



**Obaga & another v Wanjiku (Civil Appeal E394 of 2023)
[2024] KEHC 17255 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 17255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E394 OF 2023
DO CHEPKWONY, J
OCTOBER 4, 2024**

BETWEEN

VICTOR OBAGA 1ST APPELLANT

DIOCESE OF MOUNT KENYA SOUTH (ACK) 2ND APPELLANT

AND

JAMES KIMANI WANJIKU RESPONDENT

(Being an Appeal from the Judgment of the Honourable Kibet Sambu, Senior Principal Magistrate at Kiambu in Civil Case No. 382 of 2022 delivered on 6th September, 2023)

JUDGMENT

1. The Appeal stems from the Judgment delivered on 6th September, 2023 whose cause of action arose from a road traffic accident which occurred on 28th July, 2022 involving Motor Cycle Registration Number KMFD 951E and Motor Vehicle Registration Number KBV 318K.
2. By way of Complaint dated 7th October, 2022, the Plaintiff (herein referred to as the Defendant) instituted a suit against the Defendant (hereinafter referred to as the Appellant) seeking the following prayers:-
 - a. General damages for pain, suffering and loss of amenities.
 - b. Special damages of Kshs.19,270/- and future medical expenses of Kshs.200,000/=.
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c) above
 - e. Any other orders that the Honourable Court may deem fit.
3. At Paragraph 4 of the Complaint, the Respondent pleaded that on or about 28th July, 2022 along Kirigiti-Kiambu junction, the Plaintiff was a lawful rider in Motor Cycle Registration No.KMFD 951E, when



- the Defendant's authorised driver, agent, servant and/or employee so negligently, carelessly and/or recklessly drove Motor Vehicle Registration No.KBV 318K that he lost control and caused an accident whereby the Plaintiff suffered serious injuries.
4. As a result of the accident herein, the Respondent sustained serious injuries and has suffered loss and damages for which he claims from the Defendant both special and general damages (As particularized at Paragraph 5 of the Plaintiff).
 5. In response to the Respondent's claims, the Appellant filed a statement of Defence dated 25th October, 2022. The Appellant denied the averments contained in the Plaintiff and pleaded that if at all the accident occurred, the Respondent was to blame for the same (As particularised in Paragraph 4 of the Defence)
 6. The matter proceed to full trial after which the trial court entered judgment for the Respondent and gave the following award:-
 - a. Liability 80:20 in favour of the Respondent
 - b. General damages Kshs. 1,200,000.00
 - c. Future medical expenses Kshs. 200,000.00
 - d. Special damages Kshs. 19,270.00
 - e. Total award Kshs. 1,419,270.00
Less 20% contribution Kshs. 283, 854.00
Net total Kshs. 1,135,416.00
 - f. Costs and interest Kshs. 400,000.00
Total Kshs. 735,416.00
 7. Being aggrieved with the Judgment, the Appellants filed a Memorandum of Appeal dated 12th October, 2023, wherein they cited the following grounds:-
 - a. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 - b. The Learned Trial Magistrate erred in law and in fact by failing to consider the conventional awards and established precedents in cases of similar nature and provisions of statute in awarding the general and special damages and thereby proceeded to award manifestly excessive and undeserved general and special damages to the Respondent.
 - c. The Learned Trial Magistrate consequently occasioned a miscarriage of justice; and,
 - d. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the Appellant's contentions, arguments and submissions on the issues of quantum.
 8. Therefore, the Appellants seek the following orders from this court:-
 - a. This appeal be allowed and the Learned Trial Magistrate decision on apportionment of quantum be set aside, quashed and/or be substituted by this Honourable Court's orders.
 - b. This Honourable Court do adjudicate and determine this matter and enter a just Judgment on quantum in light of the evidence on record.
 - c. That the costs of this Appeal and proceedings be provided for.



9. As directed by this court, the Appeal was canvassed by way of written submissions wherein the Appellants filed theirs dated 21st May, 2024 while the Respondent filed his submissions dated 24th June, 2024, which the court has read and considered in determining the appeal.
10. In the Appellants' submissions, it has been averred that the award for general damages by the trial court was erroneous and not in line with comparable awards for the injuries sustained. They cited various authorities in support of their argument such as the cases of Kimaru Maina –vs- Boniface Onyango Aliwa [2017] eKLR, Joseph Kimani Githaga & Another –vs- Dickson Ndungu Njoroge [2019] eKLR and further Kenya Power Lighting Company Ltd and Another –vs- Zakayo Saitoti Naingola & Another [2008] eKLR.
11. The Appellants have urged the court to interfere with the award granted by the trial court given the nature of the injuries sustained by the Respondent. They further cited various authorities where parties suffered similar injuries and the awards that respective courts awarded them as follows:-
 - a. Bhachu Industries Ltd –vs- Peter Kariuki Mutura [2015] eKLR where the Respondent sustained injuries to the chest, right thigh and a fractured femur which was fixed by insertion of K-nail and was awarded Kshs. 300,000/- including Kshs. 50,000/= for removal of the K-NAIL.
 - b. Joseph Musee Mua –vs- Julius Mbogo Mugi & 3 Others [2013] eKLR where the Respondent sustained injuries on the left leg tibia and fibula, two broken upper jaw teeth, chest injury, right shoulder injury and bruises on the left elbow and the court awarded him Kshs. 1,300,000/= but the Appellants hold that these injuries were more severe than those sustained by the Respondent herein.
12. On future medical expenses, the Appellants hold that the award of Kshs. 200,000/= was inordinately high and it ought to be set aside. They cited the case of Ndegwa –vs- Kartar Singh Nyeri Ltd & Another [1985] eKLR where the court awarded Kshs. 70,000/= as future medical expenses for fractured femur. The Appellants hold that according to the medical report by Dr. Mwaura the future medical expenses were estimated at Kshs. 80,000/= which would be sufficient to remove the metal implants.
13. The Appellants have urged the court to set aside the award of Kshs. 1,135,416 and the same be substituted with an award of Kshs. 480,000/=. The Appellants have further urged the court to set aside the liability ratio of 80:20 and substitute it with a 50:50 ratio given that the Respondent was a motor cyclist and the Appellants had already stopped and was waiting to join the road when the accident happened. That other road users had also stopped but the Respondent ignored them and he ran into the Appellant's motor vehicle on the right hand side. The Appellant therefore has urged the court to allow the Appeal and grant the orders sought.
14. In his submissions, the Respondent formulated the following issues for determination: Whether the appeal is fatally defective and liable for being struck out for failure to include the decree appealed from in the record of appeal, whether the award on general damages is inordinately excessive and unjustified and whether the Trial Magistrate was entitled to arrive at the decision it did.
15. The Respondent holds that the Appeal is defective since the Appellants failed to include the decree appealed from in the record of appeal and they did not seek leave to file any supplementary record to include it yet it is a primary document which must be included. He has relied on the Court of Appeal decision in the case of Salama Beach Hotel Limited & 4 Others –vs- Kenyariri & Associates Advocates & 4 Others [2016] eKLR.



16. On the issue of award of damages, the Respondent holds that this is a matter within the discretion of the court. He supports the award given by the trial court as he submit that they are in line with the injuries he sustained in the accident which are as follows:-
- a. Swollen, painful, tender – right orbital region
 - b. Blunt injuries – chest
 - c. Deep cut wound – right foot
 - d. Fracture – left lateral malleolus (fibular)
17. According to the Respondent, these injuries were severe in nature and the medical report confirmed that he was walking in crutches for almost eight (8) months after the accident. He further stated that the medical report of Dr. G.K Mwaura confirmed that he would have to incur Kshs. 200,000/= for future medical expenses which was affirmed in his evidence in court. He further stated that the Appellants did not raise any ground on liability and future medical expenses in the Memorandum of Appeal and therefore, since the parties are bound by their own pleadings the court should disregard the submissions on the same.
18. The Respondent relied on the following authorities:-
- a. Kironyo –vs- Nene (Civil Appeal E197 of 2021) [2022] KEHC 15604 (KLR) (24 November 2022) (Judgment), where the High Court awarded the Respondent who had sustained a fracture of the lateral malleolus and other soft tissue injuries the sum of Kshs. 1,000,000/- as general damages.
 - b. Mwangi –vs- Siloma & Another (Civil Appeal E102 of 2022) [2023] KEHC 26140 (KLR) (27 November 2023) (Interim Judgment) where the Appellant suffered a fracture of the left lateral malleolus, blunt injuries to the back and other soft tissue injuries. She was awarded Kshs. 1,200,000/- as general damages on appeal.
 - c. Mungai –vs- Kirui (Civil Appeal 11 of 2020) [2024] KEHC 5606 (KLR) (11 April 2024) (Judgment) where the Respondent suffered malleolus fracture (Right Ankle), Right foot laceration and chest contusion and the Court awarded the Respondent Kshs. 1,200,000/-.
19. It is the Respondent’s contention that the award given was fair and reasonable as there is no evidence that the trial court relied on wrong principles of law and he has urged the court to find that the appeal has not merit and dismiss the same with costs to the Respondent.

Analysis and Determination

20. This being a first appeal, it is the duty of the court to reassess and re-analyse the evidence as was stated in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where the Court had the following to say:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

21. It is trite law that this court can only interfere with discretion of a court in awarding damages only if it is based on wrong principles of law or the award is inordinately too high or too low. This principle was adopted with approval by the Court in the case of Butt –vs- Khan [1981] KLR 349 where it was held by Law, JA that:-

“... An appellate court will not disturb an award of damages unless it is also inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”

22. It is also trite that the court should award damages that are commensurate to the injuries that one sustained. Other principles to be considered in awarding damages were set out by the Court of Appeal in the case of Charles Oriwo Odeyo –vs- Appollo Justus Andabwa & Another [2017] eKLR where it was stated as follows:-

“The assessment of damages in personal injury case by a court is guided by the following principles:

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain the stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high”

23. In this instant case, the court has been called upon to consider if the award on quantum of damages is fair and reasonable and more so commensurate to the injuries that the Respondent sustained in the accident. The court has relied on the case of Kitavi –vs- Coast Bottlers Limited [1985]KLR 470(Kneller, JA) where the court held that:-

“It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidly” classify them will be in vain and wrong...”

24. Firstly, with respect to liability, I have read through the evidence adduced before the trial court and found that PW1 testified that the bus driver, DW1 who was driving Motor Vehicle Registration No.KBV 318K joined the Kiambu road without ensuring that it was safe to do so and hit the Motor Cycle Registration No,KMFD 951E which was being ridden by PW2, James Kimani Wanjiru, who sustained injuries. It is the Respondent’s evidence that the Motor Cycle the right of entry and the bus



driver joined the main road without looking out on other motorists. A police abstract was produced by PW1 to confirm that investigation confirmed that the bus driver was to blame for the accident. This was denied by the bus driver, DW1 who stated that the Motor Cycle rider did not hoot at all and hit the bus at the rear tyre. Having analysed the evidence before the trial court, the trial court found that the accident occurred on a busy road whereby the bus driver had a higher duty of care and attention to other road users as opposed to the motor cycle who equally was expected to have exercised a duty of care and attention on the road. The trial Magistrate then apportioned liability in the ratio of 80:20 as against the Appellant on account of apportionment fair in view of the evidence on how the accident occurred.

25. On General damages, the court has considered the award of Kshs.1,200,000/= awarded to the Respondents in view of the injuries sustained by the Respondent. According to the evidence of PW2 and medical evidence vide a report dated 23rd September, 2022 and it shows the Respondent sustained swollen painful and tender injuries on the right orbital region, blunt injuries to the chest, deep cut to the normal right foot and a fracture of the left lateral malleolus (fibular). I have considered the finding in the case of Pestony Limited & Another –vs- Samuel Itonye Kagoko [2022] eKLR where the Respondent sustained fracture of the left femur (mid-shaft) and swollen left tender thigh and the High Court set aside the award of Kshs. 1,400,000/= and substituted it with an award of Kshs. 800,000/=. This Court finds the said injuries almost similar to those sustained by the Respondent herein. In view of this, I find the award of Kshs.1,200,000/= excessive and proceed to substitute the same with an award of Kshs.800,000/= which I find reasonable.
26. In respect to the Future medical expenses the court finds that the Appellants did not raise any challenge on the same in the Memorandum of Appeal and neither is there evidence adduced on the contrary therefore the submissions under this head are an afterthought and therefore the court will not interfere with the said award.
27. In the end, the court finds that the Appeal partially succeeds in respect to the general damages only. Wherein the award of Kshs.1,200,000/= is substituted to a sum of Kshs.800,000/=. In the resultant, Judgment is entered for the Respondent as against the Appellant in the following terms:-
- a. Liability 80:20 in favour of the Respondent
 - b. General damages Kshs. 800,000.00
 - c. Future medical expenses Kshs. 200,000.00
 - d. Special damages Kshs. 19,270.00
Total award Kshs.1,019,270.00
Less 20% contribution Kshs. 203,854.00
Net total Kshs. 815,416.00
 - g. Costs and interest Kshs. 400,000.00
Total Kshs.1,215,416.00
- It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF OCTOBER 2024.

D. O. CHEPKWONY

JUDGE



In the presence of:

M/S Nyota counsel for Appellant

Mr. Ombati holding brief for Mr. Njagi counsel for Respondent

Court Assistant - Martin

