

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.E014 OF 2025

ERICK ODHIAMBO
ONGINJO.....APPELLANT

VERSUS

HEZRA NDOLO WANJIR.....
.....RESPONDENT

(Being an appeal from the Judgment/decree of Hon. E. Tsimonjero
(SRM) dated and delivered on 11th September 2024 INE Ukwala
SPMCC No. E045 of 2022)

BETWEEN

HEZRA NDOLO
WANJIR.....PLAINTIFF

VERSUS

ERICK ODHIAMBO

ONGINJO.....DEFENDANT

JUDGMENT

1. By a Plaint dated 20th May 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. 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. That as a result of the accident, the Respondent sustained blunt injury to the forehead, occipital scalp, right ear, neck, chest and lacerations of the left elbow, left palm, left hip, left leg, and right knee. The Respondent blamed the Appellant or his driver, servant or agent for negligent, careless and/or reckless driving.
2. PW1, the Respondent stated that he was yet to recover. He stated that he still had problems with his left eye. By consent of parties, the medical report of Dr. Steve Ochieng was admitted into evidence without calling the maker.
3. In his defence, the Appellant filed a defence dated 5th December 2022. The Appellant denied that the suit motor vehicle belonged to him and that the allegations of negligence

by the Respondent are false. 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. On quantum, the learned trial Magistrate held that the Respondent sustained severe multiple soft tissue injuries as there were no fracture or dislocations. Guided by the case of **Francis Omari Ogaro vs JAO(Minor Suing Through Next Friend and Father GOD) [2021]eKLR** where an award of Kshs. 230,000.00 was reduced to Kshs. 180,000.00, the learned trial Magistrate noted that the decision was delivered three years ago and taking into account the inflation rate, he found that an award of Kshs. 230,000.00 was reasonable.
6. This appeal is limited to the issue of the quantum of damages, in particular, general damages of Kshs.230,000.00. Dissatisfied with the decision, the Appellant contends that the award is excessive and not commensurate to the nature of injuries sustained by the Respondent herein. According to the Appellant, the exercise of discretion in assessment of quantum was injudicious. The Appellant prays that the decree be set aside and that this Court do re-assess

the evidence on record on quantum and that the costs of this appeal be awarded to him.

7. The appeal has been disposed of by way of written submissions.
8. I have considered the record of appeal, the grounds in support thereof, the respective rival submissions and the law.
9. 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.”

10. In the same vein, Section 107 of the Evidence dictates that whoever desires 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

11. 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.’ ”

12. The Appellant challenges the award of general damages as excessive. It is trite that assessment of damages is an exercise of judicial discretion and that 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)**

13. 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.”

14. The Appellant contends that the award of Kshs. 230,000.00 is excessive and not commensurate to the injuries sustained by the Respondent. According to the Appellant, the Respondent suffered soft tissue injuries from which he has fully recovered since 2022 when the accident occurred. The Appellant urges this Court to find that an award of Kshs. 90,000.00 will be fair and adequate compensation. Reliance

is placed on the case **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] KEHC 9928 (KLR)** where **Majanja J.; LNK (A Minor Suing Through CNK as Next Friend) & 2 others v Simon Gatuni Njuria [2022] KEHC 2497 (KLR) C.Kariuki J.** where the Plaintiffs were awarded Kshs. 90,000.00 and 80,000.00 respectively.

15.The Respondent's submissions are not on record.

16.I find the learned trial Magistrate applied the principles in assessment of damages correctly and that the award of Kshs. 230,000.00 was not manifestly excessive. It is noted that the Respondent sustained comparable injuries to the Plaintiff in the decision relied upon by the learned trial Magistrate. The Appellant cited decisions which offered low awards. I find the awards for such injuries sustained by the Respondent fall within that range taking into account the inflation rate and the nature of injuries.

17.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.

18. In the final analysis, I find that the learned trial Magistrate properly evaluated the evidence, applied correct legal principles, and exercised discretion judiciously. I see no reason to interfere with the learned trial Magistrate's discretion.

19. In view of the foregoing observations, it is my finding that the Appellant's appeal has no merit. The same is dismissed with costs.

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

D. K. Kemei

Judge

In the presence of:

M/s Ongonga.....for Appellant

Mr Omondi.....for Respondent

M/s Maureen.....Court Assistant