



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Jabuya (Civil Appeal E079 of 2021)
[2023] KEHC 2439 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E079 OF 2021**

**KW KIARIE, J
MARCH 23, 2023**

BETWEEN

KEVIN OTIENO ONYANGO APPELLANT

AND

KENNETH OKONGO JABUYA RESPONDENT

*(Being an Appeal from the judgment in Oyugis Principal Magistrate's
PMCC No 108 of 2020 by Hon B Omwansa–Senior Principal Magistrate)*

JUDGMENT

1. Kevin Otieno Onyango, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No 108 of 2020. This was a claim that arose from a road traffic accident involving motor vehicles registration number KCM 682L Subaru Impreza in which the respondent was a passenger and motor vehicle registration number KBE 453V Mitsubishi FH. The respondent sustained injuries. In the judgment that was delivered on August 11, 2021, the respondent was awarded Kshs 950,000.00 general damages and Kshs 27, 500.00 special damages before factoring in contributory negligence. On June 23, 2021 parties had recorded consent on liability which they apportioned at 80:20 in favour of the respondent.
2. The appellant was aggrieved by the award in general damages and filed this appeal. He was represented by the firm of Okong'o, Wandago & Company Advocates. He raised grounds of appeal as follows:
 - a) That the learned trial magistrate erred in fact and in law in awarding general damages of kshs 950,000/- which amount was so manifestly high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's injuries which injuries comprised a single fracture of the femur bone coupled with minor soft tissue injuries.



- b) That the learned trial magistrate erred in fact and in law in awarding future medical expenses in the absence of expert medical opinion that the injuries sustained resulted in permanent and/or residual, debilitating incapacity.
 - c) That the learned trial magistrate erred in fact and in law in disregarding the written submissions and supporting authorities which were tendered by the appellant thereby awarding general damages which were excessive in view of the nature and degree of injuries sustained by the respondent.
 - d) That the learned magistrate's assessment and finding on damages was without any basis and/or not supported by relevant case law or otherwise, any case law at all.
3. The appeal was opposed by the respondent through the firm of H Obach & Partners Advocates. He contended that the award was not inordinately high.
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 vs Associated Motor Boat Co Ltd* [1965] EA 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 parties herein having entered consent on liability, the trial magistrate had only the issue of quantum of general damages to address.
6. It is now settled law that an appellate court will only disturb an award of the trial court if the award is inordinately high or low or where wrong principles were applied or that the court misapprehended the evidence in some material respect. This was succinctly put by Law JA in *Butt v Khan* [1981] KLR 349 at page 356 as follows:
- "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 at a figure which was either inordinately high or low."
7. According to the medical report by Mr Stephen Omondi, a clinical officer, the respondent sustained the following injuries:
- a) Severe head injury; and
 - b) Fracture of the left femur bone.
8. At the trial, the appellant proposed an award of Kshs 400,000/= in general damages and Kshs 50,000/= for future medical expenses. The following cases were cited and relied upon for the proposal:
- a) *Mwavita Jonathan v Silvia Onunga* [2017] eKLR where an award of Kshs 400,000/= in general damages for the following injuries: Left hip commuted intertrochanteric fracture, Blunt chest injury, Dislocated right knee joint, Sprains at the cervical spine of the neck and the lumbar-sacral spine of the back, Deep wound on the left lower leg which caused a lot of blood.
 - b) In *Aloise Mwangi Kabari v Martin Mutisya & another* [2020] eKLR the respondent sustained the following injuries: Compound fracture of right tibia and fibula, Bleeding from left lower limb, Swollen leg.

For these injuries the appellant was awarded Kshs 500,000 as general damages.



- c) In *DG (Minor suing through her next friend MOR v Richard Otieno Onyisi* [2021] eKLR an award of Kshs 400,000/= in general damages was made where the minor had sustained a chest contusion, left tibia fracture, bruises on the left foot and bruises on the left leg.
9. There were other two cases with wards between Kshs 600, 000/= and 500, 000/= with comparable injuries.
10. The respondent at the trial court relied on the following cases:
- a) *James Thiongo Gitbiri v Nduati Njuguna Ngugi* [2012] eKLR the plaintiff sustained multiple fractures of all the limbs during the accident, and that open reduction and internal fixation of the unilateral fractures of the humerus and femur was done. The plates and the intermedullar rods were still in place and were to require removal in future, at the cost of Ksh 150,000/=, and that the function of the left leg would improve.
- The Doctor also reported that the fracture of the right tibia and fibula mal-united resulting into a prominent deformity in the right leg, and that function of the right lower limb is reduced and he also limps, and suffers from pain in both hip joints and weakness of the upper limbs. He was awarded Kshs 1,800,000/= for Pain and suffering.
- b) *Michael Njagi Karimi v Gideon Ndungu Nguribu & another* [2013] eKLR the plaintiff sustained the following injuries:
- i) Bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus.
 - ii) Deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement.
 - iii) Injury to the right lower limb involving the right leg which was tender, swollen and deformed. X-ray examination showed a fracture of the right tibia and fibular.
 - iv) Swelling and deformity of the left thigh with apparent shortening; x-ray revealed a segmental fracture of the left femur with marked displacement.
- The plaintiff who was discharged on a wheelchair following the accident was awarded Kshs 2,000,000.00 for pain and suffering.
11. It is evidently clear that the respondent herein relied on cases where the injuries were more severe than what he sustained. I am therefore persuaded to interfere with the award by the learned trial magistrate.
12. I set aside the award of kshs 950, 000/= and substitute it with an award of Kshs 600,000/= before factoring contributory negligence. The appellant will have half costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

