

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E069 OF 2024

KENNEDY ONYANGO OTIENO.....1ST
APPELLANT

KENNEDY OCHIENG ODIYO.....2ND
APPELLANT

VERSUS

ELEKTA AKINYI OKELO.....1ST
RESPONDENT

AYAN AUTOMOBILES LTD.....2ND
RESPONDENT

***(An appeal from the judgment of Hon. JP Nandi (SPM) in
Bondo PMCC No. E101 of 2022 delivered on 20/11/2024)***

BETWEEN

ELEKTA AKINYI OKELO.....PLAINTIFF

VERSUS

**KENNEDY OCHIENG OTIENO.....1ST
DEFENDANT**

**KENNEDY OCHIENG ODIYO.....2ND
DEFENDANT**

**AYAN AUTOMOBILES LTD.....3RD
DEFENDANT**

JUDGMENT

1. The appeal herein arises from the judgment of Hon. J.P. Nandi (SPM) in Bondo PMCC No. E101 of 2020 wherein he held the 1st and 2nd Appellants vicariously liable at 100% for an accident which took place on 7/7/2022 involving the Appellants and 2nd Respondent's vehicle reg. No. KDE 994T make Regius Ace and the 1st Respondent who was then a pillion passenger aboard motor cycle reg.No. KMFE 702N make Boxer and proceeded to enter judgment in favour of the 1st Respondent for general damages (Kshs800, 000/=), future medical expenses (Kshs620,000/=) and special damages of Kshs14,750/= as well as costs and interest from the date of judgment until payment in full.

2. The two Appellants herein were aggrieved by the said judgment and lodged their Memorandum of Appeal dated 16/12/2024 wherein they raised the following grounds of appeal namely:

- 1) that the learned trial magistrate erred in law and fact in awarding future medical expenses of Kshs620,000/= which was not proved.
- 2) That the learned trial magistrate erred in law and in fact in awarding future medical expenses which were excessive.
- 3) That the learned trial magistrate erred in law and in fact in failing to consider the medical report by the Appellants' doctor.
- 4) That the learned trial magistrate's exercise of discretion in assessment of liability and quantum was injudicious.
- 5) That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on the awards of future medical expenses and as a result arrived at an unjustified decision on future medical expenses.

The Appellants therefore prayed that the appeal be allowed and the decree of the trial court be set aside and that the court do re-assess the award on future medical expenses and come up with its own award.

3. This being the first appellate court, its duty is well cut out namely to re-evaluate the evidence and come up with its own independent conclusion as to whether or not to

uphold the decision of the trial court. See **Selle Vs. Associated Motor Boat Co. Ltd [1968] EA 123.**

4. The record of the trial court indicates that the 1st Respondent had lodged suit before Bondo Law Courts vide plaint dated 21/9/2022 and amended on 11/1/2023 wherein she sought for both special damages for injuries sustained in a road traffic accident which took place on 7/7/2022 involving the Appellants' and 2nd Respondent's motor vehicle Registration No. KDE No. 994T white Regius Ace and the 1st Respondent who was then a pillion passenger aboard motor cycle registration number KMFE 702N make Boxer when the driver or agent in control of motor vehicle registration No. KDE 994 T carelessly and recklessly controlled the same and which hit the motor cycle registration number KMFE 702N Make Boxer as a result of which the 1st Respondent sustained serious injuries. The 1st Respondent blamed the driver of the motor vehicle KDE 994 T. The Appellants and the 2nd Respondent denied the claim and contended that the accident occurred due to the negligence of the 1st Respondent and rider of the motor cycle.

5. The parties agreed that orders in Bondo PMCC No. E097 of 2022 do apply in the matter and that the evidence of PW1 and PW2 therein do apply in the matter as evidence of PW1 and PW2 respectively.

6. The 1st Respondent herein testified as PW3. She adopted her witness statement dated 21/9/2022 as her evidence in chief which was a reiteration of her averments in the Complaint as amended. That she sustained three fractures on the right hand, a cut wound on the head, a cut on her right foot leg as well as injuries on her back and chest. She presented several exhibits inter alia; police abstract, P3 form, copy of Identity card, X-ray film, court proceedings in traffic case, discharge summary, receipts, copy of records.

On cross examination, she stated inter alia; that she currently did not work due to pains; that she had no evidence showing that she did business prior to the accident; that she has not fully recovered as she still attends Acela Hospital for medication; that the police abstract showed the owner of the vehicle as the 2nd Appellant herein.

7. **Joan Okidi Bunde (PW4)** was a clinical officer attached at Bondo sub County hospital. He stated that the 1st Respondent was admitted at the said hospital as per the discharge summary and X-ray film. That the x-ray showed a fracture of mid shaft humerus bone.

On cross examination, he stated inter alia; that loss of consciousness and dislocation are not indicated on the discharge summary; that a patient who suffers multiple fractures will require surgical treatment; that the fracture

takes between fourteen days to three months to heal; that there was no need for MRI.

8. **Paul Aloo (PW5)** a medical officer at Acela Medical Centre testified that he examined the 1st Respondent herein and noted a dislocation of the wrist (right hand). That he recommended for MRI on wrist and shoulder as well as corrective surgery of wrist joint. He produced the medical report as Exhibit 11.

On cross examination, he stated that the fractures would heal within 6-8 weeks.

9. The 1st Respondent closed her case. The Appellants and 2nd Respondent opted to rely on the evidence and judgment in Bondo PMCC No. E097 of 2022 and in which the 1st Respondent's second medical report by Dr. Steve Ochieng was produced in evidence.

10. The appeal was canvassed by way of written submissions.

11. I have considered the record of the trial court and submissions. It is not in dispute that from the Appellants Memorandum of Appeal, their grievances is in regard to the trial court's determination on two issues namely liability and assessment of future medical expenses. I find the issue for determination is whether the appeal has merit.

12. As regards the aspect of liability, parties agreed that the judgment and orders in Bondo PMCC No. E097 of 2022

regarding liability and adoption of evidence of PW1 and PW2 do apply as well as the adoption of the 1st Respondent's second medical report as the Appellants' exhibit. As the liability was apportioned against the 1st and 2nd Appellants herein, then the same applies in the present circumstances mutandis mutandis. It is instructive that the Appellant's driver was subsequently charged with a traffic offence vide Bondo Traffic Case No. E093 of 2022 wherein he was fined Ksh100,000/= and in default to serve six months imprisonment. From the facts as stated by the prosecutor, it is clear that the Appellant's motor vehicle KDE 994 T had smashed onto the motor cycle forcing the rider and pillion passenger to fall down and sustain injuries. The rider had already indicated his intention to enter Shell Petrol station and thus the Appellants' driver (1st Appellant) ought to have a proper look out and to observe the Highway Code of traffic and to give way to the motorcyclist but instead threw caution to the wind and drove onto and smashed the motor cycle. It is noted that the 1st Respondent herein was a pillion passenger and thus had no control over the manner in which the motor cycle was being controlled and likewise the Appellants' vehicle. I find that the 1st Respondent did not contribute to the accident in any way. In any event, the Appellant's driver was later found to be responsible and was duly charged with a traffic offence. I find the apportionment of liability at 100 % against both Appellants herein by the trial court was quite sound and

must be upheld. Hence, the appeal on liability lacks merit and is dismissed.

12. As regards the award of future medical expenses, it is noted that the 1st Respondent vide her Complaint dated 21/9/2022 and amended on 21/1/2023 did plead specifically for future medical expenses. The trial court upon consideration of the evidence and documents allowed the 1st Respondent's claim for Kshs620,000/= comprising of MRI scan of right shoulder, MRI scan of the right wrist, corrective surgery of the right shoulder and open reduction and internal fixation of the right wrist joint. The Appellants have urged this court to interfere with the said award as it is excessive in the circumstances. In the case of **Kemfro Africa Limited t/a Meru Express Services & Another Vs Lubia & Another [1985] KECA 137 (KLR)** the Court of Appeal held as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took factor, or left out of account or relevant one, or that short of this, the amount is so inordinately low or so

inordinately high that it must be a wholly erroneous estimate of the damage.”

As the claim for future medical expenses is in the nature of special damages, the 1st Respondent was under obligation to specifically plead and prove the same on a balance of probabilities. In the case of Kenya Bus Service Ltd vs Gituma [2004] EA 91 it was held:

“And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. that follows from the general principle that all issues other than those which the law does contemplate as raising naturally from the infringement of a person’s legal right should be pleaded.”

The issue of award of damages must be handled by courts in a judicious manner. In the case of Kigaraari vs. Aya [1982 - 1988] KAR 768 the court held as follows:

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford as large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the

burden in the form of increased insurance and increased fees.”

Also, in *Tayib vs Kinanyu* [1983] KLR 14 it was held as follows:

“By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is essentially desirable so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

It is noted that the 1st Respondent herein was first attended to at Bondo sub County hospital by John Okidi Bunde (PW4) and that an X-ray was conducted which revealed a fracture of mid shaft humerus and that the right ankle joint was swollen as well as the first index finger. She was also examined by Dr. Paul Aloo (PW5) who prepared a medical report and that he noted injuries inter alia; swollen wrist, inability to move the finger on the right hand, dislocation of wrist on right hand. That he recommended MRI of wrist and shoulder as well as corrective surgery of wrist joint. That the fracture heals within 6-8 weeks and that if it has healed then there would be on need for ORIF.

The 1st Respondent was also examined by the Appellant’s doctor Steve Ochieng who noted inter alia; that there is union of the humerus and radial fractures in satisfactory

positions; that physical disability resulting from the injuries amounted to 40% for shoulder and right thumb stiffens; that the patient does not require corrective surgery as there is union of both humerus and radial fractures in satisfactory positions and that she does not require MRI scans but that she needs rehabilitation, through physiotherapy; that there is shoulder and right thumb stiffness; that there were fractures of the right humerus and right radius.

It is noted that the 1st Respondent was first examined by Dr. Paul Aloo (PW5) of Acela Medical Centre on 2/11/2022 who assessed the degree of disability at 40%. This percentage of disability was confirmed by the Appellants' doctor Steve Ochieng when he examined the 1st Respondent on 16/10/2023. Indeed, the second medical examination of the 1st Respondent took place almost one year after the first examination and that the injuries could have healed somewhat. However, it is instructive that the Appellants' doctor was not called to testify so that he could be cross examined just like the 1st Respondent's doctor and that the amounts sought for the future medical expenses could be properly established. It was not enough for the Appellants' doctor to just dismiss the recommendation of the 1st Respondent's doctor. Indeed, the issue of 40% disability on the 1st Respondent was a huge impact on her health and hence the need for the said future medical expenses. Indeed, the 1st Respondent during her testimony stated that she had not fully healed

and hence her request for future medical expenses was quite valid. It is not in dispute that inflation on the economy must be taken into account and thus the proposed amounts appear to me to be reasonable in the circumstances. I find the said amounts are not excessive and that the trial court did not take into account irrelevant factors when awarding the sums. Hence, the finding of the trial court was proper and must be upheld.

13. As there was no dispute on the other heads of damages namely general damages and special damages, the same shall remain undisturbed.
14. In view of the foregoing observation, it is my finding that the Appellants' appeal lacks merit. The same is dismissed with costs to the 1st Respondent.

Dated and signed at Siaya this 19th day of January 2026.

D. K. KEMEI

JUDGE

In the presence of:

N/A Tessot.....for Appellants

M/s Mukoya.....for 1st Respondent

N/A.....for 2nd Respondent

Maureen/Kimaiyo.....Court Assistant

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