REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.E025 OF 2025

ERICK ODHIAMBO ONGINJO.....**APPELLANT**

VERSUS

EVANS ONACHO AGANDA.....

.....RESPONDENT

(Being an appeal from the Judgment/decree of Hon. E. Tsimonjero (SRM) dated and delivered on 13th March 2025 in Ukwala SPMCC No. E060 of 2022)

BETWEEN

EVANS ONACHO AGANDA.....PLAINTIFF

VERSUS

ERICK ODHIAMBO ONGINJO……

DEFENDANT

JUDGMENT

1. By a Plaint dated 15th June 2022, the Respondent prayed for judgment against the Appellant for: general and special damages; costs of the suit; and interest on damages at court rates. It was pleaded that on 30th April 2022, the Respondent was a passenger in Motor vehicle registration No. KDE 689R Toyota Hiace Matatu that was involved in an accident along Kisumu-Busia Road at Got-Nanga area. As a result of the accident, the Respondent sustained multiple facial lacerations, lacerations and bruises to both knees anteriorly, blunt injury to the neck, chest, back, forehead, abdomen, right shoulder, and left shoulder with torn rotator cuff muscle. The Respondent blamed the Appellant or his driver, servant or agent for negligent, careless and/or reckless driving leading to the accident and eventual injuries sustained.

2. PW1, the Respondent stated that he had not recovered from the injuries as he still feels pain in the neck, back and legs.

3. In his defence, the Appellant filed a defence dated 4th November 2022. The Appellant denied that the suit motor vehicle belonged to him and further denied the allegations of negligence by the Respondent. It was pleaded that the

accident was caused solely and/or substantially contributed by the Respondent's own negligence. The Appellant prayed that the suit be dismissed with costs.

4. The Appellant's case was closed without calling any witness.

5. In the judgment, the learned trial Magistrate apportioned 100% liability to the Appellant. Regarding quantum of damages, the learned trial Magistrate held that the injuries sustained by the Respondent are similar to the injuries sustained by the Plaintiff in **National Industrial Credit Limited & 2 Others vs MNO (Minor Suing Through Next of Friend and Mother FNM) Civil Appeal No. E035 of 2023[2024]** where the Plaintiff was awarded Kshs. 300,000.00 for sustained chest contusion, cut wounds on the left knee, blunt trauma to the scalp, and blunt trauma to the neck. The trial magistrate awarded the Respondent general damages of Kshs 300,000/ and that all the particularized special damages were awarded save for the Kshs. 200 for the police abstract.

6. This appeal is limited to the issue of the quantum of damages, in particular, general damages. Dissatisfied with the decision, the Appellant contends that:

    1. **The learned trial magistrate erred in law and in awarding general damages of Kshs. 300,000.00 which award was excessive**

and not commensurate to the nature of injuries sustained by the Plaintiff/Respondent herein.

2. **The learned trial Magistrate erred in law in failing to consider the Appellant's submissions on quantum by completely disregarding the submissions and authorities of both the Appellant ad the Respondent herein and as a result arrived in unjustified decision on quantum.**
3. **The learned trial Magistrate's exercise of discretion in assessment of quantum was injudicious.**
4. **The learned trial Magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.**

7. The Appellant prays that the decree be set aside and this Court do re-assess the evidence on record on quantum and award its own decision and that the costs of this appeal be awarded to him.

8. The appeal has been disposed of by way of written submissions. Both parties duly filed and exchanged submissions.

9. I have considered the record of appeal, the grounds in support thereof, the respective rival submissions and the law.

10. It will be noted that the Appellant's case was closed without any witness testifying. **Odunga J.** (as he then was) in **Republic vs County Government of Machakos [2019] KEHC 8492(KLR)** delved into the consequences of a party failing to adduce evidence. Guided by court decision, the learned Judge held that the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. However, the learned Judge held that a party must satisfy the particular burden and standard of proof even when his/her claim is not opposed. The learned Judge held that:

> **" 38. I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter, the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. This was the Court of Appeal's position in Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil**

Appeal No. 75 of 1998 where it was held that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders ex parte as the applicant is not relieved of the onus on him of justifying his application.

39. This is my understanding of the holding of Rajah, JA in Britestone Pte Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR (R} 855 at 59 that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

11. In the same vein, Section 107 of the Evidence dictates that whoever desires the court to give judgment regarding a legal right or liability dependent on facts they assert, must prove that those facts exist. The burden lay on the Respondent to prove his claim on quantum of damages which the learned trial Magistrate found was satisfactorily discharged

12. In addressing the trial court’s duty in assessment of damages, the Court of Appeal in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko (2006) KECA 130** held:

“It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. West & Son Ltd v Shephard [1964] AC 326 at page 353.

‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. 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.' "

13. The Appellant challenges the award of general damages as excessive. It is trite that assessment of damages is an exercise of judicial discretion and the Court in assessing award of damages, should take into account, so far as possible, comparable injuries and the passage of time from when the award was made, that is the rate of inflation. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru (2014) KECA 755 (KLR)** 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."** See ***Arrow Car Limited vs. Elijah Shamalla Bimomo & 2 others (2004) KECA 136 (KLR)***

14. The Court of Appeal **in Kaikai v Chacha & 2 others (Civil Appeal E028 of 2020) [2025] KECA 1278 (KLR) (11 July 2025) (Judgment) Neutral citation: [2025] KECA 1278 (KLR)** had this to say:

> **''It is trite that each case must be determined on its circumstances as injuries suffered cannot be 100% identical. The**

> **award of general damages is not a mathematical exercise in which a court takes a calculator to add or subtract from previous awards. Each case depends on its own facts, and the award of damages is just an estimate that should be as close as possible for similar injuries. This means that unless an award is inordinately low or high, an appellate court should be slow to interfere with an award of damages by the trial court. This is because, unlike an appellate court that only relies on what is written on paper, the trial Judge has the advantage of seeing the victim of the accident assess the impact of the injuries, even as they consider the medical reports."**

15. The Appellant contends that the award of Kshs. 300,000.00 is excessive since the Respondent only suffered soft tissue injuries which have fully recovered and noting that the accident happened in the year 2022 and that the Respondent failed to prove his case on balance of probabilities. Reliance is placed on **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] KEHC 9928 (KLR)**, **Majanja J.**; **LNK (A Minor Suing Through CNK as Next Friend) & 2 others v Simon Gatuni Njukia [2022] KEHC 2497 (KLR), C.Kariuki J.** where the Plaintiffs were awarded Kshs.

90,000.00 and 80,000.00 respectively. The Appellant submits that an award of Kshs. 60,000.00 is fair.

16. The Respondent submits that the award by the trial Court was within the range as seen in **National Industrial Credit Limited & 2 Others (supra); Herbert Otare Mabure &Another vs Daniel Omare Nyamboga Kisii HCCA No. E011 of 2023; Poa Link Services Co.Ltd & Another vs Sindani Boaza Bonzemo Bungoma HCCA No. 17 of 2019.**

17. I find the learned trial Magistrate applied the principles in assessment of damages correctly and that the award of Kshs. 300,000.0 was not manifestly excessive. The Respondent sustained comparable injuries to the Plaintiff in the decision relied upon by the learned trial Magistrate and the decision cited by the Respondent in this appeal. The Appellant's cited court decisions offer low awards. Awards for such injuries sustained by the Respondent fall within that range noting the inflation rate and the nature of injuries must be taken into consideration. I find that the decision in support of the Respondent's case are recent and were quite persuasive.

18. The Court of Appeal in **Butt vs. Khan [1981] KLR 349,** held that an appellate court will only interfere with the award of damages where it is shown that the trial court took into consideration an irrelevant fact or that the sum awarded is inordinately low or high that it must be an erroneous

estimate of the damages or that a wrong principle of law was applied in awarding the damages.

19. In view of the foregoing observations, it is my finding that the learned trial Magistrate properly evaluated the evidence, applied correct legal principles, and exercised discretion judicially. I find no basis to interfere with the learned trial Magistrate's discretion.

20. In the result, it is my finding that the Appellant's appeal lacks merit. The same is hereby dismissed with costs to the Respondent.

Dated and delivered at Siaya this 20th day of February 2026

D. K. Kemei

Judge

In the presence of:

M/s Ong'onga…….for Appellant

Mr Omondi……. for Respondent

M/s Maureen…….Court Assistant