



**Obure & another v Okwanyo (Civil Appeal 88 of 2023)  
[2024] KEHC 13333 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13333 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 88 OF 2023  
TA ODERA, J  
OCTOBER 17, 2024**

**BETWEEN**

**BOAZ OBURE ..... 1<sup>ST</sup> APPELLANT**

**BETHUEL GITHONGA MUTHAMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMWEL KIYUKA TIMOTHY OKWANYO ..... RESPONDENT**

*(Being an Appeal from the judgment delivered by the Honourable  
P.K. Mutai – Senior Principal Magistrate on 7th August, 2023)*

**JUDGMENT**

- 1 The Appellants herein being dissatisfied with Judgment of the Hon. P.K. Mutai - Senior Principal Magistrate sitting at Kisii Civil Suit No.195 of 2020 and delivered on 7<sup>th</sup> August, 2023 appeals to this Honourable Court against the said judgment on the following principal grounds: -
- a. The learned magistrate erred in law and misdirected himself when he failed to consider the Appellant’s submissions on both points of law and facts.
  - b. That the learned magistrate’s decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
  - c. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the [Insurance \(Motor Vehicle Third Party Risks\) \(Amendment\) Act, 2013, CAP 405.](#)
  - d. The learned magistrate erred in law and fact in finding the Appellants 100% liable in view of the evidence produced before the trial court and in particular the following: -



- e. That the Respondent failed to prove his case on liability against the Appellant.
  - f. The learned magistrate erred in law and fact in awarding the Respondent Kshs, 257,050/= as damages for soft tissue injuries hence arriving at a wrong finding as regards the nature of injuries sustained by the plaintiff.
  - g. The learned trial magistrate erred in law and fact by awarding the plaintiff inordinately high quantum damages in the circumstances of this case.
  - h. The learned magistrate erred in law and fact by awarding the plaintiff a sum that was so excessive to an amount that is so erroneous as to the estimate of general damages suffered by the plaintiff.
  - i. The learned magistrate erred in fact and in law in failing to consider, and rely on the Appellant's submissions on quantum and legal authorities relied upon in support thereof.
  - j. The learned magistrate erred in law and fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstance of the case.
  - k. The learned magistrate erred in facts and in law in failing to consider convenient awards in cases of similar nature.
- 2 The 1<sup>st</sup> appellant prayed for the following orders that: -
- a. This Appeal be allowed with costs.
  - b. The judgment delivered on 7<sup>th</sup> August, 2023 by Honourable P.K. Mutai – Senior Principal Magistrate be set aside and a judgment of this court dismissing the suit against the Appellant with costs be entered in its place.
  - c. That without prejudice to prayer (b) above this Honorable Court re-assesses the quantum awarded.
  - d. That the costs of this Appeal and that of the trial court be awarded to Appellant.
  - e. That such further orders may be made by this Honourable Court may deem fit to grant.
- 3 The facts of the case as per pleadings and evidence of Samuel Kiyuka Timonthy Okwanyo (PW1) as per copy of his national identity card (Pexh 1), the respondent herein was that on 2.3.2020 he was a lawful passenger in motor vehicle registration number KCJ 194L along Keroka - Kisii Road and on reaching Eremo area Motor vehicle registration no KAQ 541 H recklessly overtook the said KCJ causing it to roll. The respondent testified that he sustained the following injuries;
- i. Bruises on his right knee.
  - ii. Bruises on his left knee.
  - iii. Bruises on his left elbow.
  - iv. Bruises on his right elbow.
  - v. Blunt trauma to the neck.
  - vi. Blunt trauma to the back
- 4 He was treated at Keumbu sub-county hospital as per treatment book (Pexh 2) He reported the case to Keroka police station and a police abstract (Pexh5) and P3 form (Pexh 4) were issued. He said spent monies as follows;



- Medical report Kshs 6500/=and receipt for Kshs 5600(as per Pexh 6a and 6b).
- Treatment expenses -Kshs 200/= (Pexh 7)
- Copy of records and receipt Kshs 550/= (Pexh 8a and 8b).

The demand letter was produced as Pexh (9).

- 5 PW2 Dr. Peter Morebu Momanyi examined the witness in the year 2020 when the injuries were 3 weeks old and he confirmed that he sustained multiple soft tissue injuries on the hands, legs neck and lower back. He opined that he did not anticipate any permanent disability.
- 6 The firm of Kimondo Gachoka & Co advocates entered appearance and a joint defence for both appellants. In their defence the appellants denied occurrence of the accident, involvement of the respondent in the accident, ownership of the said vehicles. Special and general damages. 1<sup>st</sup> defendant blamed the owner of the vehicle he described in paragraph 7 of the defence as “motor cycle KCJ 194 L” for the accident. The medical report by Dr. Jennifer Kahuthu dated 22.8.22 was produced by consent on 19.4.23.
- 7 The duty of this court is to re-evaluate the evidence and arrive at its own decision bearing in mind that it neither saw nor heard the witnesses during their testimony as was held in the case of *Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126*

#### submissions

- 8 The appellants submitted that the appeal was based on quantum only though in the memorandum of appeal it indicates that it was on liability & quantum. The appellants submitted that the injuries sustained by the respondent were bruises on the left knee and right knee, bruises on the left and right elbow and blunt trauma to the neck and lower back. Also that the treatment notes from Keumbu sub county hospital indicate that the respondent sustained chest pains only and was treated with pain killers and thus the injuries in the plait and the medical report have no basis. Also that Dr. Kahuthu who examined the respondent in her medical report (D-exh 1) found that the respondent sustained soft tissue injury to the chest and lower limb only.
- 9 Counsel submitted that in the case of *Kenya Breweries Limited vs Abraham lain*. Kisii HCCA no. 23 of 2003 Musinga J cited the Court of Appeal case of *Mohammed Hassan Musa & Another V Peter M. Mailanyi & Another* [2000] eKLR where it was held that; “The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and in justice to the defendants as well as to plaintiffs, that sum must be commensurate with the injuries suffered. We are satisfied that the learned Judge acted on wrong principle of law and he made a wholly erroneous award of damages for unproven injuries. There was no evidence whatsoever to enable the court to make calculations or to reach a conclusion thereon. Clearly, the onus on this lay on the plaintiff and that onus has not been discharged. The award cannot therefore stand and must be set aside.” The appellant cited the case of *HB (Minor suing through mother and next friend DKM) v Jasper Nchonga Magari & Another* (20921) eKLR where the court upheld an award of general damages in the sum of Kshs. 60,000/= where the plaintiff sustained blunt injury to the head, neck, thorax abdomen and limbs. they submitted that an award of general damages in the sum of Kshs 50,000/= would be appropriate here considering that the injuries sustained by the respondent were less severe than the ones in the cited case.
- 10 The respondent submitted that the appellate court will not disturb and award of damages unless the trial court;
  - i. Took into account an irrelevant factor.



- ii. left out of account a relevant factor.
  - iii. The award is inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages.
- 11 As was held in the case of *Paul Kipsang Koech & Another vs Titus Osule Osore* (2013) eKLR Counsel also cited the case of *Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda* [2008] eKLR where the court cited the case of *Shabani vs City Council of Nairobi* (1985) KLR 516 that; - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong legal principle or on a misapprehension of the evidence.
- 12 The only issue for determination herein is that of quantum.
- 13 It was submitted that the award of Kshs 250,000/= was reasonable considering the nature of the injuries sustained which was supported by Dr. Morebu. Also that the respondent had suggested general damages in the Sum of Kshs. 600,000/= in the lower court while the appellant submitted on general damages in the sum of Kshs 90,000/=
- 14 I have seen the judgment of the trial court's judgment and on page 3 at paragraph 9 he held; "there is consensus that the plaintiff suffered soft tissue injuries, fracture to of pelvis, fracture of the right tibial with contamination as well as blunt chest injury". This is strange as it was pleaded that the respondent sustained
- I. Bruises on his right knee.
  - ii. Bruises on his left knee.
  - iii. Bruises on his left elbow.
  - iv. Bruises on his right elbow.
  - v. Blunt trauma to the neck.
  - vi. Blunt trauma to the back
- 15 These injuries were confirmed by Dr. Morebu. Dr. Kahutu however found that the respondent sustained soft tissue injuries to the chest injuries and lower limbs only. It is thus clear that the doctors differed on the fracture to the pelvis, fracture of the right tibial with contamination are not in the P3 form and medical reports. The learned trial magistrate thus erred in considering injuries which were neither pleaded nor proved in the judgment. I have also noted that the respondent did not provide the full treatment notes to the lower court as what was produced is the cover page of the treatment book but not the notes by the doctor.
- 16 The Appellant in the supplementary record of appeal listed the initial treatment notes of the respondent dated 2.3.20 and the same indicates that the respondent sustained chest pain and was put on tramadol injection and paracetamol which are pain killers as rightly submitted by appellant. The treatment notes are in tandem with the findings of Dr. Kahutu. Treatment notes form the basis of injuries sustained by any patient and so it is not clear where the maker of the P3 form and Dr. Morebu, got the multiples soft tissue injures from. The injuries of the respondent were thus exaggerated. I agree with the appellant that the respondent sustained soft tissue injuries to the chest and lower limbs only. I have seen the case of *Godwin Ileri vs Franklin Gitonga* (2018) eKLR which was cited by the appellant where the respondent sustained 2 cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the left knee and general damages in the sum of Kshs 300,000/=



awarded by the lower court was reduced to Kshs 90,000/= . The general damages in the sum of 50,000/= suggested by the appellant is on the lower side.

17 I have carefully considered the injuries sustained by the respondent, the cited case and their age and especially The aforesaid Godwin case where the injuries were multiple and less serious than the ones sustained by the respondents herein injuries the age of the same, the inflation factor and all the necessary factors. The general damages in the sum of Kshs 250,000/= awarded to the respondent was on the higher side and the appellant has made out a case to warrant this court to interfere with the same as the award was erroneous as it was based on exaggerated injuries.

18 On whether the award of Kshs 250,000/= ought to be set aside. It is trite law as was held in the cited the case of *Shabani vs City council of Nairobi* (1985) KLR 516 that: - “an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong legal principle or on a misapprehension of the evidence”. In this case there was a misapprehension of the evidence in that the trial magistrate relied on injuries which were neither pleaded nor proved to arrive at the general damages which were inordinately high considering the nature of injuries sustained and the comparable awards for similar injuries. There is thus a justification to interfere with the award in the impugned judgment herein.

19 As a result, I allow the appeal on quantum and I proceed set aside the award of general damages of Kshs 250,000/= and substitute it with Kshs 70,000/=.

20 Costs of this appeal to the appellant.

**T.A ODERA**

**JUDGE**

**17.10.24**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF: -**

Miss Ndemo for the Respondent

N/A for the Appellant

Court Assistant - Oigo

