



REPUBLIC OF KENYA



**Nyambane v Okoth (Civil Appeal E036 of 2023)
[2023] KEHC 19555 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 19555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E036 OF 2023**

**KW KIARIE, J
MARCH 14, 2023**

BETWEEN

JAMES OUMA NYAMBANE APPELLANT

AND

RHODAH ATIENO OKOTH RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 132 of 2021 by Hon. Celesa Okore–Principal Magistrate)*

JUDGMENT

1. James Ouma Nyambane, the appellant herein, was the defendant in Oyugis Principal Magistrate's SPMCC No 132 of 2021. This was a claim that arose from a road traffic accident involving motor vehicle registration number KAT 865J owned by the appellant. The said motor vehicle hit the respondent who was a pedestrian. She sustained injuries. The learned trial magistrate delivered judgment dated June 16, 2022. She apportioned liability at 50:50 and awarded Kshs 1,750,000.00 in general damages before factoring liability.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Dennis Onyinkwa & Company Advocates. He raised grounds of appeal as follows:
 - a The learned trial magistrate erred in law and in fact in adopting the wrong principles in making a determination on the assessment of damages payable to the respondent thereby arriving at an erroneous decision.
 - b That the learned trial magistrate erred in law and fact in failing to take into account relevant issues and/or factors in making a determination as to the damages payable thereby arriving at an erroneous decision.



- c That the learned trial magistrate erred in law ad fact by failing to take into consideration and/or be guided by relevant authorities and/or precedents with comparable injury like the ones sustained by the respondents thereby arriving at an excessive amount payable for the general damages.
3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company Advocates.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] E A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The appeal is on quantum. The appellant has argued that the award in general damages was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs Khan* [1981] KLR 349 at page 356 Law JA stated:
- ...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.
6. The respondent sustained the following injuries:
- a Multiple cut wounds on the right knee and hip;
 - b Multiple bruises on the right side of the hip;
 - c Pain and swelling on the right leg;
 - d Soft tissue injuries on the right thigh;
 - e Wet wound on the upper part of the thigh with visible suture marks; and
 - f Fracture of the right medial malleolus.
- As at June 3, 2021 the status of the injuries were as follows:
- a Pain on the right ankle joint with limitation of activities;
 - b Pain on the hip and buttocks with limitation of movement; and
 - c A limping gait with restricted range of movement at the right ankle joint.
- Disability was assessed at 30% and which was termed as ankyloses of the ankle.
7. In the trial court the appellant proposed an award of between Kshs 200,000.00 and Kshs.250, 000.00 as adequate compensation in general damages. He cited *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR an award of Kshs. 300,000.00 for the following injuries was made:Fracture of the left tibia leg bone (medial malleolus);Blunt object injury to the chest and left lower limb; andBruises on the left forearm, right foot and right big toe.
8. The respondent on the other hand had made a proposal of Kshs 2,000,000.00. She relied in the decision in *Zachary Kariithi v Jason Otiemo Ochola* [2016] eKLR the respondent was awarded Kshs 1,500,000.00 for the following injuries:Chest pains;Injuries to the waist;Compound fractures of the right tibia/fibula;Compound fracture of the left femur bone mid shaft;Fracture of the right femur



bone;Fracture of the 3rd, 4th 5th ribs of the right side;Injuries to the forehead;Injuries to the hip joint; andInjuries to the big left toe.

9. The injuries in the Zachary Kariithi case were more severe than what the respondent suffered while Vincent Mbogholi the injuries were less severe. I am persuaded to find that the award by the trial court was inordinately high. I therefore set aside the award and substitute it with an award of Kshs 1,000,000.00 in general damage before factoring the contributory negligence.
10. The appeal is allowed in line with the above terms. The appellant will have half the costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

