

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NUMBER E030 OF 2025

ERICK ODHIAMBO ONGINJO.....
APPELLANT

VERSUS

PETER OTIENO OGOLLAH.....
APPELLANT

(Being an appeal from the judgment and decree of Hon. E. Tsimonjero(SRM) in Ukwala PMCC No. E084of 2022 delivered on 27/3/2025)

BETWEEN

PETER OTIENO OGOLLA.... PLAINTIFF

VERSUS

JUDGMENT

1. The appeal herein arises from the judgment and decree of Hon. Tsimonjero (S.R.M) in Ukwala PMCC No. E084 of 2022 dated 27/3//2025 wherein he entered judgement in favour of the Respondent against the Appellant inter alia; Liability at 100%; general damages of Kshs 600, 000/; special damages of Kshs 11, 395/; Interest at court rates; Costs of the suit to the Respondent.
2. Aggrieved by the said decision, the Appellant filed his Memorandum of Appeal dated 10/4/2025 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact in awarding general damages of Kshs600,000/= which award was excessive and not commensurate to the nature of injuries sustained by the Respondent (Plaintiff).
 - ii. That the learned trial magistrate erred in law and fact in failing to pay regard to the Appellant's (Defendant)

evidence on quantum thereby arriving at an unjust award on quantum.

- iii. That the learned trial magistrate erred in law and in fact in failing to pay regard to the Appellant's (Defendant's) submission and authorities in the Defendant's submission that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.
- iv. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

Reasons wherefore, the Appellants prayed that the appeal be allowed and that the decree of Hon E. Tsimonjero be set aside; and that this court re-assesses the quantum of damages afresh and that the Appellants be awarded costs of the appeal.

3. Being the first appellate court, this court's duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore must give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire &**

Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of G2000.
(Okubasi, Githinji & Waki JJA).

4. **Dr. Joseph Sokobe (PW1)** testified that he had a medical report dated 29/7/2022 in respect to Peter Otieno Ogolla which contains injuries which have been summarized and that he charged Ksh10,000/= for the same report. That he relied on the history of discharge summary from Segla X-ray films and treatment notes from Kenyatta National Hospital. That he produced receipts as well and that he charged kshs 5,000/= for his court attendance.

On cross examination, he stated that he relied on treatment notes from Kenyatta National Hospital and discharge summary from Siaya County Referral Hospital. That the injuries were not exaggerated as he had a chance to examine the patient. That the injuries would have healed by then.

On re-examination, he stated that the injuries in the report tally with the injuries suffered.

5. **Victor Odhiambo Achayo (PW2)** stated that he is a senior clinical officer at Segla Referral Hospital and that the patient was attended to on 30/4/2022. That he had a history of being involved in a road traffic accident and that he had injuries on the right clavicle which were both skeletal and blunt in nature. That there was a fracture on the right distal 3rd clavicle and the right index finger as well as the right scapula bone. That

he filled and signed the P3 form on a certain date which he produced together with discharge summary as exhibits 2 and exhibit 2b. That the injuries were classified as grievous harm. On cross examination, he stated that the patient was treated and discharged on 30/4/2022. That there was fracture on the clavicle as was indicted in the discharge summary. That the treatment note do not indicate the fractures. That the kind of fractures do not warrant admission unless there was a planned surgery. That the scapula fractures and the fingers had healed fast and not detectable after about five weeks. That the linear fracture of the scapula is not easy to be seen on x-rays.. That he cannot seeing an x-ray report by Dr Musyaki. That the fractures should have healed as they are not weight bearing bones as they heal fast within one year. On re-examination, he stated that he referred to the discharge summary. That at the time of admission, examination was for soft tissue injuries and fractured clavicle. That the treatment notes showed fracture of distal fingers and right scapula and that the injuries were captured in the P3 form.

6. **Peter Otieno Ogolla (PW3)** testified that he was involved in a road traffic accident on 30/4/2022 and that he filed this case and recorded his statement that he relied on. That he filed his list of documents dated 1/9/2024 which he as well adopts as follows:

- a)** Police Abstract - P Exhibit 4
- b)** Receipts for Ksh1995 - Pexhibit 5
- c)** Demand Notice - Pexhibit 6

d) Treatment notes from Sona Imaging centre – Pexhibit

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Further, he stated that he is not fully recovered. That his right shoulder and both knees and neck are still in pain and that he prays for compensation.

On cross examination, he gave details of his Identity Card as No. 319370 and indicated that he was involved in an accident on 30/4/2022 at around 9.00 am along Busia Kisumu road at Got Nanga. That he was a passenger on board motor vehicle registration No. KDE 689 R which was from Kisumu. That he was taken to Siaya County Referral Hospital then Kenyatta National Hospital. That the vehicle rolled and that he heard a bang and later found himself in hospital.

On re-examination, he stated that P exhibit 5 has a value of Kshs1645/= which bears receipt number of 00362471. That the driver was over speeding and that the vehicle rolled. That x-rays were done and that he had fracture on right shoulder and the right small finger. That his shoulder has not healed yet.

That marked the close of the Plaintiff's case.

7. **Dr. Steve Ochieng (DW1)** testified that he was in court to produce the report in respect of Peter Otieno Ogolla which he prepared on 20th May 2024. That the patient had been involved in a road traffic accident on 30/4/2022 at around 10.00 am along Kisumu Busia Road. That he was treated at Siaya County Referral hospital for an alleged fracture of the right index finger, right scapula and right clavicle. That he

was treated with painkillers and anti-biotics. That he examined the plaintiff on 22/4/2024. He further stated that it was his finding that the patient was in a fair general state, normal walking gesture, no visible scars. That there was stiffness of the stapes of the right shoulder and that he was unable to fully extend the right elbow joint. That right index finger was normal. That he had a look at the x-ray which had confirmed a right cervicular fracture and that of the right shoulder and the right hand. That the x-ray confirmed that the union of the right clavicle was in good position. That the scapula and the right-hand bone and joints were normal. That he formed the opinion that there was no future medical expenses and stiffness of the right shoulder joint. That the Plaintiff sustained a fracture of the right clavicle and blunt injuries to the chest and right hand. That there were no other injuries as alleged by Dr. Sokobe. The witness produced his medical report as evidence before court as D exhibit 1. He further stated that he relied on medical report by Dr. Sokobe, X-ray report as well as his own examination.

In conclusion, he stated that there was fracture of the right clavicle and injuries to the chest and fracture of the scapula and that the right index finger was not deformed.

On cross examination, the witness stated that the Plaintiff sustained fracture of the clavicle and soft tissue injuries. That the date of admission was on 30/4/2022 and that he was discharged the same day. That the P3 form indicated multiple lacerations on both knees, fracture of the scapula of the clavicle and fracture of the right index tenderness on the

chest. The P2 form is dated 28/7/2022. That he never saw treatment notes from Kenyatta National Hospital and also never saw X-ray report from Sona Imaging Centre. That he did not see the discharge summary. That the report is not based on all the documents and that it is true that this report was not based on the documents availed to him by the Plaintiff. That the Plaintiff informed him that he got a blunt injury to the right index finger. That he examined the right finger and found it normal. That it takes one to two years for a fracture of the finger to heal. That the fracture of the scapula takes one to two years and that it is possible that some of the fractures had healed at the time of his examination. That he was instructed by lawyers to examine the Plaintiff and that his duty was to examine the patient in the interest of the insurance company. Finally, it is not true that the insurer wants to pay as little as possible.

On re-examination, he stated inter alia; that the instructing client cannot influence his findings; that he acts professionally; that he used the documents availed to him by the Plaintiff; that he recommended for a check by way of x-ray which was conducted; that he only captured the fracture of the right scapula.

That marked the close of the defence case.

8. The appeal was canvassed by way of written submissions. Both parties complied.
9. The Appellant's counsel vide submissions dated 17th October 2025, gave a brief history of the matter. That the Respondent sued the Appellant vide plaint dated 1/9/2022 as a result of a

road traffic accident which occurred on 27/3/2021 at Got-Nanga area along Kisumu-Busia road when the Appellant's motor vehicle registration No. KDE 689R was negligently, driven, managed and/or controlled by the Appellant's driver such that he lost control and knocked down the Respondent who was a passenger in the said motor vehicle sustained severe personal bodily injuries. (**Refer to page 3-4 of the Record of Appeal-Plaint**). That the Respondent blamed the Appellant for causing the accident as he blames the Appellant's driver, servant and/or agent for negligently driving and managing the motor vehicle registration No. KDE 689 R thus causing the accident. That the Appellant entered appearance and filed his statement of defence dated 23/4/2024 upon setting aside interlocutory judgment, denying all material allegations of fact pleaded against him. The Appellant averred that if at all any accident occurred (*which was denied*), the same was caused due to negligence and/or omission on the part of the Respondent. (**Refer to page 19-22 of the Record of Appeal -statement of defence**). That the suit was heard and judgment was eventually delivered in favour of the Respondent inter alia; Liability at 100%; General Damages kshs. 600,000/=; Special Damages-Kshs. 11,395/=

10. Aggrieved by the judgment of the subordinate court on quantum, the Appellant lodged the instant appeal vide the Memorandum of Appeal dated 10/04/2025.
11. Counsel submitted that the court is duty bound pursuant to Section 78 of the Civil Procedure Act, Cap. 21 of the Laws of

Kenya to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify in the first instance. (*Also see position in Kenya Ports Authority vs Kushton (K)Ltd (2009) 2 EA, 212*).

12. It was submitted that from the Memorandum of Appeal on the issue of quantum, the Appellant raised one issue for determination namely whether the Respondent sustained a fracture of the right scapula and right index finger and whether the general damages award of Kshs. 600,000/= was excessive in the circumstances.
13. It was submitted that a re-evaluation of the quantum herein would be prudent seeing that the Respondent suffered mainly fracture of the right clavicle and soft tissue injuries. That it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion; must be exercised judicially, with wise circumspection and upon some legal principles. That the said dimensions are vital such that when the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. That the discretion in assessing the amount of general damages payable will be disturbed if the trial court inter alia; took into account an irrelevant factor; or left out of account a relevant factor; or, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

14. It is also submitted that it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. In **Kigaraari vs_Aya (1982-88) 1 KAR 768**, as quoted by **Kamau J** in **Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR** it was stated as follows: -

“Damages must be within the limits set out by decided cases and also inevitably passed on to members of the public, the vast majority of whom cannot within the limits the Kenyan economy can afford. Large awards are a burden in the form of increased insurance and increased fees.”

15. The particulars of injuries as enumerated in paragraph 5 of the plaint (**page 4 of the record of appeal**) are: -

- Head injury with brief loss of consciousness
- Multiple forehead lacerations
- Blunt injury to the chest and back
- Fracture of the right scapular
- Fracture of the right clavicle
- Fracture of the right index finger.
- The Appellant reproduced the evidence at trial. That the Respondent testified as PW3 on 9/9/2024. His statement was adopted as his evidence in chief. (**Refer to page 91-94 of the Record of Appeal -Certified Typed proceedings**) and who stated that he was treated at Siaya County Referral Hospital and later to Kenyatta National Hospital. He equally stated that sought

treatment in other hospitals. On cross examination, he stated that he had x-rays done at Siaya County Referral Hospital but the same were not produced before court. He also confirmed that there was no CT Scan done on him. According to him, he had a fracture of the right clavicle which was confirmed by a Doctor Musyoki. **(Refer to page 92-94 of the Record of Appeal - Certified Typed proceedings)**

16. Doctor Sokobe testified as PW1 and produced the medical report as Exhibit 1. It was his evidence that the Respondent suffered injuries as listed in his medical report **(see page 16 of the Record of Appeal-Medical report)**. The same are the ones listed on paragraph 5 of the Plea. On cross examination, he stated that he relied on the treatment notes from Kenyatta National Hospital, discharge summary from Siaya County Referral Hospital and an x-ray of the right hand. He confirmed that he did not see any medical report by the Radiologist (Dr. Musyoki). He also confirmed that there was no loss of consciousness captured in the treatment notes. **(Refer to page 87-88 of the Record of Appeal -Certified Typed proceedings).**

17. PW2, Victor Achayo, was the Clinician from Siaya County Referral Hospital. He testified that the Plaintiff had sustained fractures of the right 3rd clavicle and the right index finger and the right scapular and that he filed the p3 form. He produced the Discharge Summary and treatment notes. On Cross

examination, he confirmed that the treatment notes did not indicate the fractures. It was his evidence that the said fractures would have healed and that they would have been noted in the treating hospital without a scan or x-ray with an exception of the fracture of the scapular. (**Refer to page 89-91 of the Record of Appeal -Certified Typed proceedings**)

18. DW1, Doctor Steve Ochieng, testified and produced the Defendant's medical report as D. Exhibit 1a and 1b. It was his testimony that the Respondent did not suffer any fracture of the index finger and scapula as they would have been indicated in the initial treatment documents. He confirmed the fracture of the right clavicle and soft tissue injuries. He confirmed that he had the Respondent's initial x-ray of the right shoulder reported by a radiologist and also had a check x-ray conducted. (**Refer to page 97-99 of the Record of Appeal -Certified Typed proceedings**). It was his evidence that the radiologist report only confirmed the fracture of the clavicle only. (**see pages 30-31 of the Record of Appeal**).

19. Further, it was submitted that the Respondent is hell bent on insisting that he suffered a fracture of the scapular and right index finger yet there was no evidence. There was no x-ray done to the Respondent on his fingers (or hand) to confirm the fracture of the index finger. The discharge summary from Siaya County Referral Hospital confirms on the diagnosis upon discharge that the Respondent suffered fracture of the

Clavicle and multiple soft tissue injuries. **(See page 9 of the Record of appeal- discharge summary)**. The radiologist report from Sona Imaging centre also confirmed the fracture of the clavicle only. There was no x-ray report confirming the other fractures.

20. Reliance was placed in the Court of Appeal case in **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** where it held that *“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”*
21. Further reliance was placed in **Jazon Chomba Thiaka v Samuel Maina Warui & Another [2024] KEHC 13847 (KLR)**, where the High Court set aside an award of Kshs.120,000/- and substituted the same with Kshs.400,000/- for a cut on the left eye, bruises on the forehead abrasions on the left elbow and knee and fracture of the left shoulder.
22. Again, in **Seth Kipkoech Muttai & Another v John Simiyu Nalunyu (CA 56 of 2023) (2025) KEHC 3837 (KLR)**, the High Court upheld an award of Kshs.400,000/- for fracture of right clavicle amongst other injuries. Again, in **Thiaka v Warui & another (Civil Appeal 15 of 2014) [2024] KEHC 13847 (KLR) (5 November 2024)** where the court awarded **Kshs. 400,000/= for a** cut on the left eye, bruises on the left forehead, fracture of the left shoulder,

abrasions on the left elbow and knee with a disability assessed at 7%.

23. Counsel further submitted that the Appellant therefore submits that the Respondent only suffered a fracture of the Clavicle and soft tissue injuries. There was no disability assessed and all the medical practitioners who testified in court confirmed that as at the time of testifying, the Respondent would have healed. We therefore humbly submit that an award of Kshs. 400,000/= would be reasonable in the circumstance.

24. Counsel further submitted that it is clear that the learned trial magistrate erred in awarding the Respondent herein confirming that the Respondent had suffered multiple fractures and proceeded to award Kshs. 600,000/= for the injuries sustained. Counsel urged that the court proceeds to allow the appeal and substitute the award of the trial court with an award of Kshs. 400,000/=.

25. On the issue of cost, it was submitted that it is trite law that costs follow the event. That the Appellant prays for costs of this Appeal based on **Section 27(1) of the Civil Procedure Act** which provides **“27. Costs**

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to

determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

26. The Respondent's submissions are dated 27th October 2025.

27. It was submitted that the Memorandum of Appeal and the Appellant's submissions show that this appeal is exclusively against the award of general damages by the trial court.

28. It was submitted that and as correctly submitted by the Appellant, this court on a 1st appeal is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own conclusions. Further, this court ought to appreciate that assessment of damages is an exercise of judicial discretion and the court would only disturb the award if it is shown that

the said discretion was not exercised judiciously and lastly, the court should bear in mind that similar injuries should attract similar awards.

29. Learned counsel referred the court to the injuries sustained by the Respondent vide the Plea namely, head injury with brief loss of consciousness, multiple forehead lacerations, blunt injury to the chest, blunt injury to the back, fracture right scapula, fracture right clavicle, fracture right index finger.

30. It was submitted that in order to prove these injuries, the Respondent (PW3) testified at pages 91 - 94 and called PW1 (pages 87 - 88) and PW2 (pages 89 - 91). The Respondent also produced a medical report by PW1 (Ex 1a) and through PW2 discharge summary (Ex 2a), treatment notes (Ex 2b) and the P3 form (Ex 3). These documents are at pages 16, 9 and 10 respectively. The P3 form is at page 1 of the supplementary record. For the Appellant (DW1), he testified and produced a 2nd medical report. A radiological report was also admitted. The medical report is at pages 30a and 30b of the record. The radiological report is at page 31.

31. According to PW1, the Respondent sustained the injuries set out in his report. These injuries are consistent with what is pleaded. Similarly, PW2 who filled the P3 form and works at the Siaya County Referral Hospital produced both the P3 form and the treatment notes. Both documents allude to the injuries pleaded in the plea.

32. In cross examination, PW2 stated that the fractures of the scapula and fingers heal fast and cannot be detected after five weeks. He also stated that loss of consciousness was based on clinical examination. He testified that all the injuries should have healed within one year. In re-examination (page 91) the witness clarified that the treatment notes (EXH 2b) the fractures of the fingers and scapula were captured.
33. The Respondent as PW3 testified in cross examination that he heard a big bang and found himself in hospital. And in re-examination, he stated that he fractured the right shoulder and right finger.
34. DW1 in his testimony alleged that the Respondent only suffered a fractured clavicle and soft tissue injuries. He nonetheless confirmed that the Respondent's right shoulder was stiff and that he was unable to fully flex the right elbow. In cross examination the witness admitted that the P3 form is not one of the documents he looked at and admitted that his report was not based on all documents availed to him (page 100) and further admitted that some of the fractures may have healed at the time he examined the Respondent and finally conceded that he examined the Respondent in the interest of the Insurance Company. Hence, from the said evidence, there is no dispute that the Respondent suffered a fractured clavicle and multiple soft tissue injuries and that there is a dispute on whether the Respondent suffered loss of consciousness, fracture of the scapula and fracture of the index finger.

35. With regard to loss of consciousness, it was submitted that PW1 stated in his report that the Respondent suffered a brief loss of consciousness. In his testimony, he stated that if such loss is brief, there would be no need to capture it in the treatment notes. PW2 stated that he came up with the loss of consciousness from clinical examination. On his part, the Respondent in his witness statement (page 7) stated that he lost consciousness and found himself at the Siaya County Referral Hospital. In his testimony, he stated in cross examination that he heard a bang and found himself in hospital.
36. This is a civil case. The standard of proof is on a balance of probabilities. As was held in **Henry Binya Oyala =VS= Sabera Otira** (2011) eKLR, the primary source of information on injuries sustained is from the victim. On a balance of probabilities, the Respondent proved loss of consciousness.
37. With regard to fracture of the scapula and index finger, the starting point would be the treatment notes (EXH 2b). The accident giving rise to this case occurred on 30th April 2022. The Respondent was taken to Siaya County Referral Hospital on the same date. The treatment notes prepared on the same date (page 10) are clear even to a lay person. The notes show that the X-ray revealed fracture of right index finger, a fracture of right distal clavicle and fracture of right scapula. The document was never disputed. PW2 examined the Respondent on 28/7/2022 and prepared the P3 form (Ex

3). This was after three months from the date of accident. He isolated the same injuries and so did PW3 who examined the Respondent on 29/7/2022.

38. The report by DW1, which ruled out these fractures was prepared in May 2024. That was about two years after the accident. The witness himself conceded that he did not see the P3 form and that his report was not based on all documents available to him. He also conceded that some fractures would have healed by the time of his examination.

39. Reliance was placed in the case of **Kiambu HCCA NO. 54 of 2016: - Ndungu Dennis vs. Ann Wangari Ndirangu and Ano.** where the court held that the treatment notes and P3 form that are prepared immediately after the accident without litigation in mind should carry more weight compared to medical reports.

40. On the other hand, the court in **Naivasha HCCA NO. E 080 of 2021: Edward Mbugua Muigai and Ano. vs Simon Mburu Kiiru,** took the view that medical reports by doctors instructed by an Insurance Company ought to be handled with a lot of caution. As indicated, DW1 conceded that he examined the Respondent in the interest of the Insurance Company.

41. PW1, PW2 and DW1 were all medical experts. PW1 and PW2 gave evidence that is consistent with what the Respondent pleaded. DW1 in his report discounted some

injuries. The Respondent himself alluded to a fractured shoulder, soft tissue injuries, loss of consciousness and fractured finger. The scapula is the bone that connects the upper arm and the shoulder while the clavicle is the collar bone. The bones are therefore connected to the shoulder and the Respondent could not be expected to name the exact bones.

42. DW1 found that the Respondent had a stiff shoulder with inability to fully extend the right elbow. The fact that there was an issue with the elbow and shoulder would imply that the bone that links the two joints had an issue. And that bone is the scapula. DW1 did not try to connect the relationship between the rigid elbow and the shoulder. The radiological report he relied on was prepared long after the period when the fractures were expected to heal had lapsed.

43. It was submitted that expert evidence does not trump all other evidence and should be tested against known facts. That a court should thus consider expert evidence in the context of all other available evidence and where there is conflicting expert opinion, the court should test it relative to all other evidence before deciding which expert to believe (See **Nyeri HCCA No. 2 of 2014: Stephen Kinini Wang'ondu vs. The Ark Limited.**)

44. It was submitted that in the instant case, the contents of the treatment notes, P3 form as well as the concession by DW1 that some fractures may have healed by the time he examined the Respondent as well as DW1's own evidence that the Respondent's elbow could not fully flex leads to the conclusion that the evidence by DW1 was incomplete. Indeed, he conceded that his evidence was not based on all documents availed to him.

45. Learned counsel for the Respondent submitted that the Respondent sustained the injuries pleaded in the plaint as amplified by the evidence and exhibits adduced by PW1 and PW2 and which the court should sustain.

46. It was also submitted that for the said injuries, the sum of Kshs.600, 000/- cannot be said to be an excessive award. That the injuries compare favourably with the injuries in the following cases; -

i. Nyamira HCCA No. 30 of 2016: -

Easy Coach Limited vs. Mary Lossa Aketch

In this appeal the High Court upheld an award of Kshs.750, 000/- to the Respondent who sustained a fracture of the clavicle, fracture of the scapula and soft tissue injuries in 2019.

ii. Nairobi HCCA No. 376 of 2013: -

Milton I. Milimu Vs. Coast Bus Safaris Ltd & Anr.

The High Court awarded the Appellant Kshs.600, 000/- for a fracture to the right clavicle, a fracture of the lateral scapula and soft tissue injuries. This was in 2015.

47. It was further submitted that even if the court were to agree with the Appellant and uphold the medical report by DW1, the award of Kshs.600, 000/- for fracture of the clavicle and soft tissue injuries would still be within limits. Reliance was placed in decisions inter alia; **a) Eldoret HCCA No. 2 of 2020: -**

Lawrence Wairimu Wainyoike and Anr =vs= Joseph Letting.

In this appeal, the Respondent was awarded Kshs.800, 000/- for a fracture of the clavicle and soft tissue injuries. On appeal the High Court upheld the award and dismissed the appeal. This was in 2021

b) Marsabit HCCA No. 3 of 2019: -

The Board of Trustees Anglican Church of Kenya Diocese of Marsabit =vs= Adano Isacko.

In this appeal the lower court awarded the Respondent Kshs.700, 000/- for fracture of the right clavicle. The High Court upheld the award and dismissed the appeal in 2019.

56. Counsel further submitted that in the upshot, this appeal lacks merit as there is no demonstration that the court erred

in principle or that the award is excessively high to warrant interference by this court. The judgment by the trial court considered all relevant factors and arrived at the correct decision and hence the appeal should be dismissed with costs.

57. I have considered the record of appeal together with submissions presented as well as authorities cited. It is not in dispute that the Appellant's appeal revolves around the question of quantum of damages awarded and that the issue of liability is not contested by the Appellant. I find the issue for determination is whether the quantum of damages awarded by the trial court was inordinately high as to represent an erroneous estimate.

58. As the Appellant has opted not to challenge the issue of liability, then this court will proceed to consider the issue of quantum of damages awarded by the trial court. It was contended by the Appellant that the amount awarded was inordinately high and not commensurate with the injuries sustained by the Respondent. The Appellant is of the view that the only injury that passed the test of prove is the fracture of clavicle and soft tissue on the fingers. The Appellant further takes issue with the Respondent's claim that he also suffered a fracture of some of the fingers since the Appellant's doctor (DW1) disowned such injuries. The Respondent on his part called a medical officer (PW1) and a clinical officer (PW2) who maintained that the Respondent sustained a fracture of the clavicle and fracture of some of the

fingers. Hence, in my view, the rival evidence amounted to be a battle of medical professionals. This court will re-evaluate the evidence of those witnesses and find out whether the Respondent suffered the injuries as claimed in the plaint and whether the trial court's award of general damages in the sum of Ksh600,000/= was reasonable in the circumstances. In the case of *Mkube v Nyamuro*[1983]LLR at 403 Kneller JA & Hancox Ag JJA held that:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

Likewise, in *Butt v Khan* [1982-88] KAR 1 it was held that:

“An appellate court shall not disturb an award of damages unless it is 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.”

59. It is trite law this court on a 1st appeal is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own conclusions. Further, this court ought to appreciate that assessment of damages is an exercise of judicial discretion and the court would only disturb the award if it is shown that the said discretion was not exercised judiciously

and lastly, the court should bear in mind that similar injuries should attract similar awards.

60. According to the Respondent's plaint dated 1/9/2022, the injuries sustained by the Respondent were listed as, head injury with brief loss of consciousness, multiple forehead lacerations, blunt injury to the chest, blunt injury to the back, fracture right scapula, fracture right clavicle, fracture right index finger. In order to prove these injuries, the Respondent (PW3) testified at pages 91 - 94 of the record of appeal and called the doctor (PW1) found in pages 87- 88 of the record and the clinical officer (PW2) found in pages 89 - 91. The Respondent also produced a medical report through PW1 (Ex 1a) and discharge summary through PW2 as (Ex 2a), treatment notes (Ex 2b) and the P3 form as (Ex 3). These documents are at pages 16, 9 and 10 respectively of the record of appeal while the P3 form is at page 1 of the supplementary record of appeal. The Appellant called a doctor (DW1) who testified and produced a 2nd medical report as well as a radiology report which was admitted. The medical report is at pages 30a and 30b of the record. The radiological report is at page 31. According to PW1, the Respondent sustained the injuries set out in his report. These injuries are consistent with what is pleaded. Similarly, PW2 who works at Siaya County Referral Hospital filled the P3 form and produced both the P3 form and the treatment notes. Both documents allude to the injuries pleaded in the plaint.

In cross examination, the clinical officer(PW2) stated that the fractures of the scapula and fingers heal fast and cannot be detected after five weeks. He also stated that loss of consciousness was based on clinical examination. He testified that all the injuries should have healed within one year. In re-examination, the witness clarified that the treatment notes (EXH 2b) indicated that the fractures of the fingers and scapula.

61. The Respondent testified as PW3 and on cross examination, he stated that he heard a loud bang and found himself in hospital. That in re-examination, he stated that he fractured the right shoulder and right finger. DW1 in his testimony claimed that the Respondent only suffered a fractured clavicle and soft tissue injuries. He nonetheless confirmed that the Respondent's right shoulder was stiff and that he was unable to fully flex the right elbow during the second medical examination. In cross examination, DW1 admitted that the P3 form is not one of the documents he looked at and admitted that his report was not based on all documents availed to him, and further admitted that some of the fractures may have healed at the time he examined the Respondent and finally conceded that he examined the Respondent in the interest of the Insurance Company. Hence, from the said evidence, there is no dispute that the Respondent suffered a fractured clavicle and multiple soft tissue injuries and that there is a dispute on whether the Respondent suffered loss of consciousness, fracture of the scapula and fracture of the index finger.

62. As regard the issue of loss of consciousness, the Respondent's counsel submitted that the doctor who was called (PW1) stated in his report that the Respondent suffered a brief loss of consciousness. In his testimony, he stated that if such loss is brief, there would be no need to capture it in the treatment notes. Again, PW2 stated that he came up with the loss of consciousness from clinical examination. On his part, the Respondent in his witness statement stated that he lost consciousness and found himself at the Siaya County Referral Hospital. In his testimony, he stated in cross examination that he heard a bang and found himself in hospital. It is clear that the Respondent upon impact must have been affected to some extent in that he found himself in hospital and did not have a recollection on how he ended up in hospital and that he only remembers the loud bang. It is common knowledge that in an accident, victims come out of the accident scene while dazed. I am therefore satisfied that the Respondent suffered some form of loss of consciousness immediately after the accident. This being a civil case, the standard of proof is on a balance of probabilities. As was held in *Henry Binya Oyala Vs Sabera Otira (2011) eKLR*, the primary source of information on injuries sustained is from the victim. On a balance of probabilities, I find the Respondent proved the aspect of loss of consciousness.

63. As regards the issue of whether the Respondent suffered fracture of scapula and index finger, it is noted that the treatment notes (Exh 2b) might not have all the injuries. The

accident occurred on 30th April 2022 and that the Respondent was taken to Siaya County Referral Hospital on the same date. The treatment notes were prepared on the same date. The notes show that the X-ray revealed fracture of right index finger, a fracture of right distal clavicle and fracture of right scapula. This document was never disputed by the Appellant's witness. The clinical officer (PW2) examined the Respondent on 28/7/2022 and prepared the P3 form (Ex 3). This was after three months from the date of accident. He isolated the same injuries and so did PW1 who examined the Respondent on 29/7/2022. It is noted that the Respondent was taken for a second medical examination by DW1 who later prepared his report which ruled out these fractures was prepared in May 2024. That was about two years after the accident when some of the injuries had already healed. The Appellant's witness (DW1) conceded that he did not see the P3 form at the time of examination of the Respondent and that his report was not based on all documents availed to him. He also conceded that some fractures would have healed by the time of his examination. This thus left no doubt that indeed the Respondent had sustained the injuries pleaded in the plaint.

64. It was quite intriguing that PW1, PW2 and DW1 were all medical experts and that they ought to have resolved the issue of the injuries. It is instructive that the Respondent's expert witnesses gave evidence which was corroborative while the Appellant's expert witness conceded that he did not

have the benefit of other documents such as P3 form, treatment notes and X-ray report and thus he conceded that he would have made a different report. I find that PW1 and PW2 gave evidence that is consistent with what the Respondent pleaded. DW1 in his report discounted some injuries. The Respondent himself alluded to a fractured shoulder, soft tissue injuries, loss of consciousness and fractured finger. The scapula is the bone that connects the upper arm and the shoulder while the clavicle is the collar bone. The bones are therefore connected to the shoulder and the Respondent could not be expected to name the exact bones.

65. It is noted that the Appellant's witness (DW1) found that the Respondent had a stiff shoulder with inability to fully extend the right elbow. The fact that there was an issue with the elbow and shoulder would imply that the bone that links the two joints namely scapula had an issue. It seems DW1 did not try to connect the relationship between the rigid elbow and the shoulder. Indeed, the radiology report relied on by DW1 was prepared long after the period when the fractures were expected to heal had lapsed.

66. It is clear that between the two experts called by the Respondent and the one called by the Appellant, the version presented by the Respondent is more believable. It is trite that a court should thus consider expert evidence in the context of all other available evidence and where there is conflicting expert opinion, the court should test it relative to

all other evidence before deciding which expert to believe (See Nyeri HCCA No. 2 of 2014: Stephen Kinini Wang'onde Vs the Ark Limited. The contents of the treatment notes, P3 form as well as the concession by DW1 that some fractures may have healed by the time he examined the Respondent as well as DW1's own evidence that the Respondent's elbow could not fully flex leads to the conclusion that the evidence by DW1 was incomplete and did not shake that of the Respondent. Indeed, he conceded that his evidence was not based on all documents availed to him. I find the Respondent sustained the injuries pleaded in the plaint as amplified by the evidence and exhibits adduced by PW1 and PW2 and he proved that he sustained those injuries on a balance of probabilities.

67. Turning to the award of damages for pain suffering and loss of amenities, it is noted that the trial court awarded the sum of Kshs.600, 000/-. I find that the said sum cannot be said to be excessive since the the injuries compare favourably with injuries in several cases such as in the case of Easy Coach Limited vs. Mary Lossa Aketch, Nyamira HCCA No. 30 of 2026, where the High Court on appeal upheld an award of Kshs.750, 000/- to the Respondent who sustained a fracture of the clavicle, fracture of the scapula and soft tissue injuries in 2019. Again in the case of -Milton L. Milimu =Vs= Coast Bus Safaris Ltd & Ano. Nairobi Hcca No. 376 of 2013 where the High Court awarded the Appellant Kshs.600, 000/- for a fracture to the right clavicle, a fracture of the lateral scapula and soft tissue injuries and this was in 2015.

Again, in the case of Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs. Adano Isacko Marsabit Hcca No. 3 of 2019, the High Court on appeal upheld an award of Kshs 700, 000/ for fracture of the right clavicle.

68. In view of the foregoing observations, it is my finding that the trial court did not err in principle when making the award of damages which is not excessive as contended by the Appellant as the same is quite commensurate with the injuries sustained. Consequently, I find

no merit in the Appellant's appeal. The same is dismissed with costs.

Dated and delivered at Siaya this 4th day of December 2025.

D.KEMEI

JUDGE

In the presence of:

M/s Tesot.....for Appellant

Omondi.....for Respondent

Maurine.....Court Assistant

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