 40%. Based on the latter two cases, the award of Kshs 1,450,000.00 is excessive in the circumstances. I would hold that an award of Kshs 1,000,000.00 would be appropriate in the circumstances.

9. In the final analysis, I allow the appeal, set aside the judgment of the Subordinate Court awarding the Respondent Kshs 1,450,000.00 as general damages and substitute it with an award of Kshs 1,000,000.00. The sum shall attract interest at court rates from the date of judgment in the Subordinate Court. The Respondent shall bear costs of the appeal assessed at Kshs 30,000.00.

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

**D. S. MAJANJA**

**JUDGE**

Ms Akasi instructed by Kimondo Gachoka and Company Advocates for the Appellants.

Mr Njuguna instructed by Shem Kebongo and Company Advocates for the Respondent.

