

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO. E068 OF 2023

LYDIA MONICA OGOLA.....APPELLANT

-VERSUS-

GEORGE LABAN OGUTU

OGANGIRA.....1ST

RESPONDENT

JOEL MWANGI.....2ND

RESPONDENT

(Being an appeal from the Judgment and Decree delivered by Hon. Celesa Okore, Principal Magistrate, delivered on 27th July 2023 in Oyugis Principal Magistrates Civil Case No. 113 of 2020)

JUDGMENT

[1] The appellant herein, **Lydia Monica Ogola**, filed **Oyugis Principal Magistrate’s Civil Case No. 113 of 2020** against the appellants, **George Laban Ogutu** and his driver, **Joel Mwangi**, for compensation by way of general and special damages. The suit was in respect of injuries allegedly sustained by the appellant in a road traffic accident that occurred on the 27th November 2019 along the Oyugis-Kisumu Road. The appellant had alleged that she was travelling as a lawful fare-paying passenger in Motor Vehicle Registration No. KCN 631T, Matatu, from Kisii to Bungoma; and that on account of the negligence of the driver of Motor Vehicle Registration No. KBL 270A, the said motor vehicle rammed into Motor Vehicle Registration No. KCN 631T thereby causing it to overturn and roll several times.

[2] It was further the contention of the appellant that, as a result of the accident, she sustained serious injuries whose particulars were set out at paragraph 6 of her Complaint dated 21st July 2020. Particulars of negligence were set out at paragraph 4 of the Complaint. Consequently, the appellant filed the lower court suit claiming general and special damages for pain, suffering and loss of amenities.

[3] The respondents denied the respondent's allegations vide their Defence dated 30th November 2020. Upon hearing the parties, the lower court found the respondents 100% liable for the accident. The court then proceeded to assess general damages payable at Kshs. 30,000/= together with special damages of Kshs. 50,780; making a grand total of Kshs. 80,780/=.

[4] Being aggrieved by the decision of the lower court, the appellant filed this appeal vide the Memorandum of Appeal dated 10th August 2023 on the following grounds:

[a] That the learned magistrate erred in law and fact in failing to analyze the evidence on record as required by law, consider the extent of injuries sustained and award commensurate damages, hence awarded a sum that was inordinately low.

[b] That the learned magistrate failed to adequately consider the submissions by the appellant hence giving an award that was inadequate.

[5] Accordingly, the appellant prayed that the judgment of the lower court on quantum be set aside and that a fresh assessment of damages be made by this Court that will adequately compensate her. She also prayed for the costs of the appeal.

[6] The appeal was canvassed by way of written submissions, pursuant to the directions given herein on the 20th February 2025. In the appellant's submissions dated 17th March 2025 her main argument was that the lower court's award was inordinately low. The appellant relied on **Daniel Otieno Owino & another v Elizabeth Atieno Owuor** [2020] eKLR for the basis principal that an appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

[7] It was further the submission of the appellant that the injuries suffered by her were not disputed by the respondent and were affirmed to be true by the learned magistrate. Whereas the appellant had no quarrel with the special damages component of the judgment of the lower court, she impugned the judgment of the lower court, contending that the award of Kshs. 60,000/= as general damages is not commensurate with the injuries sustained by her.

[8] In the premises, the appellant proposed that the award on the head of general damages be enhanced to Kshs. 500,000/=. She relied on **Bonface Mugendi & another v Emilio Murimi Njue** [2021] eKLR in which an award of Kshs. 300,000/= was upheld for soft tissue injuries to the head, chest, shoulders and abdomen. The appellant also cited the case of *Surian Enterprises Ltd v Peter* (Civil Appeal No. E199 of 2021) [2023] KEHC 20426 (KLR) (5 July 2023) (Judgment) where the court awarded Kshs. 150,000/= for similar injuries.

[9] This being a first appeal, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the lower court with a view of making its own conclusions thereon. It is also imperative to bear in mind that this Court did not have the advantage of seeing or hearing the witnesses; and therefore that it must make an allowance for that in its re-evaluation. Hence, in

Selle & Another v Associated Motor Boat Co. Ltd & Others

[1968] EA 123 it was held that:

"...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..."

[10] With the foregoing principles in mind, I have given careful consideration to the evidence placed before the lower court in the light of the pleaded injuries. The appellant testified on the 23rd September 2021 and stated that the minor was travelling to Kisumu from Kisii on the 27th November 2019 when she was involved in a road traffic accident in which she sustained injuries on her head, chest and back. She was admitted at Kericho District Hospital for 1 day while undergoing treatment. She produced several documents in support of her evidence, particularly in proof of the treatment expenses incurred.

[11] The parties adopted the evidence of **P.C. Bernard Kabayi**, a police officer attached to the Traffic Section at Oyugis Police Station, who testified as PW2 in Oyugis SPMCC No. 110 of 2020. He confirmed that an accident occurred at Chabera Bridge along Oyugis-Kisumu Road on the 27th November 2019 at about 1200 hours. PW2 further stated that the accident involved motor vehicles registration Nos. KCL 631 Toyota Matatu, being driven by **Christopher Omweri Obuya** now deceased and KBL 270K Mitsubishi Lorry, then being driven by **Emanuel Poppy Otiato**. PW2 also testified that both motor vehicles were being driven from Oyugis direction heading to Kisumu general direction; and

that the Matatu had fare paying passengers and was in front of the lorry.

[12] PW2 explained that investigations conducted by his colleague, **PC Kipkalis** who was on transfer, revealed that the lorry lost control and rammed into the matatu from behind. Both vehicles veered off the road to the right side facing Kisumu Direction. He therefore blamed the lorry driver for the accident for the reason that the said driver did not keep a safe distance from the matatu. He added that although the lorry driver alleged brake failure, the inspection report showed no pre-accident defects on the vehicle. PW2 gave a list of the occupants of the Matatu who suffered injuries; and the victims include the appellant herein.

[13] Dorothy Moraa, a Records Officer at Kericho Referral Hospital testified as PW3 and produced the Discharge Summary for Lydia Monica Ogolla who was assigned Patient No. 305795, among other documents.

[14] Dr. Obed Omuyoma (PW4) testified that he is a medical practitioner based in Nakuru; and that he examined and prepared a Medical Report for **Lydia Monica Ogola** on the 16th December 2019. He testified that the patient had been involved in a road traffic accident on 27th November 2019 in which she suffered blunt chest injury as well as soft tissue injuries to her lower back. In his assessment, the injuries sustained by Lydia Monica Ogolla amounted to Grievous Harm. He produced his Medical Report as an exhibit along with other relevant documents.

[15] The Defence opted to adduce no evidence save for the Medical Report prepared by **Dr. Jenipher Kahuho**, dated 25th March 2021. The report was produced by consent and marked Defence Exhibit 1.

[16] On quantum, it is useful to bear in mind the caution expressed in **H. West & Son Ltd v Shephard** [1964] AC 326, that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[17] The Court of Appeal restated this principle thus in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[18] As has been noted herein above, the lower court awarded the respondent Kshs. 30,000/= as general damages for her injuries along with special damages in the sum of Kshs. 50,780/=.

There is no doubt that the respondent justified her claim for special damages by producing supporting documents. As such, there is no contention about that aspect of her claim. The dispute is in respect of the general damages component. The award, naturally, was premised on the nature of the respondent's injuries. The injuries as pleaded and proved were:

- [a]** Blunt injury to the head
- [b]** Blunt injury to the anterior chest wall
- [c]** Blunt injury to the lower back

[19] The learned magistrate made reference to the P3 Form, Discharge Summary, Treatment Notes and Medical Reports produced before the lower court on behalf of the appellant. The learned magistrate also put into consideration the second Medical Report prepared by **Dr. Kahuthu** and produced as Defence Exhibit 1. On the basis thereof she was of the finding that the appellant's injuries were essentially soft tissue in nature; and that the injuries have fully healed completely without any need for further medical attention or follow up.

[20] The principle reiterated by the Court of Appeal in **Stanley Maore v Geoffrey Mwenda** [2004] eKLR, is that comparable injuries ought to be compensated by comparable awards. It expressed itself thus:

"...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should,

as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

[21] In **Bonface Mugendi & another v Emilio Murimi Njue**

[2021] eKLR the plaintiff suffered soft tissue injuries to the chest, head and abdomen. On appeal the decision was upheld on the ground that the award Kshs. 300,000/= on the ground that the award was reasonable. However, in **Surian Enterprises Ltd v Mary Bahati Peter** (Civil Appeal No. E199 of 2021) [2023] KEHC 20426 (KLR) (5 July 2023) (Judgment) an award of Kshs. 300,000/= for soft tissue injuries, including deep cut on the forehead and blunt injury to the right knee, was considered inordinately high. Consequently, the award was reduced to Kshs. 150,000/=.

[22] As has been pointed out herein above, the respondents did not file any submissions. Thus guided by the two decisions above, it is plain that the award made by the lower court was so low as to amount to an incorrect award. On the basis of the Surian case, I consider an award of Kshs. 150,000/= to be fair and reasonable in the circumstances.

[23] In the premises, I find merit in the appeal on quantum. The same is hereby allowed and orders granted as follows:

[a] That the judgment and decree of the lower court on general damages be and is hereby set aside, and is substituted with an award of Kshs. 150,000/=.

[b] That the judgment and decree of the lower court on special damages and costs of the lower court be and is hereby upheld.

[c] That the costs of the appeal are hereby awarded to the appellant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 22ND
DAY OF JANUARY, 2026**

OLGA SEWE

JUDGE