



**Peter & another v Okoth (Civil Appeal E111 of 2021)
[2024] KEHC 3404 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E111 OF 2021
RE ABURILI, J
APRIL 3, 2024**

BETWEEN

MAGANJO PETER 1ST APPELLANT

SHADRACK WAWERU GIHUNGU 2ND APPELLANT

AND

TOM ODHIAMBO OKOTH RESPONDENT

*(An appeal arising out of the Judgement and decree of the Honourable
S. Temu in the Senior Principal Magistrates Court at Nyando delivered
on the 2nd September 2021 in Nyando SPMCC No. 191 of 2017)*

JUDGMENT

Introduction

1. The appellants herein were sued for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 5th January 2017 along the Kendu Bay – Katito when the driver of motor vehicle registration No KBK 624F lost control of the said vehicle, veered off the road and hit a culvert thus resulting in the injuries sustained by the respondent who was a passenger in the said vehicle.
2. The appellants filed their defence and denied the respondent’s averments and pleaded that if at all an accident occurred then the plaintiff contributed to the same.
3. The trial magistrate found the appellants 100% liable for the accident and proceeded to award the respondent general damages of Kshs 250,000 and special damages of Kshs 6,000 as well as costs of the suit with interest.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 24th July 2023 raising the following grounds of appeal:



- a. The learned magistrate erred in law and in fact in awarding a sum of Kshs 250,000 as general damages for the injuries sustained by the plaintiff which is on the higher side considering the injuries sustained by the plaintiff.
 - b. The learned magistrate erred in law and in fact in failing to accord due regard to the appellant submissions on quantum on applicable principles for assessment of damages.
 - c. The learned magistrate erred in law and fact in failing to consider the authorities attached to the appellants' submissions that were guiding on the amount of quantum that is appropriate and applicable in similar cases.
5. The parties agreed to file submissions to canvass the appeal.

The Appellants' Submissions

6. The appellant submitted that the injuries sustained by the respondent were soft tissue injuries and thus the award of Kshs 250,000 was inordinately high and that a sum of Kshs 100,000 would have been reasonable and sufficient. Reliance was placed on the case of *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR where the court reduced an award of Kshs 300,000 to 100,000 for injuries of head concussion (brief loss of consciousness), blunt injuries to the chest and both hands.
7. The appellant also relied on the case of *HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR where the claimant sustained blunt object injury to the head and neck, thorax, abdomen and limbs which injuries were found to be soft tissue in nature.

The Respondent's Submissions

8. It was submitted that in addition to the soft tissue injuries sustained, the respondent also sustained a severe injury to his left which require surgery in the future and cannot be said to soft tissue in nature.
9. The respondent submitted that the award of Kshs 250,000 in general damages was reasonable and ought not to be disturbed and that the instant appeal be dismissed with costs.
10. The respondent relied on the following cases;
 - a. *Charles Ochola v Mumias Sugar Co. Ltd* [2014] eKLR where the court awarded Kshs 300,000 in general damages for injuries comparable to those sustained by the respondent herein.
 - b. *Hayer Bishan Singh 7 Sons Ltd v George Odhiambo Amimo* [2019] eKLR where the court awarded Kshs 400,000 in general damages for pain, suffering and loss of amenities for injuries comparable to the ones suffered by the respondent.

Analysis and Determination

11. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).



12. I have carefully considered the grounds of appeal, the submissions for and against the appeal. The appellants have not raised any grievance against the finding on liability and therefore the only issue for determination is whether the trial court erred in its award of the general damages of Kshs 250,000.
13. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:
- “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 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 damages.”
14. From the trial court record, the respondent pleaded and testified that she had sustained the following injuries;
- i. Severe chest pain.
 - ii. Tender and swollen head.
 - iii. Injury to left eye leading to squinting.
 - iv. Multiple wounds on both arms.
 - v. Multiple cut wounds on the left foot.
 - vi. Cut wound on the right side of the head.
 - vii. Pain on both thighs.
15. The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the *Evidence Act*. CW3, George Mwita, testified in corroboration of the respondent’s testimony confirmed that when he saw the respondent, she had a displaced shoulder dislocation.
16. Though it is not clear whether the respondent’s P3 form was produced as an exhibit, the injuries sustained by the respondent as detailed in the P3 form adduced as PEX4 as follows;
- i. Swollen bruises in the forehead.
 - ii. Neck tenderness.
 - iii. Chest tenderness
 - iv. Backache
 - v. Tenderness and dislocated right shoulder
 - vi. Bruises on the knee joints
17. The respondent testified as PW1 and corroborated the injuries he had sustained as pleaded in the plaint. He produced a discharge summary dated 5.1.2017 from St. Joseph Nyabondo Hospital as PEX3 that detailed that he was treated for soft tissue injuries following the accident. The respondent also adduced a P3 form dated 16.1.2017 that contained the injuries sustained by the respondent as pleaded in the plaint.



18. The appellants produced a medical report dated 14.12.2017 filled by Dr. Kahuthu that provided that in addition to the soft tissue injuries sustained by the respondent as detailed in the discharge summary, the respondent had a squinting eye which was not mentioned in the discharge summary but which the respondent attributed to the accident.
19. I have considered the evidence by both parties. I note that it was a gap of 11 days since the respondent was examined following the accident and the discharge summary filed, to when the P3 form was filled. The respondent was firm in his testimony that he sustained an injury to the eye that led to squinting, a fact that the medical report adduced on behalf of the appellants similarly noted.
20. In my opinion the respondent proved on a balance of probabilities that in addition to the soft tissue injuries she sustained to the chest, which were not in dispute, she also sustained an injury to the eye that led her to squinting. It is noteworthy that other than in the pleadings, the injury to the eye is provided for in the P3 form (PEX4) attached to his plaint. Accordingly, it is my view that the respondent proved on a balance of probabilities that she sustained an injury to the eye as well as soft tissue injuries to the chest.
21. On whether the general damages awarded by the trial court were excessive, the guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No 147 of 2002 [2004] eKLR where the Court of Appeal held:

“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.”
22. The trial court awarded the respondent general damages of Kshs 250,000 while the appellants in their submissions proposed that an award of Kshs 100,000 would be sufficient.
23. I have considered comparable awards for the same injury. In the case of *Rea Vipingo Plantations Limited v Chitsaka Runguwa Chiro* [2016] eKLR the court substituted an award of Kshs 500,000 with one of Kshs 250,000 for a plaintiff that had suffered an injury to her right eye.
24. In the circumstances, after taking into consideration the injuries sustained by the respondent, the awards by courts on similar injuries, I find the award of Kshs 250,000 issued by the trial court to have been reasonable in the circumstances. I thus find no reason to interfere with the trial court’s award of general damages.
25. In the end, I find that this appeal has no merits and proceed to dismiss it with costs to the respondent, to be assessed.
26. Mention before the Deputy Registrar on 15th May 2024 to confirm settlement of costs. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

