

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMABAY
CIVIL APPEAL NO. E006 OF 2021

SAM KENYATTA ASINO.....1ST

APPELLANT

WYCLIFFE LIUD OKERO ODERO.....2ND

APPELLANT

VERSUS

EUNICE KEMUNTO NYAKUNDI.....
.....RESPONDENT

**(Being an appeal from the Judgment and Decree of Hon.Celesa Okore (SRM)
in Oyugis PMC Civil Case No. 166 of 2017 delivered on 3rd December, 2020)**

JUDGMENT

Background of the Appeal

1. By a plaint dated 24th August 2017, the respondent, then as plaintiff, instituted a suit against the appellants, then defendants, seeking both general and special damages in the sum of Kshs. 7,050/-. She further sought the costs of the suit and interest thereon.
2. The respondent's case was that on or about 10th February 2017, she was a lawful fare-paying passenger aboard motor vehicle registration number KCG 973P when, along the Oyugis-Kisumu Road, when the said motor vehicle was recklessly, negligently and/or carelessly driven, controlled and/or managed by the 1st appellant and/or his

driver, agent, or servant, causing it to lose control and collide with motor vehicle registration number KCB 207M. As a consequence, thereof, the respondent sustained several injuries and suffered loss and damage.

3. In the plaint, the 2nd appellant was described as the registered owner of motor vehicle registration number KCB 207M while the 1st appellant was described as registered owner of motor vehicle registration number KCG 973P.
4. In his statement of defense dated 21st November 2017, the 1st appellant denied ownership of motor vehicle registration number KCG 973P, denied the occurrence of the alleged accident, and denied any negligence on his part. He further pleaded that, if the accident did occur, then the same was caused by the negligence of the respondent and/or the owner or driver of motor vehicle registration number KCB 207M.
5. Although counsel for the 1st appellant, Kairu & McCourt, had also entered appearance on behalf of the 2nd appellant, they subsequently filed an application to cease acting for the 2nd appellant, which application was allowed. However, no evidence was tendered to demonstrate that the 2nd appellant was served with the application to cease acting.
6. Under Order 9 Rule 13 of the Civil Procedure Rules, an advocate who has been granted leave to cease acting is required to serve the client

personally or by registered post, and unless a certificate of service is filed, such advocate remains liable to the client and to the court as the advocate on record. In the absence of proof of service, it follows that both the 1st and 2nd appellants continued to be represented by the same advocate, who failed to file a defense to the claim.

7. In a judgment delivered on 3rd December 2020, the learned trial magistrate found the appellants jointly and severally liable for the accident. The respondent was then awarded special damages in the sum of Kshs. 7,050/-, general damages of Kshs. 300,000/-, costs of the suit and interest at court rates to run from the date of the judgment.
8. Aggrieved by the said decision, the appellants lodged the present appeal by way of a Memorandum of Appeal dated 15th January 2021, seeking orders that the judgment and decree of the learned magistrate be set aside and the suit be dismissed as against the appellants and/or that the same judgment be substituted with an appropriate finding on liability and a downward reassessment of the quantum of damages. The appellants further pray that the appeal be allowed with costs.
9. The appeal attacks the judgment on the grounds that; *the apportionment of liability was against the grain and weight of evidence, that the aggregate award of Kshs 307,050/- as damages is excessive, unjustified and baseless for failure to consider and*

appreciate the applicable principles in assessment of damages, and, for ignoring the appellants evidence and submissions on record.

- 10.** The appeal was directed to be canvassed by way of written submissions and the 1st appellant and the respondents did comply with such directions. The 2nd appellant appears not to have filed submissions but as said before, the court appreciates that appellant to share representation with the first. The court on its part has had the benefit of reading and benefiting from the submissions filed. Having fully appreciated the submissions, the court elects not to rehash the same here but only highlight the summation.
- 11.** For the 1st appellant it is submitted that the evidence tendered before the trial court demonstrated that the accident occurred as a result of motor vehicle registration number KCB 207M, driven by the 2nd appellant, colliding with motor vehicle registration number KCG 973P, in which the respondent was a passenger. He further submits that PW3 testified that both vehicles were travelling towards Kisumu and that upon reaching Nyadindo, motor vehicle registration number KCB 207M overtook motor vehicle registration number KCG 973P, struck it on the door, and caused it to fall, thereby injuring the respondent. On the basis of this evidence, the 1st appellant argues that the trial court ought to have found the 2nd appellant 100% liable for causing the accident.

12. On the issue of quantum, the 1st appellant submits that the injuries sustained by the respondent, namely; bruises on the right leg, blunt trauma to the right knee, bruises on the left leg, and blunt trauma to the left knee, were soft tissue injuries. He contends that such injuries ought to have attracted an award of general damages in the sum not more than Kshs 80,000/-, which he considers reasonable and sufficient compensation, rather than the award of Kshs 300,000/- made by the trial court. In support of that submission, the appellant relies on the decision in **Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR**, where the court reduced an award of Kshs 300,000/- to Kshs 100,000/- for injuries pleaded as head concussion and blunt injuries to the chest and hands.
13. He further refers the court to the decision in **Eva Karemi & 5 Others v Koskei Kieng & Another [2020] eKLR**, where the court awarded Kshs. 70,000/- to an appellant for injuries to the right thigh and bruises on the lower and upper limbs.
14. For the respondent the position taken is that the in exercising its mandate as a first appeal, the court should give to the litigants a complete, fair, just and independent consideration and reevaluation of the evidence with a view to the court coming to own conclusions but administering due caution that to interfere with findings of facts

ought not be done freely. For that position of the law, the decisions in **Selle vs Associated Motor Boat Co Ltd (1968) EA 123** is cited.

15. The decision in **Kemfro Africa Ltd vs Lubia and Another (1998) eKLR** was cited to set the parameter an appellate court must observe before seeking to reverse a discretionary decision exercised in assessment of damages. The parameters are that the court must be satisfied that the trial court took into account an irrelevant factor, or left out of account a relevant factor, and short of that, that the amount awarded is so inordinately high that it must be a wholly erroneous estimate of the damage.
16. The injuries sustained by the respondent were reiterate as well as the submissions and authorities cited to the trial court in which sums of Kshs 400,000 was awarded for comparable injuries. Other decisions were cited for the proposition of the law that the trial court and an appellate court asked to consider the quantum of damages awardable ought to consider past awards as well as the incidence and effects of inflation on the value of money.
17. The respondent thus submitted that the appeal is a candidate for dismissal with costs because no demonstration had been made that the correct principles were never applied nor was there demonstration that the award was inordinately too high.

Issues, Analysis and Determination

18. The Court has anxiously considered the pleadings, the judgment of the trial court, the memorandum of appeal, and the submissions by 1st appellant and respondent, and identifies only two issues to arise for its determination:

a) Who was liable for causation of the accident? and

b) What is the appropriate quantum of damages, if any?

19. In determining liability, who is responsible for the causation of the accident, the Court has analyzed the testimony of the witnesses who testified before the trial court. The respondent, who testified as PW1, stated that the two motor vehicles were chasing each other and that motor vehicle registration number KCB 207M struck at motor vehicle registration number KCG 973P. PW3, a police officer attached to the Traffic Section at Oyugis Police Station, testified that both vehicles were travelling in the same direction towards Kisumu and that upon reaching Nyandindo, motor vehicle registration number KCB 207M overtook motor vehicle registration number KCG 973P and struck at it on the door area, thereby causing it to fall off and injure the respondent.

20. On cross-examination, PW3 stated that he was not the investigating officer, that he did not have the police file, and that his

testimony was based on entries in the Occurrence Book. He further stated that the point of impact was not clearly indicated.

21. The defense did not tender any evidence on how the accident occurred. No witness statements were filed, and no witnesses were called to testify. Consequently, the defense case was closed without any evidentiary rebuttal of the respondent's account. In fact, all the assertions in the defense filed remained mere allegations and the case thus fell to be decided on the basis of the evidence adduced on behalf of the respondent.

22. In light of the foregoing, and given that the evidence of PW1 was to the effect that the respondent was a passenger with no control over the manner the vehicles were driven and the two motor vehicles were racing each other remained uncontroverted, this Court finds that the appellants, and not the respondent were the wrongdoers.

23. As between the two defendants, the evidence on record sufficiently shows that the 1st appellants motor vehicle was hit by that of the 2nd respondent while on its lane. That evidence blames the 2nd respondent and exonerate the 1st. that state of evidence does not resonate with the finding that both were negligent. That two motor vehicles collided is not by itself an automatic blame on both where the evidence points otherwise. Here the evidence shows the 2nd respondent as the cause of the collision and he ought to have

been made to carry his burden. There is as yet no liability without fault in our jurisprudence.

24. In addition, joint and several judgment is only valid as against joint tortfeasors and not concurrent ones. Joint tortfeasors have their wrongdoing intertwined as to be inseverable because they act in concert. In this matter, the court finds that the two appellants were never joint tortfeasors and thus the finding of joint and several liability was erroneous. Being erroneous, it is set aside, and in its place, substituted a judgment on liability against the 2nd defendant wholly. The 1st appellant is absolved.

What is the appropriate Quantum Of Damages?

25. The general principles guiding the assessment of damages were set out in **Butler v Butler [1984] KLR 225**, where the Court of Appeal held:

“In awarding damages, a court should consider the general picture of all the prevailing circumstances and the effect of the injuries on the claimant, but some degree of uniformity is to be sought in awards, with regard paid to recent comparable decisions in local courts.”

26. The Court of Appeal in **Ugenya Bus Service v Gachuki (1981-1986) KLR 567** further emphasized that:

“General damages for personal injuries are difficult to assess with precision. There are many imponderables, and one cannot aim for exactness. The best the court can do is to ensure that awards are fair and reasonable, taking into account comparable cases.”

27. According to the medical report by Dr. Morebu Peter Momanyi dated 15th August 2017, the respondent sustained the following injuries:

- a) Bruises on the right leg;
- b) Blunt trauma to the right knee;
- c) Bruises on the left leg; and
- d) Blunt trauma to the left knee.

28. The medical report further indicated that the respondent complained of intermittent pain in the injured areas, and the examining doctor concluded that the respondent had suffered multiple severe soft tissue injuries which were in the process of healing.

29. The 1st appellant proposed an award of Kshs. 80,000/- as general damages, relying on comparable authorities cited in the submissions and highlighted hereinabove.

30. In awarding general damages in the sum of Kshs. 300,000/- in favour of the respondent, the learned trial magistrate relied on two authorities. The first was **Francis Mwangi Muchine v Francis**

Kimani Mbugua, HCCC No. 2637 of 1994, where the court awarded Kshs. 100,000/- to a plaintiff who had sustained fractures to the left humerus and left tibia and fibula, with a permanent disability assessed at 25%.

31. The second authority was **Joshua Mwaniki Nduati v Samuel Muchiri Njuguna [2005] KEHC 1944 (KLR)**, where the court awarded general damages of Kshs. 300,000/- for injuries comprising a fractured right acetabulum and fractures of three ribs, which required prolonged bed rest and approximately six months of rehabilitation, with a risk of developing osteoarthritis.

32. While the court appreciates that the injuries sustained by the plaintiffs in the authorities relied upon by the trial court were far more severe and were not comparable to those suffered by the respondent in the present case, whose injuries were purely soft tissue in nature and did not result in any permanent incapacity, it equally appreciates that those cases were very old, more than 25 years. Due to passage of time and the effect of inflation on the value of money, the two decisions were never a good guide at all. In using the two cases, the trial court erred by failing to appreciate the incidence of inflation.

33. The invites this court to reconsider the appropriate quantum of damages payable to the respondent in its mandate why proceeding by way of a retrial. While appreciative that the task of assessment of

damages is a difficult one and applies no mathematical formula, the court has no otherwise but to carry it out.

34. In so proceeding and being cognizant of the foregoing principles the court takes persuasion from **Philip Musyoka Mutua v Mercy Ngina Syovo [2018] eKLR**, where the court awarded Kshs. 120,000/- as general damages to a claimant who sustained blunt injuries to the head, shoulders, ribs and back, deep cut wounds to both ankle joints and a cut wound to the right knee, and upon considering that the injuries in the present case were less severe, this court is persuaded that a moderate award is appropriate. The court is further persuaded by the decision in **Rege v LA (Minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021) [2022] KEHC 16634 (KLR)** in which an award of kshs. 300,000/= for bruises on the right hand, blunt trauma to the right hand; and chest contusion was set aside and replaced with an award of kshs. 80,000/=.

35. Having regard to the nature and extent of the respondent's injuries, comparable awards, the need for consistency, and factoring in inflation as well as the fact that the judgment of the trial court was delivered in the year 2020, I am persuaded that an award of Kshs 200,000/- constitutes fair and reasonable compensation for pain, suffering, and loss of amenities.

36. For the foregoing reasons, the appeal by the 1st appellant succeeds wholly and judgment against him is set aside in whole.

37. However, the appeal by the 2nd appellant succeeds partially on assessment of damages in that the award of general damages in the sum of Kshs. 300,000/- by the trial court is hereby set aside, and in its place, substituted an award of Kshs. 200,000/-.

Having succeeded in full, the 1st appellant is awarded the costs of this appeal to be paid by the 2nd appellant. As between the 2nd appellant and the respondent, in view of the partial success of the appeal, each party shall bear its own costs.

Dated, signed and delivered at Lodwar this 13th day of February 2026.

Patrick J O Otieno

Judge