



REPUBLIC OF KENYA



KENYA LAW
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Otundo v Oeri (Civil Appeal E060 of 2024)
[2025] KEHC 2328 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2328 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E060 OF 2024
DKN MAGARE, J
FEBRUARY 27, 2025

BETWEEN

EDNAH NYAKERARIO OTUNDO APPELLANT

AND

ZAKAYO MATUNDURA OERI RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.N. Abuya– Chief Magistrate, dated 31/1/2024, arising from Kisii CMCC No. 414 of 2021.
2. The appeal concerns both liability and quantum. The court below found the Appellant 100% liable for the accident on 11.12.2020 along Kisii-Kilgoris road in the Mwembe area. The court awarded Ksh 400,000/= as general damages and Ksh. 31,110/= as special damages.
3. The Respondent as Plaintiff filed Kisii CMCC No. 414 of 2021 on 8.4.2021 vide a plaint dated 25.1.2021, claiming damages for an accident on 11.12.2020 involving motorcycle Registration No. KMED 655W and motor vehicle Registration No. KBH 457M. The Appellant was the vehicle's owner, while the Respondent was the motorcycle rider.
4. The Respondent set forth particulars of negligence against the Appellant. He pleaded Ksh. 31,950/= as special damages and injuries as follows:
 - a. Fracture of the left femur
 - b. Bruises on the right upper limb
 - c. Bruises on the left upper limb
 - d. Chest contusion
 - e. Bruises on the left knee



- f. Blunt trauma to the back
5. The Memorandum of Appeal raises only two issues, that is: -
 - a. The quantum of damages
 - b. Liability
6. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

Evidence

7. PW1 was Dr. Morebu Peter Momanyi. He relied on his medical report. According to him, the Respondent suffered the following:
 - a. Left femur fracture
 - b. Bruises to the left and right upper limbs and left knee
 - c. Chest contusion
 - d. Blunt trauma to the back
8. He stated that the Respondent was due for surgery to place metal implants at Ksh. 350,000/=, and his disability was 40%. On cross-examination, it was his case that he did not treat the Respondent and had no chance to reexamine him after seeing him on one occasion. He could not tell whether the surgery had been done.
9. PW2 was No. 85663 PC Kenneth Walumbe of Kisii Police Station. He relied on the police abstract. He stated that the investigating officer was away on other duties. The matter was pending investigation. On cross-examination, it was his case that he relied on the abstract from the police and the occurrence book. He did not have the police file. The motorcycle could not be traced at the scene.
10. The Respondent testified as PW3. He relied on his witness statement dated 25.1.2021 and a bundle of documents from the same date, which were produced in evidence. He reiterated the facts set out in the plaint and the pleaded injuries. He blamed the Appellant and stated that the driver was reckless. On cross-examination, he stated that he was heading to Kilgoris, and as a result of the Appellant's recklessness, there was a collision. He suffered a fracture of the left leg and injuries on the chest, back and hands.
11. PW4 was Lawrence Oriki of Christamarriane Hospital. He testified that he did not treat the Respondent, but his colleague did. He produced treatment notes.
12. DW1 was the Appellant. She relied on her witness statement. She stated that she had pulled up on the left side facing Kilgoris from Kisii town. She started joining the main road when the rider came speeding, heading to Kilgoris. She stopped immediately. The motorcycle came and hit the front side and fell down. She was equally a victim of recklessness. She took precautions to avoid the accident. On cross-examination, she stated that the accident occurred when she was joining the main road. She stated that she indicated to the oncoming vehicle before she joined.
13. The Court delivered its judgment on 31.1.2024. The Judgment was as follows:
 - a. Liability 100% for the Respondent
 - b. General damages Kshs. 400,000/=



- c. Special damages Ksh. 31,110/=
- Total Kshs. 431, 110/=

Submissions

14. In her submissions dated 5.12.2024, the Appellant submitted that the Respondent was entirely and solely liable for the accident, and the lower court erred in finding liability to be wholly on the Appellant. On quantum, it was submitted that Kshs. 300,000/= would be sufficient compensation in the circumstances. Reliance was placed inter alia on the case of *Gerald Muhuthia Mwangi vrs John Mburugu & Another (2022) eKLR*.
15. The Respondent filed submissions dated 4.1.2025 and submitted that the Respondent discharged the burden of proof on liability as required under Section 107 of the *Evidence Act*. The Appellant, recklessly and without due care to other road users, joined the main road, hence the accident. Reliance was placed on Section 107 (1) of the *Evidence Act* Cap 80, which provides:

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

16. On quantum, the Respondent submitted that the award by the lower court was commensurate with the injuries suffered and ought not be disturbed. It was submitted that this court should not interfere with the lower court's award simply because it would have arrived at a different figure if it were the one hearing the case. Reliance was placed on the *Catholic Diocese of Kisumu vs Sophia Achieng Tete (2004) eKLR*.

Analysis

17. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.
18. In the case of *Peters vs Sunday Post Limited [1958] EA 424*, the court therein rendered itself as follows:-
- “ It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
19. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123*, this principle was enunciated thus:

“...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...”



20. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

21. The foregoing statement had been ably elucidated by the case of *Butler vs. Butler* Civil Appeal No. 43 of 1983 (1984) KLR, where Keller JA stated the following regarding the award of damages.

“This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders* [1971] EA(CA-K); *Tayab and Ahmed Yakub & Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also *Hancox JA in Tayab* (1983 KLR, 114).

22. Therefore, for the appellate court to interfere with the award, it is not enough to show that the award is high or that if I had handled the case in the subordinate court, I would have awarded a different figure. However, where damages are at large, they must be commensurate with similar injuries.

23. Can the amount of Kshs. 400,000/= be said to be inordinately high? Will substituting it with Kshs. 300,000/= be a proper exercise of discretion.

24. I note that the 1st Respondent suffered a fracture of the femur with multiple soft tissue injuries. The court, in this case, awarded Ksh. 400,000/=. There is nothing to show that the exercise of discretion was improper. In assessing injuries arising from a road traffic accident, consistency in awarding damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”

25. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -



- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
26. I now analyze similar fact cases on quantum. In the case of Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, the court awarded Kshs. 800,000/- for injuries for fracture of the left femur mid-shaft in 2022.
27. In the case of Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR the court enhanced the award to Kshs. 600,000/= for an Appellant who had suffered a fracture of the left femur in 2021.
28. All these authorities show that the Appellant’s proposed award of Kshs. 300,000/= is inordinately low and is declined in the circumstances. I find no basis in the appeal as the award was not inordinately high. The award is actually below the normal range for the injuries suffered. However, there is no cross-appeal.
29. On liability, the Appellant correctly raises the issue of 100% liability awarded by the court. Evidence was tendered by the Respondent who gave viva voce evidence on what transpired. His evidence was that the Appellant did not give a proper look out before entering the main road.
30. The Respondent’s case was also that the Appellant was driving joining the road. She did not stop and give a proper lookout before entering the road. Therefore, that, the Appellant assumed a dangerous risk by entering the road when the motorbike was coming on its left lane.
31. The court notes that the burden of proving negligence lies with the Respondent. The Appellant raised contributory negligence in her defence. I find no evidence presented by the Respondent as to how he could not himself avoid the accident. He did not prove circumstances that could make it difficult to slow down, swerve or stop. Consequently, the defence of contributory negligence was not plausible. I align with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

“In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In *Nance v British Columbia Electric Rly* [1951] AC 601, at page 611, Lord Simon said:

“.....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim the principle



involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.”

32. The Appellant admitted that she indicated to the vehicles and joined. The Appellant was on the high. It was irrelevant whether or not she was speeding, as the road was clear. The Appellant attempted to join and realized her folly. Instead of answering back, she stood, leading to the accident. This was extreme recklessness and negligence. It is a classic case of breach of a duty of care to the neighbour. How do you join the highway when you notice a speeding motorcycle? Whether or not it was speed, which it was not, the speed did not cause the accident.

33. The highway code provides as follows: -

116. When turning, consider the pedestrians crossing the road you are going to enter.

117. If you intend to turn left, signal your intention and approach in the left-hand lane.

118. Left turn should be taken at a low speed (walking pace), take care of cyclists or pedestrians on the left as you turn the corner.

34. From the defence evidence, none of the rules were followed. The Appellant was solely to blame for the accident. The Appellant denied her own negligence but did not set plausible contributory negligence on part of the Respondent. I align with the reasoning of the Court in the case of *Mombasa Maize Millers & another v Elius Kinyua Gicovi* [2021] eKLR where Nyakundi J referred to *Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan*, and held as follows:

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35. There was nothing the Respondent did or could have done to avoid the abrupt emergence of the Appellant from a feeder road. The Respondent was correctly on the main road and could not expect a vehicle to not only emerge but also stop on the road. In the circumstances, there is no basis to interfere with the finding on liability. The appeal on liability is, therefore, dismissed.

36. The next question will be who will pay for the costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any



action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.
37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

38. In the circumstances, the appeal is dismissed with costs of Kshs. 95,000/= to the Respondent.

Determination

39. The upshot of the foregoing is that I make the following orders: -
- a. The appeal is dismissed with costs of Kshs. 95,000/= to the Respondent.
 - b. 30 days stay of execution.
 - c. 14 days right of appeal.
 - d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipyegon for the Appellant

Mr. Omandi for the Respondent

Court Assistant – Jedidah

