



REPUBLIC OF KENYA



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

**Okidi v Fanaka Merchant's Limited (Civil Appeal E377 of 2021)  
[2023] KEHC 18095 (KLR) (Civ) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18095 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E377 OF 2021**

**AN ONGERI, J**

**MAY 5, 2023**

**BETWEEN**

**PETER ORWA OKIDI ..... APPELLANT**

**AND**

**FANAKA MERCHANT'S LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D. M. KIVUTI  
(PM) in Milimani CMCC no. 8038 of 2018 delivered on 4/6/2021)*

**JUDGMENT**

1. The appellant filed CMCC no. 8038 of 2018 seeking general damages for pain and suffering, loss of future earnings, medical expenses and special damages of ksh.330,250.
2. The suit arose out of an accident which occurred on 12/4/2018 along Ngong Road at 1800 hours when the appellant was standing on the roadside waiting to cross the road.
3. The appellant in his evidence before court said he saw the motor vehicle registration KCA 021Q City Hoppa bus appearing from the direction of Karen driving towards Nairobi City Centre when it suddenly deviated from its course and headed towards the walk way where he was standing and it hit him.
4. The hearing of the case proceeded exparte the defendant having entered appearance and filed a defence but having failed to appear in court for the hearing of the suit.
5. The trial court held that the defendant was 100% liable for the accident and awarded the appellant kshs.700,000 in respect of general damages and special damages kshs.330,350 making a total of kshs.1,30,350.



6. The appellant has appealed to this court against the quantum on the following grounds;
  - i. That the award of general damages of kshs.700,000 was inordinately low in view of the injuries sustained by the appellant.
  - ii. That the trial court failed to consider the appellant exhibits and failed to award future medical costs which was specifically pleaded.
  - iii. That the trial court failed to consider the permanent incapacity and diminished earning capacity of the plaintiff in assessing general damages and failed to award loss of future earning/ earning capacity.
  - iv. That the trial court proceeded on wrong principles in assessing general damages and arrived at a wrong conclusion against tenets of law applicable and thus occasioned a miscarriage of justice.
7. The parties filed written submissions as follows; the appellant submitted that the appellant sustained the following injuries;
  - a. Spinal injuries to the cervical spine (cord passing through bones of the neck) as evidenced by: -Contusion of the cordMuscle spasmHypolordosis (loss of curative) of the bones of the neckDegeneration of cervical C2/C3 and C4/C5
  - b. Trauma to the chest as evidenced by Fracture, minimally displaced of the (R) posterior ribs-5th ,6th, 7th, 10th and 11th.Hemothorax (bleeding inside the chest cavity)Contusion of the (R) lower lobe of the lung.
  - c. Traumatic extraction of the teeth: -3 upper incisors4 lower incisors
  - d. Laceration multiples of the face
  - e. Blood loss
8. The appellant submitted that an award of Kshs. 700,000 was not commensurate to injuries he sustained and suggested an award of Kshs. 4,500,000 and in support cited [Ngure Edward Karega v. Yusuf Doran Nassir \[2014\]](#) eKLR suffered a fracture on the 6th cervical and a fracture on the right leg, bruises on the head and palms. The fractures took long to heal and the one on the spine incapacitated him and rendered him unable to work. He was awarded General Damages for Pain and Suffering – Kshs.5,000,000.
9. On loss of future earnings, the appellant argued that that the injuries he sustained made him incapable of working. That he used to be a driver but he is unable to drive anymore because of ill health and that the doctor put his incapacity at 90%. At the time the appellant sustained the injuries, he was 46 years old and earning Kshs. 24,611.00/=. We submit a multiplier of 14 years, saying the appellant could have worked for another 14 years, as the official retirement age set by the Government of Kenya is 60 years. This would then give a figure of Kshs.4,134,648/= worked at 24,611 x 14 x 12.
10. On future medical expenses the appellant submitted that Medico – Legal Report suggested that the appellant will require medical cost of Ksh 2,000,000 and further the report by Dr. Okere suggested Kshs 70,000 for his lost teeth. The medico-legal report also stated that the appellant had undergone physiotherapy while in hospital and suggest further physiotherapy. It was argued that that the appellant’s health had not improved since the accident and therefore proposed an award of Kshs. 2,000,000 as costs of future medical care.



11. The respondent on the alternatively submitted that from the record it is evident that the trial magistrate did not misdirect herself in fact and in law as she rendered a judgement based on facts, evidence tendered before the court and the law and therefore this appeal should be dismissed with costs. In support the respondent cited *Njau Nyanjui Thitu & another v Lawrence Kimani Nyanjui & 7 others* [2007] eKLR where the Appellant has suffered injuries to the spine and was awarded Kshs.520,000 for both special and general damages
12. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
13. The issues for determination are as follows;
  - i. Whether the assessment of general damages was erroneous.
  - ii. Whether the award of general damages of kshs.700,000 was inordinately low.
14. On the issue as to whether the award of general damages was erroneous, the appellant submitted that the trial court failed to consider the appellant’s exhibits and did not award future medical costs and loss of earnings.
15. I find that the court did not take into account of the future medical expenses and loss of earning capacity by the appellant.
16. The trial court only awarded general damages for pain and suffering and failed to award future medical costs.
17. I have considered the nature of injuries sustained by the plaintiff as outlined in paragraph 8 of the plaint and also the fact that the plaintiff is currently unable to work as a tour driver due to his disability.
18. I find that the trial court failed to consider these factors in the judgment delivered on 4/6/2021 and arrived at an erroneous award by leaving out future medical expenses and loss of earnings.
19. The medical report assessed functional disability at 90% and future medical expenses at a minimum of kshs. 2 million. I find that the trial court ignored these elements in its judgment and arrived at a wrong conclusion.
20. On the issue as to whether the award of general damages of kshs.700,000 is inordinately low, I find that the answer is in the affirmative.



- 21. I have considered the nature of injuries sustained which include permanent disability of 90% and future medical expenses of not less than 2 million Kenya shillings and I find that the award of kshs.700,000 is inordinately low.
- 22. I set the award aside of ksh.700,000/=.
- 23. Mention on 2/6/2023 for assessment of damages.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

.....

**A. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the Respondent

