



REPUBLIC OF KENYA



**Oichoe v Olwal (Civil Appeal E108 of 2022)
[2024] KEHC 14933 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 14933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E108 OF 2022
A. ONG'INJO, J
SEPTEMBER 19, 2024**

BETWEEN

CHARLES OMBASA OICHOE APPELLANT

AND

LAWRENCE OLWAL RESPONDENT

*(An appeal from the Judgment / Decree of the Misc. App. No. 117 of 2021
at Rongo by Hon. S. N. Mutavi (RM) dated and delivered on 15/08/2022)*

JUDGMENT

1. The Appellant herein was a rider of motorcycle registration number KMKF xxxH along Rongo-Riosiri road on 9th May 2021 when motor vehicle registration number KCJ xxxR knocked him and as a result of which he sustained a serious bodily injuries. The said motor vehicle was insured in the name of the Respondent and it was being driven by Jackline Anyango Olwal – DW3. DW3 said she veered to avoid a pot hole and collided with a motor bike rider who did not co-operate to allow her to pass. She said she requested for way by use of headlights and the motorbike seemed to have slowed down and she proceeded. She said the point of impact was in the middle of the road. DW3 said if she had not swerved the accident would not have occurred
3. DW2 the investigating officer P. C. Dickens Agumba said the driver of the accident motor vehicle was not charged because she suffered at the hands of the bodaboda rider and it is police who rescued her and towed the motor vehicle to the police station. The injuries suffered by the Appellant were:-
 - a) Left radius fracture;
 - b) Right knee dislocation;
 - c) Lacerations on the face;



- d) Blunt trauma to the neck;
 - e) Blunt trauma to the back;
 - f) Bruises on the right upper limb;
 - g) Bruises on the left upper limb.
4. Upon considering the evidence of the Appellant and the Respondent the trial magistrate apportioned liability in the ratio of 60:40 in favour of the plaintiff for reasons there was no clear evidence as to what point of the road the accident occurred and who occasioned the accident.
5. On quantum the trial magistrate made an award of Kshs. 200,000/= after taking into consideration previous awards where similar injuries were sustained. He also made an award of Kshs. 10150/= for special damages with costs of the suit and interest to the Plaintiff / Appellant.
6. The Appellant was not satisfied with the trial magistrates decision and he preferred the appeal herein on the following grounds:-
- 1) That the learned trial magistrate erred in fact and law by finding and apportioning liability in the ratio 60%:40% in favour of the Plaintiff as against the defendant in the trial court.
 - 2) That the learned trial magistrate erred in fact and law in failing to consider the plaintiff's submissions on the issue of liability;
 - 3) The learned trial magistrate erred in fact and law in failing to consider the evidence which was tendered by the plaintiff on liability during the hearing of the suit and the submissions filed at the trial court;
 - 4) The learned trial magistrate erred in fact and law in awarding the Appellant Kshs. 700,000/= as General damages which award was inordinately lower in the circumstances;
 - 5) The learned trial magistrate erred in fact and law in failing to consider the plaintiff's submissions on quantum;
 - 6) The learned trial magistrate erred in law by overruling on the defendant's case without taking into consideration the plaintiff's case thus assessing and arriving at an impartial conclusion on both liability and quantum;
 - 7) The learned trial magistrate erred in law and fact by failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum;
 - 8) The learned trial magistrate grossly misdirect herself by treating the evidence and submissions before her on quantum superficially and consequently arrived at a wrong decision without any basis in law or fact;
 - 9) The learned trial magistrate erred in fact and law in failing to accord the Appellant's evidence and submissions due consideration;
 - 10) The learned trial magistrate findings as in liability and quantum of damages are not supported by facts or law hence irregular.
7. The Appellant proposed that:-
- a) The judgment and / or Decree of the trial magistrate dated 15/8/2022 on liability and quantum of damages be set aside varied and / or quashed;



- b) The court re-evaluates the evidence and make its own findings and judgment in regard to both liability and quantum;
 - c) That the court revisits the issue of assessment of general damages payable and reviews / varies the same to a reasonable amount commensurate with the evidence tendered by the Appellant;
 - d) Cost of the appeal be borne by the Respondent.
8. The appeal was canvassed by way of written submissions. The Appellant's appeal were filed on 23/5/2024 whereas the Respondent's submissions were filed on 29/11/2023. The Appellants submissions were that there was sufficient evidence from PW1 and PW2 that imputed negligence on the part of the Respondent to the effect that the accident occurred on the lane of the rider of motor cycle registration number KMFK xxxH which the driver of motor vehicle registration KCJ xxx R while trying to avoid a pot hole moved to the opposite lane cause of collisions . It was also the Appellants submissions that the investigating officer who also testified on behalf of the Respondent and produced police Abstract said the driver of the accident motor vehicle was not charged because she was manhandled and harassed by bodaboda riders who assaulted her and she had to be hospitalised.
9. The Appellant contended that the trial courts finding on liability was inaccurate and illegal of shoot that was at great various with the probative value of the evidence tendered in court. That the decisions as liability was improper in principle and not merited in evidence. The Appellant further argued that there was evidence the driver of the accident motor vehicle failed to have due regard for the presence of the motor cycle the plaintiff was riding and she expressly admitted she was riding on the motor cycles lawful lane when the collusion occurred. Further that the driver of the motor vehicle never took any precautions to avoid hitting the Appellant.
10. On assessment of quantum of damages, the Appellants counsel submitted that there was no evidence tendered to discount and controvert the nature and seriousness of the Appellants injuries as pleaded. The Appellant relied on the holding in Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR 55 where the Court of Appeal observed as follows: -
- The Appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles or misapprehended the evidence and so arrived at a wrong conclusion. The Appellant also relied in the Court of Appeal decision in Jane Chelangat Bor vs. Andrew Otieno Onduru (1988 – 92) 2KAR 288; 190 – 1994] EA 47;
- “In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principles of law, or has misapprehend the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
11. The appellate court can only interfere with the award of damages where it finds that the trial court applied the wrong principles of law by taking into account some irrelevant factor, leaving out of account some relevant ones and therefore arriving at an erroneous estimate of damages to be awarded.
12. The Appellant submitted that the general damages awarded was inordinately low compared to the injuries sustained by the Appellant and the award of 200,000/= demonstrated the trial magistrate acted in misapprehension of the legal principle fact that the award was unjust and unfair compensation for



- the Appellants injuries as it is also inconsistent with other awards made in similar cases. The Appellant argued that it was proper and of essence that inflationary trends be taken into account. Considering the remedies sought and monetary in nature.
13. The holding in *Naomi Momanyi vs. G4S Security Services Kenya Ltd & Another* [2018] eKLR was relied upon where it was observed;-

“In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensations...”
 14. The Appellant relied on the award of Kshs. 1,000,000/= made in *Easy Coach Ltd vs. Dinah Habwe Omutsali* [2015]eKLR where it is alleged the plaintiff suffered similar injuries as the Appellant herein and the award was upheld by the High Court the respondent submissions on the other hand claimed the appellant admitted he did not have a driving license or documents to show the motor cycle was insured.
 15. It was submitted that the appellant was in breach of the *Traffic Act* and Sections 68 (3) and 103 B (3) and (7). That there was no witness who testified to confirm the appellant had helmet.
 16. The respondent blamed the appellant for causing the accident because he was allegedly riding at a high speed. The respondents counsel argued that since there was no eye witness to the accident liability had to be apportioned as was held by the court of Appeal in *Isaac Onyango Okumu =vs= James Ayere and another* (2019)eKLR. The respondent also argued that there was no sketch map to help the court to determine the point of impact and hence the court relied on witnesses available.
 17. It was contended that the party who failed to avoid the accident as a result of the one who moved towards the center of the road is equally to be blamed.
 18. The respondent argued that Appellant did not prove particulars of negligence on the part of the respondent and due to the conflicting evidence, he was equally to blame and the liability apportioned at 60:40 was proper on quantum of damages the respondent submitted and rightly award of assessment of quantum as general damages is discretionary of the principles and that on award of damages is not merited to enrich the victims but to compensate such victims for the injuries sustained.
 19. That the award should represent a fair compensation but not excisional In *PN Mashru Limited =vs= Omar Mwakoro Makenga* (2018) e KLR the court quoted the decision in *Kigaraari vs. Aya* 1982 -88 [KAR 768 as follows:-

“Damages must be within limits set out by decided cases and also within the limits Kenyan economy can afford, Large awards and inevitably passed on to members of the public, the vast majority of whom cannot afford the burden, in form of increased insurance or increased fees.”
 20. The award must therefore be considered in light of the injuries sustained and comparable injuries should as far as possible be compensated by comparable awards. Keeping on mind the correct levels of awards on similar cases.
 21. The respondent cited the holdings of the Court of Appeal on *Gitobu Imanyara and 2 others vs. AG* (2016) e KLR cited on *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A. M. Lubia and Olive Lubia* [1982 -88] 1KAR 727, to argue that is disturbing an award of the trial court the appellant court must be satisfied that either the trial court is assessing the damages took into account



- an irrelevant factor, or left out a relevant one or that, short of the amount is so inordinately lower or so inordinately high that it must be a wholly erroneously estimate of the damage.
22. The respondent argued that the appellant did not prove he had a fracture of the left radius but a medical report to that effect was produced by consent of the parties and therefore the doctors who examined and treated the appellant did not attend court to testify as to the injuries.
 23. Upon consideration of the grounds of Appeal on the Memorandum of Appeal as well as the submissions by the parties herein, upon evaluation of the evidence on the record of the trial court and the Judgement of the trial magistrate the issues for consideration are ;-
 1. Whether the liability apportioned by the trial magistrate was based on evidence tendered and applicable principles of the law regarding negligence on traffic cases.
 2. Whether the award of general damages was commensurate with the injuries suffered by the appellant.
 24. In analyzing the evidence as to the person liable for the accident the trial magistrate confirmed that DW2 the driver of the accident motor vehicle admitted that she was avoiding a pot hole in front of her and she saw the appellant rider coming from the opposite direction. It is when she swerved to avoid a pot hole that her motor vehicle colluded with the appellant who was riding a motor cycle.
 25. The evidence tendered by the investigating officer who produced a police abstract in respect to the accident inquest was confirmed what the driver and the appellant said that she left her lane to avoid a pot hole. The investigating officer was very clear that the driver of the motor vehicle was to blame for the accident but she was not charged because she had been subjected to mob injustice by other Boda boda riders at the scene where she attempted to escape from the scene and it is police who rescued her.
 26. Since there was no dispute as to the occurrence of the accident and there was an admission that the accident occurred because the driver of the accident motor vehicle left her lane to avoid a pot hole where there was an oncoming motor cycle that was being ridden by the appellant, the court finds that the trial court erred in apportioning liability when the driver of the accident motor vehicle expressly admitted on court that if she had not swerved to avoid the pot hole the accident would not have occurred.
 27. There was no need for an independent witness as there was no conflicting evidence as to what transpired. It was not necessary to make a finding as to the point of impact in the circumstances. The circumstances in these case are quite distinct from the case of M'mbula Charles Muthuni –vs- Coast Broadway C. Ltd (2012) e KLR since the appellant and the driver of the accident motor vehicle were at the scene and there were no fatalities.
 28. The fact that the driver of the motor cycle was not charged was explained by the investigating officer. The trial court magistrate accepted evidence of ownership of the motor vehicle and the motor vehicle and there is no reason why the other particulars contained therein were not acceptable to the court.
 29. This court therefore finds that the accident occurred solely for the reasons that the driver of the motor vehicle swerved to avoid a pot hole thereby coming face to face with oncoming motor cycle and collided. The conclusion from the evidence tendered clearly shows the motor vehicle was 100% liable for the accident. The apportionment of liability by the trial court is therefore set aside.
 30. The trial magistrate in Rongo CCM No. 116 of 2021 indeed concluded that the driver of the accident motor vehicle was 100% liable for the accident and it is not explained why the same finding did not apply herein and yet the two matters arose from the same accident.



31. In regard to quantum of damages, the applicable principles are well settled and properly cited by the trial magistrate as follows:-
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
 - 2) The award should be commensurate with the injuries sustained;
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated as its own facts;
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account;
 - 5) Awards should not be inordinately low or high.
32. The trial magistrate at paragraph 33 insinuated that the Appellant did not prove the allegations of his injuries to the required standards since the doctors report was produced by consent but that ought to have been a matter raised during pretrial conference. There was no dispute that the Appellant was involved in a Road Traffic Accident; there was no dispute that he was injured in the manner recounted in the medical report prepared by Doctor Morebu.
33. The Respondent did not subject the Appellant to a second medical examination by a doctor of his choice and so the trial magistrate had only one expert opinion to rely on to prove that the Appellant suffered maim as per the P3 form after he sustained a fracture of the left radius and dislocation of the right knee joint among other injuries to the different parts of his body.
34. The trial magistrate considered several authorities to assess general damages that were reasonable to compensate the Appellant. These included: -
- 1) Vincent Mbogholi vs. Harrison Tunje Chelyalya [2017]eKLR where an award of Kshs. 500,000/= for a fracture of the left tibia, blunt injury to the chest and left lower limb and bruises on the left forearm right foot and bit toe were upheld;
 - 2) In David Mutembei vs. Maurice Ochieng Odoyo [2019]eKLR an award of Kshs. 1,600,00 for fracture of the right femur and proximal fracture of the left tibia was reduced on appeal to Kshs. 800,000/=
 - 3) In Nahashon Nyabako Nyadenga vs. Peter Nyakweba Omago [2021] eKLR where the plaintiff suffered bruises on her face with compound fracture of the right leg an award of Kshs. 900,000/= was reduced to Kshs. 650,000/= on appeal;
 - 4) In Daneva Heavy Trucks & ANotehr vs. Chrispine Otieno (2022)EKLR an award of Kshs. 1,000,000/= was reduced to the Kshs. 800,000/= where the plaintiff suffered fracture of the pelvis and left tibia and fibula.
35. The conclusion by the trial magistrate that the Appellant was entitled to general damages of Kshs. 200,000/= does not reflect that inflation was considered as the awards guiding the said assessment were made several years back. The quantum of damages assessed is also much lower than similar ones in the authorities cited even where the Appellants injuries were more severe. This court therefore finds that the award made was inordinately low in the circumstances. The same is set aside and substituted thereof with an award of Kshs, 500,000 as general damages for pain and suffering. The award of special damages is upheld as it was not in dispute. The cost of this appeal to be borne by the Respondent.



DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF SEPTEMBER, 2024

A. ONGINJO

JUDGE

Ruling delivered in the presence of:-

Mr. Ochwangi Advocate holding brief for Angasa Advocate for the Appellant.

Mr. Mattah for the Respondent.

Victor Court Assistants.

