



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Odhiambo v Njoka & another (Civil Appeal 73 of 2021)
[2024] KEHC 2495 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 73 OF 2021
DAS MAJANJA, J
MARCH 11, 2024**

BETWEEN

DANIEL ODHIAMBO APPELLANT

AND

ELIUS NJERU NJOKA 1ST RESPONDENT

JANE NJERI 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Francis Kyambia, SPM dated 20th September 2019 at the Magistrates Court at Mombasa in Civil Case No.837 of 2014)

JUDGMENT

1. The Appellant is dissatisfied with the judgment of the Subordinate Court dated 20.09.2019 that found the Appellant and the 2nd Respondent 100% liable and apportioned liability at a ratio of 50:50 for injuries the 1st Respondent sustained as a result of an accident that occurred on 12.01.2014 along Mombasa-Malindi road involving the 2nd Respondent's motor vehicle registration number KBW 218P and the Appellant's motor vehicle registration number KAZ 306W. The 1st Respondent was also awarded Kshs. 2,500,000.00 as general damages, Kshs. 2,000.00 special damages and Kshs. 90,000.00 costs of future medical expenses bringing a total award to Kshs. 2,592,000.00 together with costs of the suit and interest from the date of the judgment.
2. In his memorandum of appeal dated 03.06.2021, the Appellant challenges the award of damages and beseeches the court to set aside the award and re-assess the damages.
3. At the hearing, the 1st Respondent (PW 1) testified on his own behalf and called as his witnesses Cpl. Pius Mulinge, a police officer attached to Bamburi Traffic Base (PW 2) and Dr. Ajoni Adede, a medical practitioner (PW 3). The Appellant called Cpl Abdullahi (DW 1) a police officer based at Bamburi



Traffic Base. The 2nd Respondent did not participate in the proceedings before the trial court. After the hearing, the parties were directed to file written submissions but only the 1st Respondent filed the same.

4. After finding the liability against the Appellant and 2nd Respondent, the trial court addressed the issue of quantum of damages in the judgment rendered on 20.09.2019. It noted that the injuries suffered by the 1st Respondent were reflected in the medical report prepared by PW 3. That he suffered 8% permanent disability and the metal implants inserted to immobilize his fracture were to be removed at a cost of Kshs. 90,000.00. The trial court considered the 1st Respondent's proposal of Kshs. 3,000,000.00 as an award for general damages and his reliance on the case of *Zipporah Nangila v Eldoret Express Limited & 2 Others* [2016]eKLR and held that the injuries sustained in that case were more serious than in the present case and that guided by the principles in assessment of damages in personal injury claims and taking into account inflation, it held that an award of Kshs. 2,500,000.00 as general damages was adequate compensation. The trial magistrate also found that the Kshs. 90,000.00 required to remove the metal implant was reasonable and thus awarded the same. He also awarded the 1st Respondent special damages of Kshs. 2,000.00 which he found had been pleaded and proved, costs of the suit and interest from the date of judgment.
5. As stated, the Appellant is aggrieved with the lower court's assessment of the general damages and award of Kshs. 2,500,000.00. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 as follows:

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 inordinately high or low.

6. In determining general damages, the trial court has to examine the extent and gravity of the injuries suffered by the plaintiff, relevant and comparative case law to ensure fairness and where necessary take into account the rate of inflation. In sum, as was stated by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR, "comparable injuries should attract comparable awards." As per the medical report of PW 3, it was not disputed that the 1st Respondent sustained a fracture of the right humerus arm bone, multiple rib fractures and right shoulder joint stiffness. PW 3 noted that the fracture sites remain a weak point for life even if the bones unite, that the 1st Respondent's permanent partial disability was assessed at 8%, that there was post fracture accelerated bone and joint wear and tear(osteoarthritis) and that the lung perforation injury had led to areas of lung collapse and fibrous scar tissue(atelectasis) that would predispose a repeated chest infection.
7. For these injuries, the 1st Respondent proposed the sum of Kshs. 3,000,000.00 and relied on the case *Zipporah Nangila v Eldoret Express Limited & 2 Others* (*supra*). However, the trial court noted that the injuries in this case were far more serious than those suffered by the 1st Respondent. The plaintiff therein had bilateral leg injuries, right wrist injury, fracture dislocation of the right ankle, comminuted compound fracture of the distal and fibular, fracture of the left distal and tibia and fibular and extensive skin loss with bones exposed in the right tibia. The medical report in that case showed that the plaintiff had disability on the right leg and right hand that was not mobile, Left leg was not functional, toes could not touch the ground, he was to require corrective surgery at an estimate of up to Kshs.1,000,000.00, she would require aids to walk, she experienced swelling and heaviness in the right foot on walking half a kilometer, she experienced morning stiffness and altered sensation in the right foot, the left leg had healed surgical scars - with near normal range of motion of the ankle and foot, the right wrist joint had a deformity with prominence of the ulna, the distal radio ulna joint of



- the wrists was dislocated and twisted, movements cannot occur and she could not perform most daily living activities involving squeezing, twisting and turning the right wrist.
8. Comparing the aforementioned injuries with those of the 1st Respondent herein, I cannot fault the learned magistrate for concluding that the latter's injuries were less serious than those in the case he had cited above. Whereas the Appellant has stated that his submissions on quantum of damages were not considered, the trial court noted in the judgment that he never filed any submissions as had been directed. A perusal of the record confirms this position and I find that indeed the Appellant never filed any written submissions to guide the trial court on the appropriate award.
 9. The trial court, in finding that Kshs. 2,500,000.00 was the appropriate award for general damages, stated that it was guided by the principles in assessment of damages in personal injury claims and inflation. However, I note that this sum was closer to the Kshs. 3,000,000.00 proposed by the 1st Respondent and for injuries the trial court concluded were far more serious than those suffered by the 1st Respondent. In any event, I have gone through a few authorities that had almost similar injuries to those suffered by the 1st Respondent. In *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022]eKLR, the appellant therein suffered fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture); dislocation of the right ankle and bruise on the right leg. The court took note that the appellant was walking with the assistance of crutches and that he suffered a permanent disability of 18%. The Court awarded Kshs. 600,000.00. In *Pestony Limited & another v Samuel Itonye Kagoko* [2022]eKLR the respondent therein suffered a single fracture of the femur and permanent disability was assessed at 5% and an award of Kshs. 1,400,000.00 was set aside and substituted with an award of Kshs. 800,000.00. In *David Kimathi Kaburu v Dionisius Mburugu Itirai* [2017] eKLR the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Kshs. 630,000.00 in 2017.
 10. From the above decisions, I am convinced that the sum of Kshs. 2,500,000.00 awarded by the learned magistrate was inordinately high compared to sums awarded for almost similar injuries. Taking these decisions into account together with inflation, I find that a sum of Kshs. 900,000.00 would be sufficient in the circumstances.
 11. I allow the appeal to the extent that I set aside the award of Kshs. 2,500,000.00 awarded as general damages and substitute it with an award of Kshs. 900,000.00. The Appellant is awarded costs of Kshs. 40,000.00 as against the 1st Respondent.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH 2024.

OLGA SEWE

JUDGE

