



**Ndorongo v Ouma (Civil Appeal E19 of 2023)
[2024] KEHC 9045 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E19 OF 2023
BM MUSYOKI, J
JULY 24, 2024
(FORMERLY KIAMBU HCCA NUMBER E097 OF 2023)**

BETWEEN

BENSON KIARIE NDORONGO APPELLANT

AND

JOSEPH OKOTH OUMA RESPONDENT

(Being an appeal from judgement and decree of Honourable D.N. Musyoka SPM dated 1-03-2023 in Gatundu Chief Magistrate's Court civil case number E050 of 2021)

JUDGMENT

1. The appellant filed this appeal challenging the lower court's judgement dated 1-03-2023 vide his memorandum of appeal dated 5th April 2023. In the memorandum of appeal, the appellant faulted the learned magistrate on three grounds thus;
 1. The learned magistrate erred in law and fact by awarding inordinately high general damages of Kshs 1,200,000.00 with no legal basis.
 2. The learned magistrate erred in law in failing to consider the appellant's documents and evidence that were duly filed and served as required by the law.
 3. The learned magistrate erred in law and fact by failing to consider the appellant's submissions and the authorities submitted by the appellant on the issue of quantum.
2. None of the parties in this matter has an issue with the magistrate's finding on liability. The appellant in essence takes the position that the amount awarded by the magistrate was not commensurate to the injuries sustained by the respondent in comparison to other decided authorities involving similar injuries. According to the appellant, the honourable magistrate did not take into consideration the principal of stare decisis.



3. This being a first appeal, I have a duty to conduct it in form of a rehearing where I should look at the evidence on record afresh, re-examine the same and come to my own independent conclusion. In my view, I should concentrate on evidence produced in proof the nature of injuries sustained by the respondent and the effect the same had on him as against the award of Kshs 1,200,000.00 as the appellant has not questioned the magistrate's finding on liability and special damages.
4. According to the appellant, the magistrate failed to give attention to his evidence and submissions. This is the purport of the 2nd and 3rd grounds of appeal. The evidence and document the appellant claims the magistrate did not consider was a medical report by one Dr Wambugu which appears on page 61 to 63 of the record of appeal. I have looked at that report which plays down the respondent's injuries and puts his permanent incapacity at 4% against 50% assessed by Dr Walter Jaoko. Between the two reports, which one should the magistrate have given consideration to?
5. The appellant has claimed in his submissions that the medical report by Dr Wambugu dated 22-10-2019 was produced by consent of the parties. I have gone through the entire proceedings three times just to satisfy myself of this allegation. According to the typed proceedings which I have referenced with the handwritten ones, the appellant's said medical report was never produced. It is not fair to the court and actually it is a professional misconduct for the appellant's advocates to make such serious allegations and mislead this court that the report was produced. The report may have been part of the appellant's list of documents but the same remains just that, a list of documents until the same is produced in evidence. The court had no obligation in law to even look at the medical report leave alone considering the same.
6. The matter came for hearing before the magistrate on 7-9-20022 when the plaintiff produced 17 documents as listed in his list of documents dated 16-02-2021. Exhibit number 6 was the report by the plaintiff's doctor one Dr Walter Jaoko. The next time the matter came for hearing was on 9-11-2022 when the defendant failed to attend and at 10.30 the court closed the defence case. I therefore find that appellant's complaint of failure by the magistrate to consider his evidence and submissions as claimed in grounds 2 and 3 of the memorandum of appeal fails.
7. I turn to the first ground of appeal which faults the magistrate for having awarded a sum that was too high as to amount to an erroneous estimate. In doing so, I will consider the report by Dr. Walter Jaoko and other medical documents produced in evidence. I will not give any consideration to the medical dated 22-10-2019 as it was never produced in evidence. According to the report, the respondent sustained the following injuries;
 - a. blunt injuries to the head resulting to loss of consciousness for unknown duration;
 - b. blunt injuries to the head resulting to loss of an upper tooth;
 - c. blunt injuries to the left shoulder;
 - d. a cut on the forehead; and
 - e. non depressed fracture of the skull.
8. The respondent was first treated at Gatundu Sub District Hospital on 23-09-2018 and transferred to Thika District Hospital from where he was discharged on 8-10-2018 meaning that he spent about two weeks in hospital. The doctor examined him on 20-09-2019 which was a period of nine months after the accident, at which time he was walking with a left sided gait with a support of a walking stick. The doctor finally formed an opinion that the brain injuries put the respondent at a high risk of developing post-traumatic epilepsy later in life. The doctor puts permanent incapacity of the respondent at 50%.



9. The appellant has cited *Nyota Tissue Products v Charles Wanga & 3 Others* (2020) eKLR where the plaintiff who according to him suffered similar injuries as the respondent in this case was awarded a sum of Kshs 500,000.00 and *Elizabeth Mokaya Bogonko v Fredrick Omondi Ouma* (2022) eKLR where the court awarded a sum of Kshs 500,000.00 for almost similar injuries. On the other hand, the respondent has cited Levben Products v Alexander Films (SA) (PTY) Limited 1957(4) SA 225 (SR) and *Morgan Air Cargo Limited v Everest Enterprises Limited* (2014) eKLR.
10. I have considered the submissions of both parties and the authorities cited to me. I note that the respondent has healed safe for the risk of post traumatic epilepsy later in life. I note that at the time of the hearing, this risk had not been experienced and the respondent was able to testify and remember the happenings of the date of the accident despite claim of loss of memory which I find not substantiated.
11. In my view, the authorities cited by the appellant are more relevant to the case in hand than the respondent's. I have also compared the plaintiff's case with the case of *Telkom Orange Kenya Limited v ISO* (2018) eKLR in which the respondent had sustained head injury occasioning depressed fracture of the skull, loss of consciousness, scars in the left tempo-parietal area and bruises on the left leg. In this matter, Honourable Justice D.S. Majanja reduced the award of the trial magistrate to Kshs 500,000.00 on 3-12-2018.
12. After due consideration, I find the the magistrate's award was too high as compared to the injuries suffered by the respondent such that they amounted to an erroneous estimate. I will therefore interfere with the magistrate's discretion and instead award a sum of Kshs 500,000.00 for pain and suffering and loss of amenities.
13. The conclusion of the above is that the magistrate's award of Kshs 1,200,000.00 is hereby set aside and in place thereof judgement is entered for the respondent against the appellant for a sum of Kshs 500,000.00 for general damages for pain and suffering and loss of amenities. Liability and special damages remain the same as they have not been challenged. Interest on the damages shall be calculated from the date of the lower court's judgment. The appellant will have the costs of the appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

