



**Nyang'au v Obare & 2 others (Civil Appeal E087 of 2021)  
[2024] KEHC 3162 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E087 OF 2021  
WA OKWANY, J  
MARCH 7, 2024**

**BETWEEN**

**VICTOR MANYISA NYANG'AU ..... APPELLANT**

**AND**

**ELIZABETH NYABOKE OBARE ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH ONGERI SAMBA ..... 2<sup>ND</sup> RESPONDENT**

**KEITH SAMBA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon. W. C. Waswa –  
SRM Nyamira dated and delivered on the 8<sup>th</sup> day of November  
2022 in the original Nyamira CM's Court Civil Case No. 50 of 2020)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent was the Plaintiff before the trial court where she sued the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (1<sup>st</sup> & 2<sup>nd</sup> Defendants) seeking the following orders: -
  - a. General damages for pain and suffering and future medical expenses.
  - b. Special damages of Kshs. 30,850.
  - c. Costs of the suit; and
  - d. Interest on (a), (b) and (c) above.
2. The Defendants (2<sup>nd</sup> and 3<sup>rd</sup> Respondents) entered appearance and filed their joint statement of defence which they amended on 7<sup>th</sup> June 2021.



3. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also issued Third Party Notices to the Appellant herein (1<sup>st</sup> Third Party) and one Evans Sindani Onunda (2<sup>nd</sup> Third Party) who is not a party in this appeal.
4. The entered appearance but did not file a Defence while the 2<sup>nd</sup> Third Party entered appearance and filed his Statement of Defence on 25<sup>th</sup> August 2021.
5. The 1<sup>st</sup> Respondent's case was that she was, on 3<sup>rd</sup> December 2019, a lawful fare-paying passenger traveling aboard the Appellant's motor vehicle Registration No. KBK 037C (hereinafter "Matatu") along Kericho – Kisii Road when near Ikonge area, the 3<sup>rd</sup> Respondent drove the 2<sup>nd</sup> Respondent's motor vehicle Registration No. KCH 979Y (hereinafter "Prado") so recklessly and negligently thereby permitting it to collide with the Appellant's said motor vehicle thereby causing an accident in which she sustained serious injuries. The 1<sup>st</sup> Respondent attributed the accident to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' negligence. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, on their part, blamed the accident on the Third Parties' negligence.
6. The matter proceeded for hearing before the trial court which subsequently entered judgment in favour of the 1<sup>st</sup> Respondent for general damages of Kshs. 400,000/=.
7. Liability was however distributed equally at 50% to 50% between the Defendants (2<sup>nd</sup> & 3<sup>rd</sup> Respondents herein) and the Third Party (Appellant).
8. Aggrieved by the lower court's decision, the Appellant instituted the instant appeal. He listed the following grounds of appeal in the Memorandum of Appeal: -
  1. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the third party without considering the Circumstances of the case.
  2. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the third party whereas the Police Abstract produced as plaintiff's exhibit indicated that the matter was still pending under investigation.
  3. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the third party whereas PW1, PW4, DW2 and DW3 gave evidence that the 2<sup>nd</sup> defendant was the one joining the main road without giving way when the accident occurred.
  4. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the third party whereas PW1, PW4, DW2 and DW3 gave evidence that it is the 2<sup>nd</sup> defendant that rammed the third party's motor vehicle.
  5. 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. 400,000/= that was overly in excess in the circumstances of the case.
  6. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the third party's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
  7. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.



9. The appeal was canvassed by way of written submissions which I have considered. The appeal is on both liability and quantum.
10. The duty of the first appellate court is to re-evaluate the evidence tendered before the trial court as well as the judgment with a view to arriving at its own independent judgment on whether or not to allow the appeal. In this regard, the first appellate court is empowered to subject the whole evidence to a fresh and exhaustive scrutiny and make conclusions about it while bearing in mind the fact that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another vs Associated Motor Boat Co. Ltd.& Others* [1968] EA 123 and in *Peters vs Sunday Post Limited* [1958] E.A. 424.
11. A summary of the evidence tendered before the trial court was as follows: -PW1, Dr. Morebu Peter Momanyi examined the 1<sup>st</sup> Respondent and prepared the Medical Report (P Exhibit 1 (a)). He also produced a receipt for Kshs. 6,500/= (P Exhibit 1 (b)) and P3 Form (P Exhibit 2).PW2, Ben Momanyi, a Clinical Officer at Hema Hospital testified that the 1<sup>st</sup> Respondent was admitted at the said hospital. He produced the Discharge Summary (P Exhibit 3) and Medical Report (P Exhibit 4).PW3, the 1<sup>st</sup> Respondent, narrated the events that led to the accident of 3<sup>rd</sup> December 2019. She blamed the driver of motor vehicle Registration No. KCH 979Y for causing the accident by driving the said vehicle at a high speed.PW4, Corporal Albert Micha, a Police Officer based at Nyamira Police Station, produced the Police Abstract (P Exhibit 7). He confirmed that the 1<sup>st</sup> Respondent sustained injuries in the accident. He further stated that based on the report received at the police station, motor vehicle Registration No. KCH 979Y was to blame for the accident as it was speeding at the time of the accident.DW1, the 3<sup>rd</sup> Respondent herein, was the driver of motor vehicle Registration No. KCH 979Y. He testified that the accident occurred at a plus junction (cross road) when motor vehicle Registration No. KBK 037 (Matatu) travelling from Kericho direction rammed into his vehicle. He blamed the driver of the Matatu for driving carelessly. He stated that the accident took place at the cross road and that both vehicles had the right of way as the road was not marked.DW2 PC Justus Kipkoech, a Police Officer based at Nyamira Police Station confirmed the occurrence of the accident involving the 1<sup>st</sup> Respondent and the two motor vehicles. He stated that both vehicles did not give way to each other at the plus junction and that none of the drivers was charged for causing the accident.The Third Parties called 2 witnesses, namely; DW3 Eric Kintu Ongeri, the driver of the Matatu who blamed the driver of the Prado for causing the accident as he did not give way to the Matatu. He stated that he had the right of way.DW4, Dr. Ruth Ichamwange testified on behalf of Dr. Jenipher Kahuthu who had examined the 1<sup>st</sup> Respondent and prepared a 2<sup>nd</sup> Medical Report (D Exhibit 1).

### **Analysis and Determination**

12. I have carefully considered the Record of Appeal and the parties' respective written submissions to the appeal. I find that the main issue for determination is whether the trial court made the correct findings on quantum and liability.

### **Liability**

13. The Appellant submitted that the trial court erred in distributing liability at 50% to 50% as against him and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents when the evidence by the 1<sup>st</sup> Respondent showed that the Defendants (2<sup>nd</sup> & 3<sup>rd</sup> Respondents) were largely to blame for the accident. I however note that the Appellant stated, in the grounds of appeal, that the trial court erred in apportioning liability at 100% against the Third Party.



14. I further note that the trial Magistrate rendered himself as follows on liability:-

“This court takes judicial notice of the fact that the accident occurred at a junction where two (2) highway roads intersect. The road from Chabera/Sondu leading to Chepilat is a Highway as well as the road from Kericho going towards Kisii direction. DW1, DW2 and DW3 confirmed this position. DW3’s assertion that there was a stop sign at the junction has not been supported by any evidence. Hence, this court cannot adopt that position.

At such a junction, that lacks traffic lights or stop signs, it is difficult for one to ascertain who has the right of way since both roads are highways. This is something that the respective road agencies must look into in order to avoid accidents like this one in the future. It is apparent that both drivers thought they were on the right since they were driving on their respective highways. Hence, when they reached the intersection, they just crossed without checking that it was safe to do so.

This court concurs with DW2 that it is difficult to apportion blame since both vehicles had the right of way. In the circumstances, this court apportions liability at the ratio of 50%:50% between the defendants and third parties.”

15. My finding is that the Appellant’s claim that liability was apportioned at 100% against him is incorrect. I find that, in the circumstances of this case, the trial court made the correct finding in apportioning liability equally between the Third Parties and the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents in view of the fact that the accident occurred right in the middle of a cross (plus) junction and that none of the drivers was charged with a traffic offence following the said accident.

16. I therefore uphold the trial court’s findings on liability.

### **Quantum**

17. It was not disputed that the 1<sup>st</sup> Respondent sustained the following injuries in the accident in question:

- a. Bruises on the face
- b. Chest contusion
- c. Blunt trauma to the lower back
- d. Tenderness on the back and chest
- e. Bruises on the right and left hands
- f. Right ankle dislocation; and
- g. Tenderness on the right ankle.

18. The 1<sup>st</sup> Respondent’s injuries were supported by the following Documents (Exhibits): -

- a. The P3 Form;
- b. The Medical Report from Hema Hospital;
- c. The Discharge Summary from Hema Hospital;
- d. The Medical Report by Dr. Morebu Peter Momanyi; and



e. The Medical Report by Dr. Kahuthu.

19. It is trite that an appellate court will not ordinarily interfere with the trial court's award on damages unless it is established that the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.

20. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also consider the prevailing economic environment. In *Kivati vs Coastal Bottlers Ltd* Civil Appeal No. 69 of 1984 it was held that: -

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

21. Similarly, in *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates Kisumu*, CA No 84 of 2009 it was held that: -

“We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.”

22. I am cognisant of the fact that award of damages involves the exercise of judicial discretion and that the circumstances in which the Court can interfere with the same are limited. This is the position that was taken in the case of *Butt vs. Khan* [1981] 1KLR 349 where the Court held (as per Law, JA) that:

“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. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia* (1982–88) 1 KAR 727 at p. 730 the Court stated:

“The principles 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.”

24. Award of damages is an exercise of discretion of the trial court, however, the same should be within limits set out in decided case law and must not be so inordinately low or so high as to reflect an erroneous figure. The award must also consider the prevailing economic environment.



25. In the present case, I note that the trial court rendered itself as follows on quantum: -

“The medical documents from Hema Hospital are the initial treatment notes and they have not been faulted in anyway whatsoever. Hence, no reason has been tendered as to why this court ought to disregard them.

Based on the foregoing, this court finds that the plaintiff sustained soft tissue injuries with a dislocation of the right ankle.

The plaintiff submitted for a sum of Kshs. 500,000.00 as general damages while the 2<sup>nd</sup> third party submitted for an award of Kshs. 70,000.00. This court has considered the authorities relied upon by the respective parties.

In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two (2) cases are exactly alike.

The Court of Appeal observed in *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR that: -

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

The Court of Appeal observed in the case of *Stanley Maore vs Geoffrey Mwenda*, NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR 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.”

Having considered the injuries sustained by the plaintiff herein, this court awards the plaintiff the sum of Kshs. 400,000.00 as general damages.”

26. From the above extract of the trial court’s judgment it is clear that the said court considered the injuries the 1<sup>st</sup> Respondent suffered in the accident and referred to comparable past decisions/awards before arriving at the sum of Kshs. 400,000/= for general damages.
27. I note that even though the injuries that the 1<sup>st</sup> Respondent suffered were soft tissue in nature, the said injuries were serious as they necessitated her admission in hospital for 4 days from 3<sup>rd</sup> December 2019 to 7<sup>th</sup> December 2019. I am satisfied that the trial court correctly applied its mind to the principles governing the making of awards for damages in an accident claim. I find no reason to interfere with the trial court’s said award on damages.
28. Having regard to the findings and observations that I have made in this judgment, I find that this appeal is not merited and I therefore dismiss it with costs to the 1<sup>st</sup> Respondent which I assess at Kshs. 30,000/= . The said costs shall be paid by the Appellant.
29. Before I pen off and conclude this judgment, I wish to point out that this appeal is related and identical to Appeals in Nyamira HCCA No. E088/2021 and HCCA No. E089/2021 arising from the same accident save that the Claimants/1<sup>st</sup> Respondents in the 3 appeals are different. All the Claimants were passengers in the same vehicle/Matatu that collided with the Prado.
30. The only distinguishing factor in the cases is that the degree of the injuries that the claimants sustained in the said accident and the awards made for each claimant by the trial court. It is also instructive to



note that the witnesses who testified in the present case were more or less the same witnesses in the two related appeals.

31. For the above reasons and in order to save on judicial time, I will adopt my findings on liability in this appeal as the finding on liability on the two related appeals.
32. In this regard, I direct that this judgment be placed in the 2 related files and be adopted as the judgment on liability in the related files.
33. I will however issue separate judgments, on quantum only, in the two related files.
34. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**W. A. OKWANY**

**JUDGE**

