



REPUBLIC OF KENYA



KENYA LAW
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**T. B. Distributors v Ogana (Civil Appeal E060 of 2021)
[2023] KEHC 3332 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E060 OF 2021
WA OKWANY, J
APRIL 20, 2023**

BETWEEN

T. B. DISTRIBUTORS APPELLANT

AND

JOSPHAT MOTUKA OGANA RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered at Nyamira on the 22nd day of July 2021 in the original Nyamira Chief Magistrate’s Court Civil Case No. E004 of 2021)

JUDGMENT

Introduction

1. The Respondent herein, who was the Plaintiff before the trial court, was injured in a road traffic accident that occurred on 22nd September 2020. The instant appeal is on the issue of quantum only as parties agreed on liability at 20% to 80% in favour of the Respondent.
2. The Respondent’s case was that he was on the material day walking along the verge of Nyamira Road when near Nyaikuro area the Appellant’s driver drove motor vehicle Registration No. KCY 157T negligently thus permitting to lose control and knock him down thereby causing him serious injuries.
3. The trial Magistrate assessed general damages at Kshs. 1,000,000/= thus precipitating the filing of this appeal.
4. The Respondent pleaded in the plaint that he sustained the following injuries: -
 - i. Head injury.
 - ii. Multiple cut wounds on the neck and the head with multiple bruises.
 - iii. Fracture of the right 3rd and 4th ribs.



- iv. Chest contusions.
 - v. Dislocation of the right shoulder.
 - vi. Cut wounds (bilateral) with bruises on the upper limbs bilaterally.
 - vii. Fracture of the right tibia fibula.
 - viii. Medial dislocation of the right foot.
 - ix. Cut wounds on the right calf muscle.
5. The Respondent produced the following documents in support of the injuries; Medical Report, P3 Form, Outpatient Card and Clinical Attendance Card. The Medical Report by Dr. Ombati Timothy Mokuia who examined the Respondent on 7th December 2020 confirmed the Respondent's injuries and noted that the Respondent had developed features of osteomyelitis as a complication and that he needed surgical intervention and prolonged use of strong antibiotics in order to heal. The doctor also stated that the Respondent was likely to develop traumatic osteoarthritis on the right ankle later in life. He assessed permanent disability at 10% and classified the injury as grievous harm.
 6. The Appellant produced the Medical Report of Dr. Walter S. Adero who examined the Respondent on 9th June 2021 and confirmed the injuries highlighted in the plaint. He noted that the fracture on the Respondent's leg had healed with a deformity and assessed permanent disability at 5%.
 7. The Respondent proposed an award of Kshs. 1,200,000/= before the Lower Court while the Appellant proposed Kshs. 600,000/=.
 8. The Respondent submitted that the Lower Court award is not inordinately excessive while the Appellant was of the contrary view. The Respondent relied on the decisions he cited before the trial court namely: -*Dennis Matagaro vs NKO (Minor suing through next friend and father WOO)* [2021] eKLR where the court held that Kshs. 700,000/= shall suffice where the plaintiff sustained only a fracture of the tibia fibula and soft tissue injuries. *Veronicah Mkanjala Mnyapara vs Patrick Nyasinga Amenity* [2021] eKLR where the court held that Kshs. 300,000/= shall suffice where the plaintiff sustained only a dislocation and soft tissue injuries. *Poa Link Services Co. Ltd & another vs Sindani Boaz Bonzemo* [2021] eKLR where the court upheld an award of Kshs. 350,000/= where the plaintiff sustained only soft tissue injuries. *Blue Horizon Travel Co. Ltd vs Kennedy Njoroge* [2020] eKLR where the court held that Kshs. 400,000/= shall suffice to a plaintiff who sustained only fracture of the ribs and soft tissue injuries.
 9. The Appellant, on its part, relied on the decisions in *Joseph Mwangi Thuita vs Joyce Mwole* [2018] eKLR where the High Court awarded Kshs. 700,000/= where the claimant sustained fracture of the right femur, compound fracture of the right tibia and fibula, shortening the right leg, episodic pain of the thigh with inability to walk.
 10. The Appellant also relied on the decision in *Morris Miriti vs Nabashon Muriuki & Another* [2018] eKLR where an award of Kshs. 300,000/= was made to the claimant whose permanent disability was assessed at 10%.
 11. The duty of the first appellate court is to re-consider and re-evaluate the evidence tendered before the trial court in order to arrive at its own conclusion while bearing in mind the fact that it neither saw



nor heard the witnesses testify. In *Williamson Diamonds Ltd and Another vs Brown* [1970] EA 1, the court held that: -

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

12. The circumstances under which an appellate court will interfere with an award of general damages was explained in the oft cited case of *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs A.M.M. Lubia & Ano.* (1982-88)1 KAR 777 where the Court of Appeal stated as follows:

“...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.”

13. In the present case, I note that the trial court rendered itself as follows on the issue of quantum: -

“Having considered the nature of the injuries sustained by the plaintiff, the above referenced principles and the authorities cited by rival parties herein, this court awards the plaintiff the sum of Kshs. 1,000,000.00 as general damages. This court relies on the following cases: -

- a. HCC No. 188 Of 2009 – [*Hellen Atieno Oduor V S. S. Mehta & Son Ltd And Mutbitunua*](#) [2015] eKLR.

Where Justice R. E. Ougo awarded the plaintiff Kshs. 1,500,000/= for fracture of the right tibia and fibula multiple fractures of the ribs on the right side of the chest (3rd, 4th, 5th, 6th, 7th, and 8th rib) chest injury and hemothorax, blunt abdominal trauma, fracture of the right scapula and surgical scars on the right knees, anteriorly, and right ankle joint medially.

- b. [*Joseph Kirubi Nganga vs. Kenneth Oketch*](#) eKLR 2009:

Where Lady Justice Martha Koome (as she then was) awarded the plaintiff Kenya shillings one million one hundred thousand (Kshs. 1,100,000/=) for head-scratches/bruises of face, fracture of the scapula and fracture of left femur.

14. From the above extract of the trial court’s decision, it is clear that the court took into account the principles governing the assessment of damages, the injuries that the Respondent suffered in the accident and the comparable decided cases before arriving at the decision on quantum. I am therefore not persuaded that this is one of the cases that the appellate court can interfere with the trial court’s verdict on quantum.
15. For the reasons stated in this judgment, I am not persuaded that the trial court applied the wrong principles and/or arrived at a figure that is inordinately high. Consequently, I find that this appeal is not merited and I therefore dismiss it with costs to the Respondent.
16. It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 20TH DAY OF APRIL 2023.**

W. A. OKWANY

JUDGE

