



**Otieno & another v Yongo & another (Civil Appeal E073 of 2024)
[2026] KEHC 104 (KLR) (19 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E073 OF 2024
DK KEMEL, J
JANUARY 19, 2026**

BETWEEN

KENNEDY ONYANGO OTIENO 1ST APPELLANT

KENNEDY OCHIENG ODIYO 2ND APPELLANT

AND

ROSE ADHIAMBO YONGO 1ST RESPONDENT

AYAN AUTOMOBILES LTD 2ND RESPONDENT

*(An appeal from the judgment of Hon. JP Nandi (SPM) in
Bondo PMCC No. E098 of 2022 delivered on 20/11/2024)*

JUDGMENT

1. The appeal herein arises from the judgment of Hon. J.P. Nandi (SPM) in Bondo PMCC No. E098 of 2022 wherein he held the 2nd Appellant 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 (Kshs600, 000/=), future medical expenses (Kshs340,000/=) and special damages of Kshs580/= 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 Kshs340,000/= 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 a fare paying passenger aboard motor vehicle registration number KDE No. 994T white Regius Ace 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 liability in PMCC No. E097 of 2022 do applies in the matter wherein the 1st and 2nd Appellants were vicariously held liable for the accident at 100%.
6. No. 23 5864 IP Sebastian Maloba (PW1) testified that he was based at Bondo Police Traffic Base wherein he was the Base Commander. That the 1st Respondent was issued with a police abstract after she was injured while travelling as a passenger in motor vehicle KDE 994 T. That the accident occurred on 7/7/2022 within Bondo Shell Petrol Station along Bondo- Kisumu road. That a motor cycle registration number KMFE 702N Boxer was being ridden from Kisumu towards Bondo and when it reached the petrol station, it slowed down and indicated to enter the said petrol station on his right. That the matatu was travelling from behind the motor cyclist and which hit the motor cycle that had closed the yellow line. That the rider and his two pillion passengers sustained serious injuries and were rushed to hospital. That he proceeded to the hospital to visit the victims. That he later booked the OB report for the 1st Respondent and that he issued her with the P3 form. That he produced the police abstract for the 1st Respondent as well as pillion passengers. That he charged the driver of the matatu vide Traffic Case No. 093 of 2022 who pleaded guilty and was fined Ksh100,000/=.

On cross examination, he stated inter alia; that he visited the scene immediately; that the sketch plan indicates the time the scene was visited; that he did not witness the accident; that he did not produce police file or the Traffic Case proceedings; that the owner of the vehicle was Kennedy Odiyo.



7. John Okidi Bunde(PW2) testified that he was a clinical officer based at Bondo Sub-County Hospital. That he had a medical report for the 1st Respondent. That on detailed examination, she sustained a bruise on the head, chest pain with difficulty in breathing, a fracture of right shaft of humerus, fracture of the left metacarpal (finger), bruise on the right knee joint with a swelling. That the age of the injuries was one month two weeks. That the patient was put on anti-biotics and pain killers. That she was waiting for open surgery internal fixation on the fractures side. That he also examined the pillion passengers Elka Akinyi Okello who suffered bruise on the right cheeks, chest pain, compound fracture with dislocation of right humerus, dislocation of right shoulder, cut wound on the foot. The patient was treated and was left waiting for ORIF. That he also examined Laurine Atieno Obonyo who upon examination noted bruises on the left cheek, head, chest pain and fracture on right tibia fibula which was closed (closed fracture). That he produced the P3 forms for the three victims. On cross examination, he stated inter alia; that he is the one who examined the patients; that he did not see the initial xray films to confirm the fractures; that a fracture takes about 8 weeks to unite if a patient undergoes medication; that the recovery can go upto two years and after that there will be disability; that he cannot tell the total cost of the medical fixation at the hospital; that MRI is used to check what CT scan or Xray cannot record.

8. Rose Adhiambo Yongo(PW3) testified and adopted her witness statement dated 21/9/2022 as her evidence in chief. That she had a fracture on the right arm, a cut on right hand near elbow, injury on left arm first finger (index), injury on right knee, neck injury and chest injury. She produced several items namely: police abstract, P3 form, invoice, receipt and NTSA record while she identified the court proceedings, discharge summary and x-ray.
on cross examination, she stated inter alia; that she was a passenger in the vehicle and had sat on the left side; that she did not see the speedometer as she was seated behind; that she saw the motor cycle when the motor vehicle was moving in a zigzag manner before the accident occurred as it was in front; that she saw the motor cycle when it was being knocked; that she did not see the motor cycle turning right; that she still has pain; that she was a business lady but did not produce the evidence; that she still goes to hospital at Haven hospital; that she has not gone for fixation as she did not have Kshs130,000/=; that she does not know the owner of the vehicle she had boarded; that the documents show the owner of the vehicle as Kennedy Ochieng Odiyo.

9. Boss Dick Ochiel (W4) was the court administrator at Bondo. That the 1st Defendant (1st Appellant herein) was charged with a traffic offence vide Traffic Case No. E093 of 2022 where he was convicted and fined Kshs100,000/= and in default to serve six months' imprisonment. That he produced the court proceedings as Exhibit 3.
On cross examination, he stated that he produced criminal proceedings while the case herein is civil; that he is not aware that traffic proceedings are not binding; that the person who was charged was Kennedy Otieno Onyango.

10. Dr. Paul Oloo (PW5) testified that he is a medical officer working at Alela Medical Centre and that he examined the Plaintiff (1st Respondent) who has injuries inter alia; inability to use right upper limb, pain and swelling of left index finger and bleeding on the scalp and who was rushed to Haven Hospital and that a plaster of Paris was placed on her right arm. That during the examination, he was able to elicit pain and inability to use the right upper limb, pain and swelling of left index finger and pain in the right knee. That she had had scars, limited range of right ankle, reduced power of right limb. That he assessed the percentage of disability at 40%. That the patient would need MRI and corrective surgery. That he produced the report as Exhibit 9.



On cross examination, he stated inter alia; that he relied on treatment notes from Haven hospital; that the treatment notes does not show any fracture on the finger; that ORIF was not done; that MRI is used to show what an x-ray cannot show; that the injury at the right shoulder was healing but based on his findings there was need for MRI as there was a fracture of shaft of humerus; that such a fracture takes 6-8 weeks to heal; that if the humerus was healed there was no need for MRI; that charges for ORIF is based on KMPD but he has not attached the same; that the patient was discharged in July and that she examined her in November.

11. The Plaintiff (1st Respondent) closed her case. The Appellants closed their defence case after a consent was entered in which the 1st Respondent's second medical report by Dr. Steve Ochieng was produced as DEXH – 1.

12. 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.

13. As regards the aspect of liability, parties agreed that the judgment and orders in Bondo PMCC No. E097 of 2022 regarding liability 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 Plaintiff dated 21/9/2022 and amended on 11/1/2023 did plead specifically for future medical expenses. The trial court upon consideration of the evidence and documents allowed the 1st Respondent's claim for Kshs340,000/= comprising of MRI and shoulder repair surgery in order to regain full function of the right upper limb as well as surgery to repair the fracture as the humerus had not fully healed. It is noted that the doctor has assessed degree of disability at 40 %. Again, the Appellant's doctor, Dr. Steve Ochieng who had examined the 1st Respondent confirmed that she had right shoulder pain and that he confirmed the fracture of the right humerus with a disability rate of 33%. That being the position, the 1st Respondent could not be denied an opportunity to undergo corrective surgery so as to regain full function of the limb. 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 (PW2) and who noticed that the patient sustained bruise on head, chest pain with difficulty in breathing, a fracture of right shaft of humerus, fracture of the left metacarpal, bruises on the right knee joint with a swelling. 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 who assessed the degree of disability at 40%. This percentage of disability was confirmed by the Appellants’ doctor Steve Ochieng when he later examined the 1st



Respondent and who assessed the percentage of disability at 33%. 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. The assessment by the Appellant's Dr. Steve Ochieng of 33% is close to that of the 1st Respondent's doctor. 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 M/s Tesot.....for Appellants.

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

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

Maureen/Kimaiyo.....Court Assistant.

