



**Kerage & another v Ogega (Civil Appeal 114 of 2021)  
[2023] KEHC 20264 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 114 OF 2021  
PN GICHOHI, J  
JULY 19, 2023**

**BETWEEN**

**KENNEDY OBWOCHA KERAGE ..... 1<sup>ST</sup> APPELLANT**

**SWEETONE INVESTMENT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BOAZ ARERI OGEGA ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Hon. Nathan Shiundu  
Lutta (CM) on 31st August 2021 in Kisii CMCC No. 554 OF 2019)*

**JUDGMENT**

1. The background of this appeal is that *vide* a plaint dated July 16, 2019 in Kisii CMCC No 554 of 2019 and filed by the firm of Khan & Associates Advocates , the respondent Boaz Areri Ogega sued the appellants seeking both general and special damages for injuries he alleged to have sustained June 28, 2018 when he was knocked down by motor vehicle registration number Kxx xxxU while he was walking along the Kisii-Migori. He claimed that the driver of the said motor vehicle was driving negligently and carelessly and thus lost control of the motor vehicle and whereupon it veered off the road and hit him. He sustained the following injuries: Bruises on the right knee Bruises on the left arm Bruises on the right arm Chest contusion Deep cut wound on the right temporal region Hematoma on the right parietal region
2. In their defence filed on September 25, 2019, the appellants denied the claim but pleaded in the alternative and without prejudice that if an accident had occurred , which they denied, the same was caused by the reckless, negligent and or the careless act or omissions on the part of the respondent.
3. The court heard three witnesses in support of the respondent’s case but the appellants did not call any witness. Judgment was ultimately delivered on August 31, 2021 whereby the appellants were found



100% liable for the injuries sustained by the respondent and the respondent was awarded Kshs 300,000/= as general damages and Kshs 5,000/= as special damages together with costs and interest.

4. Aggrieved by that judgment, the appellants preferred the instant appeal through the firm of Kimondo Gachoka & Company Advocates raising ten (10) grounds of appeal but which can be condensed into the four (4) that is;
  - a. The learned magistrate erred in law and misdirected himself when he failed to consider the appellant's submissions in both points of law and facts.
  - b. The learned magistrate's decision was unjust and against the weight of evidence and based on wrong principles of law thus occasioning miscarriage of justice.
  - c. The learned magistrate erred in law and misdirected himself when he failed to consider the provisions of *Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013* thus finding the appellants 100% liable.
  - d. The learned magistrate erred in law and fact in failing to consider conventional awards for similar injuries thus awarding the respondent inordinately high quantum ( Kshs 300,000/=) in the circumstances of the case.
5. The appellants therefore prayed that the appeal be allowed and the judgment of the lower court be set aside and dismissed. In the alternative, they sought that the court does re-assess the damages and award them costs in this appeal and in the lower court.
6. By consent of parties, this appeal was canvassed by way of written submissions. The respondent filed on November 18, 2022 while the appellants filed theirs on January 19, 2023.

### **Appellants' Submissions**

7. Counsel submitted on quantum only on quantum and contended that the award of Kshs 300,000 was reflective of more serious injuries than was suffered by the plaintiff. He therefore urged the court to re- evaluate the evidence and find that the respondent sustained soft tissue injuries and hence award damages comparable to awards.
8. While urging the court to award the respondent Kshs 80,000/= as general damages, counsel cites several cases including the case of *George Mugo & another v AKM (Minor suing through the next friend and mother)* [2018] eKLR where Kemei J awarded Kshs 90,000 for soft tissue injuries; *PF (Suing as next friend and father of SK(Minor) v Victor O. Kamadi & another* [2018]eKLR where the appellant had sustained cut wound on the forehead, multiple small abrasions on the face, blunt injury to the head leading to loss of consciousness for some time, abrasion to the back, abrasion wounds to the dorsum of the right hand and cut wound to the right leg. On appeal, High Court substituted the award of Kshs 50,000/= with Kshs 100,000/=.

### **Respondent's Submissions**

9. On his part, counsel for the respondent submitted that the respondent's evidence is that the said motor vehicle registration number Kxx xxxU veered off the road and knocked down the respondent. The police officer testified confirming the occurrence of the accident and that the driver was blamed for the accident. That further, the appellant did not challenge that evidence during cross-examination and did not call any evidence.



10. On that ground then, counsel submitted that there was no basis for apportioning liability and hence the trial magistrate was right in holding the appellants 100% liable. He therefore submitted that there can be no appeal on liability.
11. On quantum, counsel submitted that the assessment of general damages was based on the discretion of the trial court and that this court ought to only interfere with the same if it is satisfied that the trial court took into account the irrelevant factors or left out a relevant factor or that the award was too high or too low that it must be wholly erroneous estimate of the damages.
12. While restating the injuries sustained by the respondent, counsel submitted that Dr Peter Momanyi Morebu examined the respondent a year after the accident and confirmed healing scars. He further submitted that the respondent was also examined by the appellant's doctor but the said report was never availed to the court. He submitted further that the evidence on the injuries sustained by the appellant remained unchallenged by the respondent. He therefore contended that it was against those circumstances that the trial court awarded the respondent Kshs 300,000 as general damages for the confirmed injuries.
13. Counsel relied on the case of *Francis Ochieng & another v Alice Kanjimba* [2015] eKLR where the court awarded Kshs 350,000/= for mild head injury and soft tissue injury. He relied on the case of *Charles Gichuki v Emily Kawira Mbuiba & another* [2018]eKLR where High Court substituted the lower court award of Kshs 400,000/= with Kshs 350,000/=. In that case the 1<sup>st</sup> respondent had sustained blunt injury (tender) to the face, blunt injury (tender) to the shoulders, blunt injury (tender) chest anteriorly and blunt injury (tender) left thigh. Counsel therefore urged the court to dismiss the appeal with costs for lack of merit.

#### **Determination**

14. As the first appellate court, this court has a duty to re- evaluate the evidence before the lower court and come up with its own conclusions. After considering the submissions by the parties and having analysed the grounds of appeal and the lower court record, there is no doubt that the evidence as to how the accident occurred was not challenged whatsoever by the appellant. This was also properly captured by the trial magistrate in his judgment. His finding of liability against the appellants at 100% was justified by evidence on record. There would have been no basis to apportioning liability in the circumstances.
15. Submissions by counsel for the appellant were in no doubt considered by the trial court. Counsel's spirited defence and introduction of facts and evidence in the submissions cannot substitute evidence that he ought to have availed through testimony by witnesses for the appellants' case.
16. Counsel's attack of the judgment by the trial magistrate that he failed to consider the provisions of *Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013* thus finding the appellants 100% liable is not supported in the evidence in the lower court and in the judgment. It has no evidential value or legal basis in this appeal.
17. The only issue here is on the award of damages which the appellants submitted were inordinately high. It is now settled law that in determining whether to interfere with quantum, the court has to bear in mind the following principles on assessment of damages:
  - i. Damages should not be inordinately too high or too low
  - ii. Damages are meant to compensate a party for the loss suffered and should be commensurate to the injuries sustained.



- iii. Past decisions should be taken as mere guides and each case depends on its own facts.
  - iv. Element of inflation should be taken into account when comparing such past awards.
18. In this judgment, the trial magistrate held on the issue of quantum:
- “The last issue for determination is whether the plaintiff is entitled to damages and if so, what is the quantum. The plaintiff sustained serious injuries and pain. However as was held by Potter J A in *Rahima Tayab & others v Anna Mary Kinanu* civil appeal no 29 of 1982 KLR: “Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible injuries should be compensated by comparable awards . When all this is said it must be that amounts which are awarded are to be a considerable extent controversial.”
19. From this standpoint, it is clear that the trial magistrate was well guided on the principles governing award of damages. However, he went on to say:
- “In my considered view and with guidance of *Ibrahim Kalem Lewa v Estee Company Limited* (2016) EKLR, the appellant sustained intertrochanteric fracture of the left femur and physical pain and was awarded Kshs 300,000, an award of Kshs 300,000 would be adequate compensation to the plaintiff as general damages ....I enter judgment for the plaintiff against the defendant in the sum of Kshs 300,000 as general damages...”[Emphasis mine]
20. The above finding was after the trial magistrate had stated:
- “According to Dr Morebu Peter Momanyi’s medical report, the plaintiff sustained multiple severe bodily injuries that were in the process of healing with permanent ugly scars . He still complains of occasional headache which is on and off with permanent ugly scars. The examination stated that plaintiff was in a fair general condition and had multiple healing scar wounds on the body.”
21. No doubt the injuries sustained by the respondent herein were soft tissue injuries. There were no skeletal injuries unlike the injuries sustained by the appellant in the case of *Ibrahim Kalem Lewa v Estee Company Limited* (2016) EKLR the trial magistrate used as a guide. The injuries were not comparable.
22. The injuries sustained in the case of *PF (Suing as next friend and father of SK(Minor) v Victor O. Kamadi & another* [2018]eKLR relied on by the appellant were soft tissue in nature and so were the injuries in the case of *Charles Gichuki v Emily Kawira Mbuiba & another* [2018]eKLR relied on by the respondent. These were awards made in year 2018 which was about three years before the date the trial magistrate gave the impugned award.
23. Considering the inflation since these decisions were made and the nature of the injuries sustained by the respondent, I am satisfied that the award of Kshs 300,000/ is reasonable. It is neither erroneous nor excessive. In the upshot, the appeal has not met the threshold for interfering with this award. The appeal lacks merit and therefore dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2023.**

**PATRICIA GICHOHI**



**JUDGE**

**In the presence of:**

N/A for Appellant

Mr. Aroyo for Respondent

Kevin Isindu, Court Assistant

