

REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT MIGORI
HIGH COURT CIVIL APPEAL CASE NO E043 OF 2023

BOAZ OTIENO.....
APPELLANT

VERSUS

SHREEJI WHOLESALERS LIMITED.....
.....RESPONDENT

(Being an appeal against the judgment of Hon. S. N. Mutava (RM) delivered on 29th
May, 2023 in Rongo PMCC No E042 of 2022)

JUDGEMENT

The Appellant in the Plaint dated 7th March, 2022 sued the Respondent seeking special and general damages for injuries suffered on 6th December, 2020 when he was travelling aboard motor vehicle Reg. No. KCZ 008 A which was travelling along Angaga-Awendo road when the driver and/ or the agent of the Respondent negligently drove, managed and/ or controlled the motor vehicle permitting it to knock the plaintiff who sustained grievous injuries namely:

- Left hip joint dislocation
- Deep cut wounds on the left ear
- Chest contusion
- Lacerations on the right ear

- Blunt trauma to the back

The issue of liability was agreed upon by consent of the parties in the ratio of 75%: 25% in favour of the Appellant and trial court was only invited to determine the quantum of damages payable to him

The Trial Magistrate considered the evidence tendered in court and the exhibits produced as well as the authorities and awarded general damages of Kshs. 100,000, Special Damages of Kshs. 5,000 with cost and interest from date of judgement till payment in full.

The Appellant was aggrieved by the judgment and he lodged the appeal herein vide Memorandum of Appeal dated 16th June, 2023 on the following grounds:-

- (i) That the learned Trial Magistrate erred both in law and fact and/ or misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.**
- (ii) That the Learned Trial Magistrate erred in both law and fact and / or grossly misdirected himself in treating the evidence and submissions by the**

Appellant superficially and with baseless contempt and consequently coming into a wrong conclusion on the same.

- (iii) That the Learned Trial Magistrate erred proceeded on the wrong principles when assessing the damages to be awarded to the Appellant and failed to apply the precedents and tenets of law applicable.**
- (iv) That the Learned Trial Magistrate erred in both law and fact in awarding a sum in respect of damages which was so inordinately low in the circumstances and considering the Appellant's injuries that it represented an entirely erroneous estimate of the Appellant's claim.**
- (v) That the Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered by the Appellant on quantum and thereby arriving at a decision on quantum of damages unsustainable in law.**

Reasons wherefore the Appellant prays:

1. That the appeal be allowed

2. That the judgement and award of damages of the Trial Court be set aside and be substituted with a judgement and award of damages commensurate with the Appellant's injuries.
3. That costs of the appeal and in the subordinate court be awarded to the Appellant.

The appeal herein was canvassed by way of written submissions. The Appellant's submissions are dated 24th January, 2024.

The Appellant's counsel submitted that it is trite law that the appellate court has power to interfere with the trial court's finding on quantum if it is satisfied that the trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. It was submitted that the trial court's finding on quantum was based on the view that the Appellant never sustained a dislocation of the hip and that the injuries in the Pleint are exaggerated (see paragraph 19 of the court's judgment at page 77 of the record of appeal). It was the trial court's view that the dislocation which was noted on first appearance of the Appellant at the hospital on the day of the accident must have been sustained elsewhere. The Appellant argued that this was clear misapprehension of facts by the trial court as there was no evidence that the Appellant was involved in any other

accident prior to this where he would have sustained the dislocation thus the trial court's finding that the dislocation must have been sustained elsewhere was not based on facts. It was contended that it would have made sense if on the Appellant's first appearance in the hospital after the accident there was no dislocation but subsequently there was a dislocation but not otherwise.

It was further submitted that the Appellant's evidence that he sustained a left hip dislocation is supported by the initial treatment notes, a P3 form which shows tenderness on the left hip and the medical report and evidence by Dr. Morebu who confirmed that he examined the Appellant, looked at the treatment notes and the x-ray film which confirmed the dislocation. The trial court was thus said to have misapprehended the evidence before it thus arriving at an erroneous conclusion that the dislocation was not part of the injuries sustained by the Appellant.

The Appellant also submitted that it is now settled that comparable injuries should attract comparable awards of course taking into account the incidences of inflation and the fact that injuries cannot be exactly similar. The trial court's award of Kshs. 100,000 was too low in comparison to awards for similar injuries and was not based on facts and evidence. It was argued that even if the Appellant just sustained

soft tissue injuries with no dislocation as the trial court purported, which is not the case herein, the award made was too low and not commensurate to the injuries sustained taking into account the incidences of inflation. The trial court was therefore faulted for taking into account irrelevant facts and or misapprehending the evidence before it and it is necessary that this court interferes with its discretion on award of damages, and substitute the same with an award commensurate to the injuries sustained by the Appellant. An award of Kshs. 400,000 was proposed by the Appellant's counsel as appropriate in the circumstances. To support their proposal the Appellant's counsel relied on the following authorities.

- Nairobi City County v Mugenya (Civil Appeal E342 of 2020) [2022] KEHC 16258 (KLR) the court in November 2022 awarded the Respondent Kshs 300,000/= for soft tissue injuries enumerated as blunt injury (tender)-occipital region and blunt injury (tender)-lower back.
- Veronica Mkanjala Mnyapara vs Patrick Nyasinga Ameyia (2021) eKLR. Where the court in 2021 upheld an award of Kshs 300,000/= where the Respondent had sustained contusion to the head, chest contusion, bruises on both hands, dislocation of the left hip joint and bruises on both legs.

- The Appellant submitted that the appeal herein is meritorious and urged the court to allow the same and set aside/vary the trial court's award on quantum as proposed hereinabove. The Appellant also prayed for costs of the appeal and interest from the date of judgment before the trial court.

The Respondent's submissions are dated 19th March 2025 and submitted that this being a first appeal, the jurisdiction of this Court involves the reassessment of facts and evidence in order for the Court to arrive at its own independent decision. That in doing so, the Court is required to make due allowance to the fact that it neither saw nor heard the witnesses testifying. The Respondent cited the case of Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira & Co. Advocates [2013] eKLR, where the duty of a first appellate Court was summarized as follows:-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

The Respondent identified issues for determination as:

- i. Whether the Trial Court properly considered the Appellant's submissions in arriving at its judgment?
- ii. Whether the Trial Court's award of general damages is inordinately low
- iii. Who should bear costs of this appeal?

On whether the Trial Court properly considered the Appellant's submissions in arriving at its judgment the Respondent submits that the allegations are misconceived and ought to be disregarded. The Respondent invited the court to look at paragraph 17 of the judgement at Page 75 of the record of appeal where the Trial Court in the judgement stated, "The Plaintiff in its (his) submission submitted that they are entitled to Kshs. 400,000 and relied to the cases of..." That in view of the above extract, it is clear that the Trial Court considered the Appellant's submissions and authorities in the process of writing the impugned judgement and it is absurd of the Appellant to allege that the Trial Court did not consider his submissions and authorities.

The Respondent further submitted that submissions by parties are not binding to the Court. That the Court sat and heard the entire matter and recorded the proceedings for consideration and as such, the Court may differ from any party's submissions where the Court has reasons to differ. It was also submitted that in any civil suit the parties are

obliged to ensure that they plead their cases well and adduce enough evidence in support of their claims and submissions cannot cure the weaknesses in a case that was either poorly pleaded and/or casually prosecuted. The authority in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR was cited where the Court of Appeal observed that:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. It was reiterated that submissions do not constitute evidence at all.

The Respondents did submit that the Court properly considered the evidence tendered during hearing and the submissions filed by parties, and as the submissions were not binding on the Court, the Court was at liberty to exercise its discretion and its award should therefore not be interfered with simply because the Appellant is not agreeable. As such, they submitted that the Trial Court properly considered the

Appellant's submissions and any allegation or averment suggesting otherwise is misplaced and misconceived.

On whether the Trial Court's award of general damages is inordinately low it was submitted that the Appellant under paragraph 5 of the Plaint (at page 4 of the record of appeal) pleaded that as a result of the accident, he sustained the following injuries:-

- Left hip joint dislocation.
- Deep cut wounds on the left ear.
- Chest contusion. Lacerations on the right ear.
- Blunt trauma to the back

During the hearing of the Appellant's case, the Appellant (PW1) testified that he was treated at Angaga health center and at Awendo Sub-county hospital. That he indicated that at the said facilities, he was dressed, given pain killers and x-rays done. He testified that he sustained injuries to the ears, chest and right leg. It was submitted that the Plaintiff never testified about the alleged hip joint dislocation. He also did not avail any x-ray films as exhibits in Court to confirm the alleged dislocation. PW2, Dr. Morebu testified that he examined the Appellant on 20.12.2021 and that he observed the following injuries; dislocation of the left hip, deep cut wound on left ear, blunt injuries on

back and chest and a laceration of back ear. He produced a medical report as PEXH 4. On cross-examination, PW2 testified that he was not the treating doctor, that he relied on x-ray films, P3 form and the discharge notes and that he did not assess any permanent disability. He also did not avail the x-ray films he alleged to have relied on. PW3, Peninah Otaigo, a clinical officer attached at Awendo Sub-County Hospital produced the treatment notes for the Appellant and indicated that the appellant sustained soft tissue injuries which included laceration around the ear, bruises on the left hip and pain. On cross-examination, PW3 testified that she was not the treating doctor and that the Appellant was referred for x-ray to confirm whether the Plaintiff had a dislocation. She however did not avail the x-rays so taken and neither did she confirm the outcome of the x-ray done. The Respondent submitted that it has recently been held that x-ray films are very crucial pieces of evidence as without them, the Court cannot ascertain the existence of bony injury such as a dislocation or a fracture. That failure to produce x- rays in a claim where dislocation has been pleaded is fatal to such a claim. The Respondents were guided by the authority in **Dhiraj Manji v Tyson Ouma [2021] eKLR** where the Court held that:-

"I am also in agreement that a radiology request is not sufficient prove of the existence of a fracture. Ordinarily after a request is made, an x-ray is conducted and the doctor who conducts the x-ray does a comprehensive report on the outcome of the x-ray. In this particular case such doctor's report has not been produced. Further still, no x-ray film was produced in court to confirm that indeed the respondent herein sustained a fracture. No expert and/or specialist in fractures was called to adduce evidence in Court to the effect that the respondent had sustained a fracture. In absence of such crucial piece of evidence, it is hard for the Court to rule out the presence or otherwise, of a fracture...I must therefore re-assess the damages only on the basis of soft tissue injuries to wit: bruises on the right hand as the respondent herein never availed even an iota of evidence to prove that he sustained a fracture."

In the case of **Joseph Kiptoo Kogo -vs- Eastern Produce (k) Limited [2011] eKLR Justice J.R. Karanja** held that it is a settled principle that the initial treatment notes are the most accurate and crucial documents to confirm the exact injuries sustained as follows:

"the treatment notes were therefore the most crucial evidence in establishing the injuries actually suffered by the appellant as a result of the material accident on the material date. The award of general damages had to be based on the nature of injuries."

It was also submitted that production of a medical report prepared long after the accident without calling the treating doctor is not sufficient proof of injuries sustained. The Respondents cited on the case of TIMSALES LTD v WILSON LIBUYWA [2008] eKLR (Nakuru HCCA No. 135 of 2006) where Maraga J (as he then was) held as follows:

"Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed

he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether"

The Respondents argued that according to the treatment notes from Awendo Sub-County Hospital produced as PEXH 2, (see pages 45-46 of the record of appeal), the Appellant only sustained laceration to the left ear and soft tissue injuries to the left ear. The same was actually confirmed by the clinical officer attached at Awendo Sub-County Hospital, PW3-Peninah Otaigo who confirmed that the Appellant never sustained a dislocation. (See page 42 of the record of appeal). It was therefore submitted that having failed to produce the x-ray films as proof of dislocation, there was no basis why the Court could award damages for a dislocation or even fracture where none had been proved. The Respondent submitted that the award made by the Trial Magistrate was sufficient compensation for the minor soft tissue injuries sustained as he did not suffer any permanent disability. It was emphasized that the award made by the Trial Court was not only reasonable but also comparable with awards made in similar cases and the Trial Court was guided by several authorities cited in its judgement at Pages 78-79 of the record of appeal.

The Respondent contended that it is not the business of the Court to enrich a claimant, the Court's only mandate is to do the best it can in determining the most appropriate and reasonable award. That the Trial Court cited with approval the case of Kigaragari -vs- Aya(1982-88) 1KAR 768 where it was held that damages awardable should be within the limits set out in decided cases and also within what the Kenyan economy can afford and that it would be against public policy to make exorbitant awards because it would lead to insurers raising premiums so as to stay afloat and the effect would be directly felt by the public, majority of whom cannot afford the increased premiums.

The Respondent further drew the courts attention to the holding by Lord Morris of Borth-y-Gest in the case of **West (H) & Son Ltd v Shepherd [1964] AC. 326,345**, where he observed that:

"But 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 endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as

possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

The court was also invited to consider authorities where claimants were actually awarded lesser amounts than what was awarded to the Appellant yet they sustained more severe injuries.

In the case of **Eva Karemi & 5 others v Koskei Kieng & another [2020] eKLR** where the Appellate Court affirmed the Trial Court's decision in awarding Kshs.70,000 to one of the Appellants who had sustained soft tissue injuries to her right thigh and bruises on her lower and upper limbs.

In the case of **Onsase v Omosa (Civil Appeal 11 of 2017) [2022] KEHC 13953 (KLR) (14 October 2022)** (Judgment), the Court awarded Kshs. 70,000 to the Appellant who had sustained soft tissue injuries on the head, neck and upper limbs.

The Respondent urged the court not to disturb an award by the Trial Court unless it can be shown that the award was inordinately high or low and that the Trial Court proceeded on wrong principles as stated in

the case of **But vs. Khan [1981] KLR 349** at page 356 where Law JA stated:

"...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. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

The Respondent further submitted that an Appellate Court should also not disturb an award of damages simply because it would have awarded a different award had it been the one sitting at the trial level. We are guided by the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR where the court reiterated the position that: -

It was further submitted that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance.

The Respondent submitted that even the award of Kshs. 100,000/= was not deserved and as such the Court should find that it was sufficient and should not be disturbed unless it is to be disturbed downwards. The court was urged to uphold the finding by the Trial Court on general damages.

On who should bear costs of this appeal the Respondent submitted that costs of an appeal being awarded to a party is at the discretion of the Court however, in the course of exercising such discretion, the Court is to be guided by the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. That the Court's discretion should be exercised judiciously and not capriciously and in any event, the costs of the suit are awardable to the successful party as guided by Section 27 of the Civil Procedure Act which provides that;

"....subject to such conditions and limitations as may be prescribed.....the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid.....and give the necessary directions."

The Respondent submitted that that the appeal lacks merit and should be dismissed and as such, it is in the best interest of justice that the Appellant be condemned to pay costs to the Respondent.

ANALYSIS AND DETERMINATION

This being the 1st appeal this court is mandated to re-evaluate and scrutinize the evidence and judgment of the lower court afresh, and make conclusions and independent decision on whether to allow the appeal. The court does this even though it did not have the opportunity to see and hear the witnesses 1st hand. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

Having considered the grounds of appeal and the rival submissions and having re-evaluated and scrutinized the evidence and judgment of the trial court afresh the issues that arise for determination are:-

- (i) Whether Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.**

- (ii) Whether Trial Magistrate grossly misdirected himself in treating the evidence and submissions by the Appellant superficially and with baseless contempt and consequently coming into a wrong conclusion on the same.**
- (iii) Whether Trial Magistrate proceeded on the wrong principles when assessing the damages to be awarded to the Appellant and failed to apply the precedents and tenets of law applicable.**
- (iv) Whether the Trial Magistrate awarded a sum in respect of damages which was so inordinately low in the circumstances and considering the Appellant's injuries that it represented an entirely erroneous estimate of the Appellant's claim.**
- (v) Whether the Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered by the Appellant on quantum and thereby arriving at a decision on quantum of damages unsustainable in law.**

The only issue that the Trial Magistrate was supposed to determine was quantum of damages based on the injuries sustained by the Appellant since parties had entered consent on liability.

The Appellant in the Plaintiff indicated he sustained the following injuries:

- Left hip joint dislocation.
- Deep cut wounds on the left ear.
- Chest contusion. Lacerations on the right ear.
- Blunt trauma to the back

The Appellant in his evidence in chief said that when he was involved RTA he was rushed to Angaga Health Centre and later taken to Awendo Sub-County Hospital. He said that at the Health Centre he was given pain killers and injuries dressed. He said he injured his ears, chest and right leg. He said that x-ray report was in court but the films taken in Kisumu were not in court. He said that he had not healed and that he had permanent disability and is not working.

The list of documents filed by the Appellant does not contain the X-Ray Report and films. Dr. Morebu who examined the Appellant and prepared medical Report alluded to dislocation of left hip joint and said he relied on P3 form, X-Ray and discharge summary to prepare report but the said X-Ray was not in court. He said he did not assess permanent disability.

PW3 the Clinical Officer who treated the Appellant at Awendo Sub-County Hospital on 7th December 2021 one day after the accident observed laceration around the right ear, bruise on the left hip and pain. She f assessed injuries as soft tissue. P3 form dated 13th January 2022 filled by Joseph Owira in respect of injuries sustained by the Appellant assessed them as harm. During the examination of the Appellant on 13th January 2022 it was still indicated that he had sustained soft tissue injuries to the left ear and left hip with restricted movement.

This court having considered the evidence upon which the trial court based her assessment of award of damages confirms that indeed there was no evidence of upon which it could be found that the Appellant suffered dislocation of the left hip joint and the injuries suffered were assessed as harm and not grievous harm. The Trial Magistrate was therefore right to make a finding that damages could not be awarded for the alleged dislocation of the left hip joint. In any case the Medical report by PW2 did not even assess permanent disability upon which the Trial Magistrate could base a finding of dislocated hip joint.

However, the authorities relied upon to assess damages and which had almost similar injuries as those sustained by the Appellant range from 2018, 2019, and 2020. The decision herein was made on 29th May

2023 and the award made was much lower than those made several years before it and it is obvious that inflation was not factored in the award made. This court therefore finds that the Trial Magistrate did not make reasonable compensation for the injuries suffered and was below the limits set out in decided cases for reasons that inflation was not considered.

That being the case and in consideration of the authorities relied upon by the Trial court I do find that an award of Kshs. 200,000/= would be reasonable in the circumstances as general damages and hereby substitute the award made in the trial court with an award of Kshs200,000/= together with Special damages as awarded at Kshs.5,000 together with costs of the appeal and costs in the subordinate court, Interest on general damages to accrue from date of judgment in the subordinate court. Interest on special damages to accrue from the date of filing of suit. Both General and special damages are subject to agreed liability in the ratio of 75:25 in favour of the Appellant.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of December, 2025

.....

ANNE ONGI'NJO
JUDGE