



**Onyinkwa v Simiyu (Civil Appeal 101 of 2023)
[2024] KEHC 11717 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 101 OF 2023
REA OUGO, J
SEPTEMBER 16, 2024**

BETWEEN

JAMES NYAMASEGE ONYINKWA APPELLANT

AND

ROBERT WANJALA SIMIYU RESPONDENT

*(An appeal from the judgment and decree of Honourable W.K Onkunya PM
in Kimilili SPMCC No E96 of 2022 delivered on the 29th June 2023)*

JUDGMENT

1. In the Memorandum of Appeal dated 14/9/2023 the appellant avers that he is dissatisfied with the award of damages of the subordinate court and appeals against the judgment on the following grounds:
 1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high, erroneous, oppressive and punitive and amounts to miscarriage of justice.
 2. The learned trial magistrate ignored the appellant's submissions, paid lip service and made no reference to all the precedent on general damages cited before him, thus coming to a wrong decision on quantum.
 3. The learned magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous and which amounts to miscarriage of justice.
 4. The learned magistrate erred in law and fact in making an award of Kshs 1,500,000/- for general damages without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous and which amounts to a miscarriage of justice.



5. The Honourable magistrate's decision is plainly wrong and is against the weight of evidence
2. The facts that the respondent sustained injuries on 9/4/2022 when he was hit by the appellant's motor vehicle registration number KCD 887Z was not disputed. According to the plaint, the respondent sustained a fracture of the right head of the ulna bone and a fracture of the right tibia and fibula.
3. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:

“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 a wholly erroneous estimate of the damage.”
4. The appellant submits that as per the second medical report by Dr. James Obondi Otieno dated 3/10/2022, the respondent suffered a fracture of the right distal tibia/fibula, trauma to the forearm, and bruises of the right hand. He submits that a sum of Kshs 600,000/- would adequately compensate the respondent. He cites the following cases; *Miriam Njeri Murimi v Kenya Broadcasting Corporation (2009) eKLR* where the plaintiff therein suffered a head injury, fractured ribs L16 and R1-2, fracture-dislocation of the hip joint with permanent disability assessed at 12% and was awarded Kshs 450,000/- *Mwavita Jonathan v Silvia Onunga (2017) eKLR* the court awarded Kshs 400,000/- for a complainant who sustained commuted intertrochantric fracture of the left hip joint which required surgery involving insertion of surgical plantings and screws, the complainant also suffered blunt chest injuries, dislocation of the right knee, sprains at the cervical spine and other injuries. *Jitan Nagra v Abednego Nyandusi Oigo [2018] eKLR* the respondent therein suffered a compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and soft tissue injuries and was awarded Kshs 450,000/- The authorities cited by the appellant are of awards made more than 4 or 5 years old.
5. The respondent submitted that the Kshs 1,500,000/- was not an inordinately high compensation considering inflation. He relied on the following cases; *Esther Wanjiru Kiarie v Joseph Karie Ng'ang'a HCCC No 384 of 2000* where the plaintiff was awarded Kshs 1,000,000/- in July 2023, where the plaintiff suffered a fracture of the right tibia/fibula and the left humerus. *George William Awuor v Beryl Awuor Ochieng, Siaya HCCA No 1 of 2020* the plaintiff was awarded Kshs 1,200,000, in December 2020, after he sustained a fracture of the tibia/fibula and the right femur. I note that the injuries that were sustained by the plaintiffs in the Esther Wanjiru Kiarie case (supra) and George William Awuor case (supra) are slightly more severe than those sustained by the respondent herein.
6. According to the treatment notes from the Kimilili sub-county Hospital, the respondent suffered fractures of the tibia/fibula and ulna. The medical report by Dr. Joseph Sokobe and the P3 Form reflect the same. Dr. James Obondi Otieno found that there was trauma to the right forearm with no fracture. He however did not give any reason why his opinion contradicted the initial treatment notes from Kimilili sub-county Hospital. The respondent was first attended to, at Kimilili Hospital and I find no reason to doubt their diagnosis.
7. The trial court in arriving at its award considered the case of *Robert Gitau Kanyiri v Charles R. Kahiga & 2 others* where the plaintiff sustained a fracture of the right radius and ulna, fracture of the left humerus and fracture of the right femur and was awarded Kshs 1,000,000/-. The subordinate court



also took into account that Dr. Obondi had assessed disability at 20%. Although Dr. James Obondi noted that the respondent sustained 20% permanent disability, the medical report by Dr. Sokobe was that the respondent was healing well. The plaintiff did not give any evidence on the assessment of permanent disability. Therefore, the trial magistrate erred in considering the percentage of disability assessed by Dr Obondi. The injuries listed in Robert Gitau Kanyari case (supra) were more serious than those sustained by the respondent herein.

8. The learned trial magistrate took into account an irrelevant matter and considered authorities where the degree of disability was higher than that of the respondent. The award of Kshs1,500,000/-was therefore excessive and presents an erroneous award. In George Raini Atungu vs. Moffat Onsare Aunga [2021] eKLR this court awarded Kshs. 650,000.00 for a fracture of the right tibia and fibula bones and a fracture of the left radius and ulna. Considering that the respondent sustained simple fractures with no permanent disability, I hereby set aside the award of general damages by the learned trial magistrate and substitute it with an award of Kshs 700,000/-. The appellant shall have the cost of the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 16TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Nyangano h/b Mr. Omayo -For the Appellants

Mr. Okile -For the Respondent

Ms Wilkister - C/A

