



**Oeba & another v Ombese (Civil Appeal E055 of 2022)  
[2023] KEHC 2122 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E055 OF 2022  
KW KIARIE, J  
MARCH 21, 2023**

**BETWEEN**

**JOSEPHAT OEBA ..... 1<sup>ST</sup> APPELLANT**

**MOMBASA KHUISHI MOTORS COMPANY LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALEX ORORA OMBESE ..... RESPONDENT**

*(Being an Appeal from the ruling in Oyugis Principal Magistrate's  
PMCC No. 55 of 2018 by Hon. B.O. Omwansa–Principal Magistrate)*

**JUDGMENT**

1. The appellants herein, were the defendants in Oyugis Principal Magistrate's PMCC No 55 of 2018. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCG 731N driven by the 1<sup>st</sup> appellant and owned by the 2<sup>nd</sup> appellant. The motor hit the motor cycle on which the respondent was a passenger and he sustained injuries. The learned trial magistrate delivered judgment dated 21<sup>st</sup> October, 2020. He held appellants 100% liable and made an award of Kshs 2,500,000 in general damages and Kshs 602, 052/= special damages in favour of the respondent.
2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised the following grounds of appeal:
  - a. The learned trial magistrate in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.
  - b. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.



- c. The learned magistrate erred in law and fact in finding the defendants liable jointly and severally yet the 2<sup>nd</sup> defendant never entered appearance nor defended the matter.
  - d. The learned magistrate erred in law and fact in awarding the respondent Kshs 2, 500,000/- for general damages hence arriving at a wrong finding as regards the nature of injuries sustained by the respondent.
  - e. The learned trial magistrate erred in law and fact by awarding the respondent an inordinately high quantum as damages in the circumstances of this case.
  - f. The leaned magistrate erred in law and fact in awarding the respondent a sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the respondent.
  - g. The learned magistrate erred in fact and in law in failing to consider the appellants' submissions on quantum and liability and legal authorities relied upon in support thereof.
  - h. The learned magistrate erred in fact and in law unfailing to consider convention awards in cases of similar nature.
3. The appeal was opposed by the respondent through the firm of Njogu, Omwansa & Nyasimi Advocates. He raised the following grounds of opposition:
    - a. That the decision of the learned trial magistrate was on merits; and
    - b. That there are no reasons to interfere with the discretion of the learned trial magistrate.
  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] 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. According to the evidence of Alex Orora Ombese (PW1) the respondent herein, he was a pillion passenger on a motor cycle that was going towards Chabera from Sondu. The motor vehicle that knocked their motor cycle down was attempting to overtake a lorry. It was in this process when it knocked them down. He was not cross examined and evidence therefore went unchallenged. The appellants did not call any witness.
  6. I make a finding that the finding on liability cannot be faulted.
  7. The appellate court before interfering with an award of the trial court will require to be satisfied that clear principles which have been decanted overtime have not been adhered to. Law JA in *Butt v Khan [1981] KLR 349* at page 356 stated 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 a figure which was either inordinately high or low."
  8. As a result of the accident, the respondent sustained the following injuries:
    - a. Superficial median nerve cut;
    - b. Right femur fracture;



- c. Right radial ulna fracture;
  - d. Tendon lacerations; and
  - e. Right leg amputation.
9. In the case of *James Maina Muriithi v My Beauty Transporters Limited & 2 others [2018] eKLR* in awarding Kshs 4,200,000/= for the following injuries:
- a. Burns and abrasions;
  - b. Crushed upper and lower limbs leading to two amputations;
  - c. Compound injuries on both knees; and
  - d. Exposed tibia.
- Observed as follows:
28. In *Kurawa Industries Limited v Dama Kiti & Another [2017] eKLR* Chitembwe J, summarised a number of cases in which awards were made for amputation of limbs. He stated:
- “The scenario given by the above awards shows that damages for amputation of one’s leg above the knee would range from Kshs 1.2 million to 2.5 million. The trial court awarded Kshs 2million on June 26, 2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries”
10. It is my considered opinion that the award by the learned trial magistrate cannot be described as inordinately high. The respondent suffered more injuries in addition to amputation of the right leg. The appeal is accordingly dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

