



REPUBLIC OF KENYA



KENYA LAW
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**Kerandi & another v Okong'o (Civil Appeal E028 of 2023)
[2024] KEHC 3823 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E028 OF 2023**

**WA OKWANY, J
APRIL 18, 2024**

BETWEEN

ERICK RIOBA KERANDI 1ST APPELLANT

WATU CREDIT LIMITED 2ND APPELLANT

AND

DAVID OGEKA OKONG'O RESPONDENT

*(Being an Appeal from the Judgment/Decree in Nyamira CMCC E196
of 2022 at the Chief Magistrate's Court in Nyamira delivered on
31st May 2023 by Hon. C. W. Waswa - Senior Resident Magistrate)*

JUDGMENT

1. The Appellants herein were the Defendants before the trial court where the Respondent (Plaintiff) sued them seeking general and special damages arising out of injuries that he sustained in a road traffic accident that occurred on 25th day of July 2022.
2. The Respondent's case was that he was on the material date a lawful pedestrian walking along the verge of Kericho-Kisii road when at/or near Ibara Hospital area or thereabout, the Appellants' rider, servant and/or agent negligently rode, managed and/or controlled the Appellant' motor cycle Registration No. KMFW 146S thereby causing and/or permitting it to violently lose control and knock the Respondent who sustained injuries and has suffered pain, loss and damage as a consequence thereof. The Respondent held the Appellants vicariously liable for the tortious acts and/or omissions of their driver, servant and/or agent's negligence.
3. The trial court heard the case and at the end, entered judgment in favour of the Respondent as follows: -
Liability at 100% in favour of the Plaintiff
General Damages – Kshs. 600,000/=



Special Damages – Kshs. 6,500/=

Total – Kshs. 606,500/=

Costs and Interests of the Suit at court rates.

4. Aggrieved by the decision of the trial court, the Appellants instituted the present appeal through a Memorandum of Appeal dated 19th June 2023 wherein they listed the following grounds: -

1. THAT the Learned Trial Magistrate erred and misdirected himself in law and in principle in his assessment of damages awardable to the Plaintiff by awarding damages that were manifestly in excessive and out of tune with the established law and judicial precedents in analogous cases.
2. THAT the Learned Trial Magistrate erred in law and in fact in awarding general damages that were manifestly and so inordinately high and not in tandem/commensurate with the Respondent's injuries.
3. THAT the Learned Trial Magistrate erred in law and in fact in assessing damages and failing to apply the trite principles in awarding damages and specifically on general damages and comparable awards for analogous injuries.
4. THAT the Learned Trial Magistrate erred in law and in fact in failing to keenly consider the relevant 2nd Medical Report by Dr. Malik (marked as D.Exh 1) filed and produced by the Appellant.
5. THAT the Judgment and Decree were erroneously high and against the weight of the evidence and law.

5. The Appeal was canvassed by way of written submissions which I have considered.

6. Since the Appellants did not contest the trial court's finding on liability, I will confine this judgment to the determination of whether the trial magistrate erred in its decision on quantum of damages.

7. The duty of a first appellate court was stated in *Sembuya vs. Alports Services Uganda Limited* [1999] LLR 109 (SCU), where Tsekooko JSC said thus: -

“I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).”

8. It was not contested that the Respondent was knocked down by the Appellants' motorcycle on 25th July 2022 while walking on the road side and that he sustained injuries.

9. The Respondent testified that he suffered the following injuries: -

- a. Scalp contusion
- b. Chest contusion with resultant rib fractures (3rd, 4th and 5th Right side)
- c. Right Shoulder joint dislocation
- d. Bruising of both upper limbs
- e. Right Tibia and fibula fractures



- f. Right ankle joint dislocation
 - g. Left leg cut wounds
10. The Medical Report by Dr. Nyameino (P.Exh 6[a]) categorized the injuries as grievous harm and indicated that they were in the process of healing well. The doctor noted that the Respondent was likely to develop post traumatic degenerative arthritis of the right shoulder and right ankle joints later on in life. A perused the P3 Form and found that the injuries recorded therein are similar to those in P.Exh6a.
 11. The Appellants, on their part, produced a second medical report by Dr. M.S. Malik (D.Exh1) who confirmed that the Respondent suffered a fracture of his right tibia which had healed. The said doctor noted that the Respondent suffered total incapacity of a temporary nature, at the time of the accident, for a period of 4 months followed by partial incapacity of a temporary nature for a further period of one month. He opined that there were no clinical signs of permanent physical disability and that his right leg was now operating normally.
 12. I find that it was established that the Respondent suffered a fracture on his right leg among other soft tissue injuries which had healed over time.
 13. It is trite that an appellate court should not interfere with the trial court's assessment of quantum of damages unless it is satisfied that the same was unfounded in law, or was inordinately too high or too low as to amount to a wrong estimate. This is the position that was taken in *Kemfro Africa Limited vs. Lubia & Another (No.2) [1987] KLR 30*, where Kneller JA held as follows:-

“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 for Eastern Africa to be that it must be satisfied that either 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 wholly erroneous estimate of the damage.”

(See also the decision of the Court of Appeal at Kisumu in *Akamba Public Road Services Ltd vs. Omambia, Civil Appeal 89 of 2010 [2013] eKLR.*)
 14. As a general rule, comparable injuries should receive comparable awards which should be within the limits set by similar decided cases. In *Kigaragari vs. Aya (1982-1988) 1 KAR 768* it was held as follows:-

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenyan awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee.....”
 15. I have compared the Respondent's injuries to the injuries sustained by claimants in the following cases:
 - a. In *Joseph Mwangi Thuita vs. Joyce Mwole [2018] eKLR*, the Appellant suffered fractures to the right femur, compound fracture on the right tibia and right fibula, shortening right leg and episodic pain in the right thigh with inability to walk without support. The court, on appeal, increased an award of Kshs. 100,000/= to Kshs. 700,000/= as General Damages.
 - b. In *Civicon Limited vs. Richard Njomo Omwancha & 2 others [2019] eKLR*, the 3rd party claimant sustained the following injuries: fracture of four upper teeth, cut wound on the



upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula and had a 30% permanent disability which rendered her unable to walk without support. The court on appeal awarded her Kshs, 500,000/=.

- c. In *Jitan Nagra vs. Abednego Nyandusi Oigo* [2018] eKLR, the court, on appeal, reduced an award of Kshs. 1,000,000/= to Kshs. 450,000/= for a Respondent who had sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and where a permanent disability was anticipated.
 - d. In *Vincent Mbogholi vs. Harrison Tunje Chilyalya* [2017] eKLR, the appellate court upheld an award of Kshs. 500, 000/= for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.
 - e. In *David Mutembe vs. Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered fracture of the right femur and proximal fracture of the left tibia. On appeal, the court reduced the award of Kshs. 1,600,000/= in general damages to Kshs. 800,000/=.
16. The above cited cases indicate that the claimants suffered more serious injuries when compared to the present case and that in some instances, permanent disability was expected. The awards ranged from Kshs. 450,000/= to Kshs. 800,000/=. The Respondent herein was awarded Kshs. 600,000/= general damages yet permanent disability was not anticipated. The Appellants proposed an award of Kshs. 250,000/=.
17. I have considered the above proposal and the cases cited by the Appellants. It is my view that even though the Respondent did not get permanent disability following the accident, the proposed award of Kshs. 250,000 would be inordinately low considering that he sustained fractures. On the other hand, the award of Kshs. 600,000/= is on the higher side. I therefore reduce the award to Kshs. 450,000/=.
18. I have also considered the award of special damages and find that the same was specifically pleaded and proved as required by the law. I therefore uphold the trial court's award for special damages.
19. In conclusion, I find that the appeal is merited and I therefore allow it. I therefore set aside the judgment of the trial court and in its place enter judgment for the Respondent as follows: -
- Liability remains at 100% in favour of the Respondent
- i. General Damages – Kshs. 450,000/=
 - ii. Special Damages – Kshs. 6,500/=
- Total – Kshs. 456,500/=
- iii. Since the Appeal is successful, albeit in part, I award the Appellant half the costs of the appeal which I assess at Kshs. 25,000/= plus interests on the costs at court rates.
 - iv. I award the Respondent the interests on the award on damages at court rates till payment in full.
20. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH APRIL 2024.



W. A. OKWANY
JUDGE

