



**Mwananchi Credit Limited & 2 others v Owenga (Civil Appeal  
E36 of 2022) [2023] KEHC 22552 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E36 OF 2022  
JRA WANANDA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... 1<sup>ST</sup> APPELLANT**

**NELSON MUKARA SECHERE ..... 2<sup>ND</sup> APPELLANT**

**LEAKEY IGAMBI OMBIRI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MICHAEL OWUOR OWENGA ..... RESPONDENT**

**JUDGMENT**

1. This Appeal is framed to be in respect to the determination of both liability and quantum arising from a road accident.
2. Although the Appellant's Counsel has strongly submitted on the issue of liability and has faulted the trial Magistrate for finding the Appellants 100% liable, I refuse to entertain that limb of the Submissions. This is because this is a matter in which default Judgment had already been entered thus fully and conclusively settling the issue of liability. The trial that was thereafter conducted was what is referred to as "formal proof" which is limited to only the Respondent proving quantum. By the time of the formal proof therefore, the matter of liability was no longer in issue the same having been long settled by the entry of the default Judgment.
3. It is therefore now too late for the Appellants to challenge the entry of Judgment on liability and in any event, that cannot be done at this appellate stage.
4. Back to the Appeal, the background of this matter is that by the Complaint filed on 25/03/2021 in Kakamega Chief Magistrate's Court Case No. 055 of 2021 through Messrs Mahida & Maina Co. Advocates, the Respondent alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were the owners of the motor vehicle registration number KCP 327G and that the 3<sup>rd</sup> Appellant was their driver, agent and/or employee,



that as such the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are vicariously liable for the torts of the 3<sup>rd</sup> Appellant, that on 1/01/2021 the Respondent was a lawful rider of the motor-cycle registration number KMFH 086H along Kakamega-Mumias road when the 3<sup>rd</sup> Appellant so carelessly and negligently drove, managed and/or controlled the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' said motor vehicle that he caused the same to collide with the Respondent's said motor-cycle and as a result whereof the Respondent suffered severe injuries.

5. In his Witness Statement filed with the Plaint, the Respondent stated that the Appellant's said motor-vehicle was being driven at a high speed, overtook the vehicle ahead of it, came to the Respondent's lane and knocked him down.
6. As aforesaid, upon failure by the Appellants to enter Appearance, default Judgment was on 27/05/2021 entered against them. The matter then proceeded to formal proof. 2 witnesses testified on behalf of the Respondent and the case closed since there was no attendance from the Appellants.

### **Prosecution Evidence**

7. PW1 was Police Constable Rachel Muthoni who stated that she was from the Kakamega Police Station. She testified that on 1/01/2021 at 1830 hours at Ejinja corner, the accident referred to above was reported. She stated that the accident was still under investigation and she then produced the P3 and Police Abstract.
8. PW2 was the Respondent. He adopted his witness statement as his evidence-in-chief and also his bundle of documents which he then produced in evidence.

### **Judgment of the Trial Court**

9. After close of the case and while the matter was pending for Judgment, Messrs AKO Advocates came on record for the Appellants, sought for setting aside of the default Judgment and in the interim, also sought arrest of the Judgment to be delivered. Although a consent to set aside the default Judgment appears to have been recorded, for reasons that are not clear to me, the Judgment was never formally set aside and remained in place.
10. Pursuant to the above, on 10/06/2022 the Court proceeded to deliver its Judgment whereof it assessed and awarded general damages at Kshs 800,000/- and special damages of Kshs 136,400/- to the Respondent. Costs and interest were also awarded to the Respondent.

### **Grounds of Appeal**

11. The Appellant was aggrieved by the said decision and filed this Appeal on 27/06/2022. He preferred the following 6 grounds:
  - i) That the trial Magistrate erred in law and fact as he did when he failed to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of liability.
  - ii) That the trial Magistrate erred in law and fact as he did, on evaluation of liability.
  - iii) That the trial Magistrate erred in law and fact as he did by basing his decision on irrelevant matters and failing to base his decision on the facts and evidence on record thereby arriving at an excessive award on the issue of general damages.
  - iv) That the trial Magistrate erred in law and fact as he did, on the assessment on quantum of damages.



- v) The trial Magistrate erred in law and in fact by basing his decision on irrelevant matters and failing to base his decision on the facts and evidence on record.
  - vi) The trial Magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of general damages and liability in similar circumstances.
12. It was then directed that this Appeal be canvassed by way of written submissions. The Appellants filed their Submissions on 18/08/2022 and the Respondents filed on 12/09/2022.

### **Appellant's submissions**

13. As aforesaid, considering that this is a matter in which default Judgment was already entered, I will not entertain the limb of the Appellant's Submissions challenging the entry of liability at 100% against the Appellants. I will therefore only consider the portion relating to the assessment and award of quantum.
14. On quantum, Counsel submitted that the award of Kshs 800,000/- in general damages was excessive, that the cases relied on in the trial Court related to much more severe injuries and complications than those cited and that an award of Kshs 350,000/- would be a reasonable compensation. He relied on the cases of *Mbaka Nguru & another v James George Rakwar* [1998] eKLR, *Tirus Mburu Chege v JKN (minor suing through next friend and mother DWN & Another* [2018] eKLR, *Gladys Lyaka Mwombe v Francis Nanmatasi & 2 others* and *David Momanyi Matonda v Baharani Consultants Ltd* [2019] eKLR.

### **Respondent's Submissions**

15. Although the Respondent's Counsel has similarly made Submissions on the ground of Appeal challenging liability, for the reasons already stated, I will not consider the same.
16. On quantum, Counsel submitted that the award of damages was not excessive and that the trial Magistrate cited authorities relied upon.

### **Analysis & Determination**

17. Being a first appeal, this Court applies the now settled principles set out in many cases as regards its duty. For instance, in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1 EA 123, the following was stated:
- “... 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. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
18. Having declined to entertain the challenge on liability as already stated above, I also note that even on quantum, no express objection has been raised against the award of special damages at Kshs 136,400/-. Only general damages has been challenged.



19. Upon perusing the record and the Submissions presented therefore, I find that the issue that now remains for determination is the following;

Whether the assessment and award of general damages at Kshs 800,000/- by the trial Court for the injuries suffered was excessive.

20. I now proceed to analyze the said issue.

21. In respect to the Appellants' invitation to this Court to interfere with the assessment of quantum and reduce the general damages awarded, the Court of Appeal gave guidelines in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:

“..... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

An appellate Court will not therefore 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 trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

22. Kneller, JA in the Court of Appeal decision in *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR also gave the following guidelines:

“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

1. Each case depends on its own facts;
2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
3. comparable injuries should attract comparable awards.
4. inflation should be taken into account; and
5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”

23. From the foregoing, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries. Indeed, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”



24. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must be avoided. The Court must therefore ensure that awards result in fair compensation
25. In this instant suit, the Respondent suffered the injuries on 1/01/2021. At the trial Court, he relied on the Medical Report dated 16/02/2021 prepared by one P. I. Mambiri, Principal Clinical Officer, Othorpaedic/Surgery/Trauma at the Kakamega County Teaching & Referral Hospital. From the Report, as read with the rest of the medical and/or treatment documents produced in evidence, it can be concluded that the Respondent suffered compound fractures of the left tibia and fibula bones, a mid-shaft fracture of the femur and bruises on the upper limb. The Respondent was then admitted in hospital for treatment for slightly over one month. At the time of examination, about 1 ½ months after the accident, he still experienced pain on the lower right limb and tenderness over the right femur. He was also still using crutches and walked with a gait.
26. I have perused various previous recent cases involving similar or comparable injuries and analyzed the awards therein. I find that most awards for such multiple fractures range at between Kshs 800,000/- and Kshs 1,200,000/- depending on the severity of the injuries.
27. For instance, in *Daneva Heavy Trucks & another v Chrispine Odera* [2022] eKLR, Hon. Lady Justice R. Aburili reduced an award of Kshs 1,000,000/- to Kshs 800,000/-. The decision was delivered on 17/01/2022.
28. In *George William Owuor v Beryl Awuor Ochieng* [2020] eKLR, again Hon. Lady Justice R. Aburili reduced an award of Kshs 2,000,000/- to Kshs 1,200,000/-. The decision was delivered on 15/12/2020.
29. In *Martin Ireri Namu v Alicalina Igoki Kiringa* [2019] eKLR, Hon. Lady Justice F. Muchemi reduced an award of Kshs 2,500,000/- to Kshs 800,000/-. The decision was delivered on 26/11/2019.
30. In *George Raini Atungu v Jared Ogwoka Ondari* [2021] eKLR, Hon. Lady Justice R. Ougo J upheld an award of Kshs 1,000,000/-. The decision was delivered on 27/10/2021.
31. In *Kimathi Muturi Donald v Kevin Achieng Aseso* [2021] eKLR, Hon. Justice S. Chitembwe J reduced an award of Kshs 1,200,000/- to Kshs 800,000/-. The decision was delivered in 21/10/2021.
32. In light of the comparable awards cited above and the applicable principles earlier referred to, I find the sum of Kshs 800,000/- for general damages as awarded by the trial Magistrate to have been well within the bounds of comparable awards made in similar cases. The same cannot therefore be said have been considerably high or substantially excessive to justify interference by this Court. In my view therefore, the Appellants have failed to demonstrate that the trial Court failed to evaluate the evidence on record or proceeded on the wrong principles in its assessment.

### **Final Orders**

33. The upshot of my findings above is that this Appeal lacks merit. Accordingly, the same is dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023**

.....

**WANANDA J.R. ANURO**

**JUDGE**

