



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Opiyo v Abiud (Civil Appeal E135 of 2021)
[2023] KEHC 2155 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E135 OF 2021**

TA ODERA, J

MARCH 8, 2023

BETWEEN

PAMELA ANYANGO OPIYO APPELLANT

AND

OYIER ODIERO ABIUD RESPONDENT

(Being an appeal from the Judgment and Decree of HON. S.O. TEMU, Senior Principle Magistrate, Nyando, delivered on 4th November 2021 in Nyando SPMCC NO. 59 OF 2020)

JUDGMENT

Background

1. The appeal before court is against the award of Kshs 60,000/= as general damages.
2. Brief facts of the case were that on the 22/6/2017 while the plaintiff was aboard Toyota reg no KCD 934 K as a fare paying passenger, it lost control, swerved, veered off the road and rammed into a tree occasioning him severe body injuries. The plaintiff blamed the defendant for among other things over speeding and reckless driving.
3. Vide a judgment delivered on 4/11/2021 the learned magistrate found the respondent 100% liable for the accident and condemned them to pay general damages of Kshs 60,000/= together with costs of the suit.
4. Being aggrieved the appellant has now proffered this appeal *vide* the memorandum of appeal dated November 25, 2021 on the following grounds.
 - a. The learned trial magistrate erred in law and in fact in awarding the appellant damages which were inordinately low as to represent an erroneous estimate and not commensurate with the injuries suffered by the appellant.



- b. The learned trial magistrate erred in law and in fact in writing a judgment which is at variance with the pleadings and against the weight of evidence.
 - c. The learned trial magistrate erred in fact by failing to appreciate the degree, extent and long-term effect of the appellant's injuries thereby awarding the appellant damages which were inordinately low/ little taking all the relevant factors into consideration.
5. She urged the court to set aside the trial magistrate's judgment on quantum and make its own findings.

Appellant's Submissions

6. Vide her submissions dated 10/1/2023 the appellant contended that damages of Kshs 60,000/= were inadequate for the chest injuries and a fracture of the rib. It was her further contention that the trial magistrate disregarded the medical evidence adduced thereby arriving at a wrongful conclusion that the appellant had suffered soft tissue injuries.
7. The appellant urged this court to interfere with the trial courts award of damages and substitute it with Kshs 500,000/= based on *Daniel Otieno Owino vs Elizabeth Atieno Owuor* [2020] eKLR and *H Young & Company EA ltd Vs Edward Yumatsi* [2016] eKLR where the courts awarded Kshs 400,000/= and Kshs 500,000/= respectively for comparable injuries.
8. On a without prejudice basis the appellant submitted that Kshs 60,000/= was low even for soft tissue injuries taking into account the inflation rates. She stated that any amount between Kshs 150,000/= to 250,000/= would suffice based on *Ogembo Tea Factory vs George Biringi Oino* [2019] eKLR and *Joseph Mwangi Kiarie & another vs Isaac Otieno Otieno* [2019] eKLR where Kshs 200,000/= and Kshs 180,000/= respectively were awarded for soft tissue injuries.
9. They urged this court to set aside the court's judgment on quantum.

Respondent's Submissions

10. On his part the respondent filed submissions on 16/1/2023 in which he urged this court to uphold the trial court's award on quantum. It was his contention that the rib fracture had not been proved on account of the contradictions in the witness testimonies and the discrepancies in the medical documents.
11. Specifically, he averred that the lack of an x-ray report vitiated the claim of a fracture, as evidenced by the cases of *Pitalis Opiyo Ager vs Daniel Otieno Owino vs Daniel Otieno Owino & Anor* [2020] eKLR and *Dhiraj Manji vs Tyson Ouma* [2021] eKLR.
12. He urged this court to find, just as the trial magistrate did that the evidence did not support the injuries.

Analysis And Determination

13. It is so far evident that the appeal is only on the issue of quantum. As has been well established the duty of a first appellate court is to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remember, and give allowance to the fact that the trial court had the advantage of hearing the parties.
14. Similarly, and of much relevance to this case is the circumstances under which this court can interfere with the trial court's award on quantum.



15. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. 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, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

16. In arriving at Kshs 60,000/- the trial magistrate considered the absence of an x-ray report and took the view that the injuries were not soft tissue in nature.
17. A look at the discharge summary from St Joseph’s Nyabondo shows complaints of chest pains and fracture of the left rib. appellant was put on diclofenac and amoxyl. The P3 form on its part indicates severe chest pains especially on the left rib bone, and fracture of the left rib bone and he assessed the injuries as grievous harm.
18. In her testimony PW1 indicated that she had fully healed. PW3 the clinical officer at Nyakach Sub-County hospital on his part stated that he did not have an x-ray report. PW4 the medical records officer at Nyabondo Mission hospital testified to the effect that the plaintiff had soft tissue injuries, with complaints of chest pains and dehydration. It was his further testimony that PW1 was managed with diclofenac.
19. It is trite law that the burden of proof lies on the person who alleges as stipulated by section 107 of the *Evidence Act*. In this suit the burden was on the appellant to prove that she suffered a fracture and not merely allege the same. In the case of *Dhiraj Manji vs Tyson Ouma* (2021) eKLR. The court found that it was not possible to determine whether there was a fracture as the x-ray films were not produced to prove the same.
20. It is this court’s finding that no evidence was led to prove that a fracture occurred since the X-ray films were not produced. In view of the foregoing, I agree with the trial magistrate that the appellant failed to prove on a balance of probabilities that she suffered a fracture.
21. The absence of a fracture leaves the appellant with chest pains and pain on the left rib as her only injuries. It is trite law that so far as possible comparable injuries should be compensated by comparable awards. The Court of Appeal in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 stated that: -

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”



22. The observation in *H West & Son Ltd vs Shephard* [1964] AC 326, was that;

“...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

23. The appellant urged this court to award between Kshs 150,000/= and 250,000/= based on *Ogembo Tea Factory vs George Biringi Oino* [2019] eKLR and *Joseph Mwangi Kiarie & another vs Isaac Otiemo Otiemo* [2019] eKLR.

24. In the Ogembo case, the respondent had suffered blunt trauma to the chest together with a contusion of the knee and the left hip and was awarded Kshs 200,000/=.

25. In the Joseph case, the respondent suffered injuries to the head, chest, right knee and left elbow. In all fairness the injuries suffered by the appellant herein were minor as compared to those in the cited cases.

26. Respondent submitted that the general damages awarded to commensurate with the injuries sustained. The trial magistrate did not refer to any authority in which comparable damages were awarded for comparable injuries but this does not go to the root of the case as in the case of *HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR. The plaintiff sustained blunt object injury to the head and neck, thorax, abdomen and limbs and general damages of Kshs 60,000/= was awarded by the trial Magistrate and the same were upheld on appeal

27. This court agrees with the trial magistrate that the injuries suffered were minor soft tissue injuries. There is nothing to show that the learned Trial Magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately low.

28. Accordingly, this court finds no reason to disturb the award made by the learned trial Magistrate.

29. The upshot is that the appeal lacks merit and is dismissed with costs.

T. A. ODERA - JUDGE

8.3.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THR PRESENCE OF;

Mr Okoth the appellant,

No appearance for Respondent,

Court assistant Oyando.

T.A. ODERA - JUDGE

8.3.2023

