

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMABAY**  
**CIVIL APPEAL NO. E098 OF 2023**

**KEVIN OTIENO ONYANGO.....1<sup>ST</sup>**  
**APPELLANT**  
**OCHIENG MBOYA PAUL.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**MARY ATIENO**  
**MAJOR.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the learned magistrate, Hon. B.O. Omwansa, SPM delivered at Homabay on 17<sup>th</sup> May, 2023 in Oyugis SPMCC No. 140 of 2020)*

**JUDGMENT**

**[1]** This appeal arises from **Oyugis Senior Principal Magistrate’s Civil Suit No. 140 of 2020: Mary Atieno Major v. Kevin Otieno Onyango and Ochieng Mboya Paul**, a road traffic accident claim. It was alleged that on or about 31<sup>st</sup> May 2020, the respondent was a passenger in Motor Vehicle Registration No. KCM 682L traveling along the Kendu Bay-Oyugis Road when, at Kochung area, the 1<sup>st</sup> appellant’s driver, servant, agent, or employee so negligently drove, managed, and controlled the said vehicle, causing it to collide with Motor Vehicle Registration No. KBE 453V, which was also alleged to have been driven carelessly and recklessly.

**[2]** As a result of the collision, the respondent sustained grievous injuries, and the appellants were alleged to be jointly and severally liable, whether vicariously or otherwise, for the tortious acts and omissions. Consequently, the respondent claimed to have suffered loss and damage. The respondent

alleged that she sustained a fracture of the left humerus, deep cut wounds on the left lower limb, a dislocated left shoulder, chest contusion, and a cut wound on the face. She therefore sought judgment in her favour before the trial court for special damages amounting to Kshs. 38,080/=, general damages for pain, suffering, loss of amenities, and loss of future earning capacity, together with the costs of the suit and interest at court rates.

**[3]** In their Statement of Defence dated 23<sup>rd</sup> October 2020, the appellants expressly denied all the averments made by the respondent and put her to strict proof thereof. In the alternative, and without prejudice, they contended that the accident was caused or substantially contributed to by the respondent's own negligence. The particulars of contributory negligence were stated as follows:

**[a]** That the driver of Motor Vehicle Registration No. KCM 682L was engaged in unnecessary conversation and failed to concentrate on the road;

**[b]** That the respondent negligently jumped or alighted from the said moving vehicle, thereby causing her own injuries; and

**[c]** That the respondent voluntarily agreed to be ferried as a passenger in an already packed vehicle, thereby assuming the risk of injury in the event of an accident.

**[4]** The appellants denied that the respondent sustained any injuries or suffered any consequential loss or damage and put her to strict proof of the special damages claimed. They further denied that the respondent suffered any permanent disability

assessed at 30%, or that her earning capacity in the labour market had been diminished as alleged.

**[5]** Upon hearing the parties, the learned magistrate delivered her judgment on 17<sup>th</sup> May 2023 in favour of the respondent and found that:

**[a]** The defendants were 100% liable

**[b]** General damages of Kshs. 650,000/= was awarded

**[c]** Special damages of Kshs. 5,100/= was awarded and

**[d]** Costs of the suit.

**[6]** Being aggrieved by the decision of the lower court, the appellant filed this appeal dated 10<sup>th</sup> November 2023 on the following grounds:

**[a]** THAT the learned trial magistrate erred in fact and in law in awarding general damages of Kshs. 650,000/= which amount was so manifestly high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's injuries which injuries comprised a single fracture of the left humerus coupled with soft tissue injuries and which injuries did not result in any residual or permanent disability.

**[b]** THAT the learned magistrate erred in treating the evidence and written submissions tendered before him on quantum of damages superficially thereby arriving at a wrong conclusion on the same.

**[c]** THAT the learned magistrate erred in fact and in law in disregarding the written submissions and supporting authorities which were tendered by the Appellants thereby awarding damages which were excessive in view of the

nature and degree of injuries sustained by the Respondent which injuries were classified as “harm”.

**[d]** THAT the learned magistrate’s assessment and finding on damages was without any basis and/or unsupported by relevant case law or otherwise, any case law at all.

**[7]** The appellants in the premise prayed that their Appeal be allowed and the finding and/or assessment of the learned magistrate on general damages be set aside and be substituted with a finding commensurate to the injuries sustained vis-à-vis the documents tendered in support thereof and judicial authorizes in similar cases. It is manifest from the foregoing grounds that the appeal was centred on quantum as opposed to liability and I will proceed to determine it accordingly.

**[8]** The appeal was disposed of through written submissions. The appellant relied on submissions dated 4<sup>th</sup> June 2025, in which grounds 1 and 4 were argued together, and grounds 2 and 3 were similarly addressed jointly. On grounds 1 and 4, the appellants submitted that the award of Kshs. 650,000/= was excessively high and amounted to an erroneous assessment when compared to the nature of injuries sustained by the Respondent. They contended that the award was unjustified and lacked support from any relevant judicial precedents.

**[9]** Relying on **Kigaraari v Aya** [1982-88] 1 KAR 768, the appellants submitted that since the award of general damages lies within the discretion of the court, that discretion ought to be exercised reasonably, guided by comparable awards for similar injuries. The appellants urged the Court to note that the

respondent did not produce any documentation to demonstrate that she was undergoing further treatment and had, in fact, testified that she had fully recovered. They noted that PW3's medical report indicated that the respondent was in fair general condition with some tenderness on the shoulder, yet inexplicably concluded that she had suffered a 30% permanent disability. The appellants therefore urged the court to disregard that assessment.

**[10]** It was therefore the submission of the appellants that the learned trial magistrate erred in awarding Kshs. 650,000/= as general damages and posited that an award of Kshs. 500,000/= would suffice in light of the injuries sustained. They relied on the case of **Nguku Joseph & another v Gerald Kihui Maina [2020] KEHC 7670 (KLR)** where the court revised the sum of Kshs. 2,500,000/= downwards to the sum of Kshs. 500,000/= for a plaintiff who had sustained a fracture of the right humerus and other minor soft injuries.

**[11]** On grounds 2 and 3 the appellant submitted that the lower court erred by disregarding their written submissions and supporting authorities and thereby awarding general damages which were excessive in view of the nature and degree of injuries sustained by the respondent which were classified as "harm". The appellants relied on **Logistics Solutions Ltd v Steere Mavu Mwambela (Civil Appeal 169 of 2019) [2021] KEHC 8614 (KLR) (29 January 2021) (Judgment)** in which the court upheld the award of Kshs. 450,000/= where the sustained injuries were fracture of the right humerus arm bone, deep cut on the right eye, abrasion on the head, blunt injury on

the right shoulder and chest and a metallic implant insertion in his hand. They also relied on the case of **Philip Mwago v Lilian Njeri Thuo [2019] KEHC 1381 (KLR)**, where the court upheld the trial court's award of Kshs. 500,000/= where the Respondent had sustained a fractured humerus.

**[12]** Likewise, the respondent relied on her submissions dated 30<sup>th</sup> May 2025, which addressed only the issue of whether the award of Kshs. 650,000/= in damages was inordinately high. She contended that it is trite law that an appellate court may only interfere with an award on quantum if it is shown that the trial court considered irrelevant factors, failed to consider relevant ones, or that the award was so excessive or so low as to amount to an erroneous estimate. The court was referred to the case of **Catholic Diocese of Kisumu v Tete** (Civil Appeal 284 of 2001) [2004] KECA 154 (KLR) (1 June 2004) (Judgment).

**[13]** The respondent highlighted the injuries sustained as a result of the road traffic accident to be a fracture of the left humerus, deep cut wounds on the left lower limb, a dislocation of the left shoulder, a chest contusion, and a cut wound on the face. The respondent maintained that the trial court's award of Kshs. 650,000/= in general damages was proper and justified. She argued that the appellants failed to demonstrate that the trial court applied wrong principles, considered irrelevant factors, or that the amount awarded was so excessive as to warrant interference by this Court. She further contended that the award was, in fact, on the lower side compared to awards made in recent cases for similar, particularly given that she suffered a permanent disability assessed at 30%. She also

mentioned that no award was made for future medical expenses, despite such expenses having been established in the medical report prepared by **Dr. Peter Morebu**.

**[14]** The respondent relied on the case of **Nyang'au v Mekenye & 2 others [2024] KEHC 2830 (KLR)** in which the court upheld an award of Kshs. 700,000/= where the plaintiff had sustained bruises on the face, chest contusion, tenderness on the chest, right humerus fracture, right shoulder dislocation, bruises on the right and left lower limbs and blunt trauma to the knee; and **Benuel Bosire v Lydia Kemunto Mokora [2019] KEHC 8146 (KLR)**, where the High court awarded Kshs. 700,000/= in general damages for a fracture of the femur and soft tissue injuries.

**[15]** The respondent contended that, taking into account awards made for comparable injuries in recent cases, the prevailing inflation trends, the severity of the injuries sustained, and the degree of permanent disability, the award of Kshs. 650,000/= could not be deemed inordinately high.

In the premises, the sole issue for determination is whether the award of damages was inordinately high.

**[16]** This being a first appeal, the duty of the first appellant court was well stated in **Selle v Associated Motor Boat Co.**

**[1968] EA 123** where the Court of Appeal stated:

**"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if**

**the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

**[17]** It is undisputed that the claimant sustained the following injuries:

- [a]** a fracture of the left humerus,
- [b]** deep cut wounds on the left lower limb,
- [c]** Dislocation of the left shoulder,
- [d]** Chest contusion, and
- [e]** a cut wound on the face.

**[18]** PW3, Dr. Peter Morebu, testified that the respondent sustained multiple injuries for which she received treatment at Kendu Adventist Hospital and Rachuonyo South Sub-County Hospital. At the time of examination, she complained of pain in the left shoulder. PW3 in the medical report dated 7<sup>th</sup> June 2020 concluded that:

**“Following the RTA Mary sustained grievous harm i.e. left humerous fracture, left shoulder dislocation with some multiple severe body injuries. Recovery is expected to take a very long time. He requires physiotherapy with occupational therapy. the dislocation may complicate later with post traumatic chronic osteoarthritis that is associated with severe pain. She is due for surgery for the fractured bones to be correct with metal implants for proper bone alignment. this will cost her approximately Kshs. 350,000/=. Permanent disability is assessed at 30%.”**

**[19]** The appellant’s submission was that the 30% was inexplicable, yet PW3’s report shows that the assessment of 30% permanent disability indicated that, as a result of the injuries sustained in the road traffic accident, the respondent’s overall physical capacity has been reduced by approximately one-third. The assessment takes into account the severity of the fracture to the left humerus, the dislocation of the left shoulder, and the likelihood of developing post-traumatic chronic osteoarthritis associated with persistent pain and

limited mobility. It also reflects the prolonged recovery period, the need for physiotherapy and occupational therapy, and the anticipated corrective surgery involving metal implants.

**[20]** In essence, the 30% disability represents a significant and lasting impairment that is expected to affect the respondent's ability to perform normal physical functions and engage in her usual activities with full efficiency.

**[21]** The Court of Appeal in **Butt v Khan** [1978] KECA 24 (KLR) held:

**"...An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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..."**

**[22]** Further in **Savana Saw Mills Ltd v George Mwale**

**Mudomo** [2005] KEHC 372 (KLR), the court stated: -

**"...I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless that discretion is exercised on wrong principles of law...."**

**[23]** An appellate court may only interfere with an award of damages if it determines that the trial court acted on wrong principles of law, such as by considering irrelevant factors, failing to consider relevant ones, or thereby arriving at an erroneous assessment of the appropriate damages. The general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal in **Stanley Maore v Geoffrey Mwenda** [2004] eKLR reiterated this principle as follows:

**"...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.”

**[24]** In the present case, it is noted that the respondent sustained a 30% permanent disability, which has been considered in comparison with the authorities cited. The more comparable awards are the two authorities relied on by the respondent. For instance in **Nyang’au v Mekenye & 2 others (supra)** an award of Kshs. 700,000/= was made for bruises on the face, chest contusion, tenderness on the chest, right humerus fracture, right shoulder dislocation, bruises on the right and left lower limbs and blunt trauma to the knee. Similarly, in **Benuel Bosire v Lydia Kemunto Mokora [2019] KEHC 8146 (KLR)**, the court awarded Kshs. 700,000/= in general damages for a fracture of the femur and soft tissue injuries.

**[25]** Having carefully evaluated the cited precedents and the nature of the injuries sustained by the appellant, I find no reason to interfere with the award of Kshs. 650,000/= under the head of general damages. There was no dispute with regard to liability or special damages.

**[26]** The final computation was as follows: -

**[a] Liability- 100%**

**[b] General damages - Kshs. 650,000/=**

**[c] Special damages - Kshs. 5,100/=**

**Total - 655,100/=**

**[27]** In the result, the appeal dated 10<sup>th</sup> November 2023 is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup>  
DAY OF FEBRUARY 2026**

.....

**OLGA SEWE**

**JUDGE**

ORIGINAL