



REPUBLIC OF KENYA



KENYA LAW
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**Nyandigisi v Oirere (Civil Appeal E132 of 2023)
[2025] KEHC 3115 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E132 OF 2023
DKN MAGARE, J
FEBRUARY 26, 2025**

BETWEEN

JOSHUA BIKUNDO NYANDIGISI APPELLANT

AND

SAMWEL JUMA OIRERE RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. W. Kugwa
(RM) dated 18th October, 2023 in Kisii CMCC No. E1037 of 2021)*

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. W. Kugwa (RM). The court delivered judgment on 18/10/2023 as follows:
 - a. Liability 100%
 - b. General damages 850,000/=
 - c. Special damages 27,470/=Total - 877,470/=
2. The Appellant was aggrieved and set out the following grounds of appeal:
 - a. That the award of general damages awarded to the Respondent was manifestly and inordinately excessive in the circumstances.
 - b. That the learned trial magistrate erred in law and in fact in holding the Appellant 100% liable or at all.
 - c. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.



- d. The learned trial magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
- e. The learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.

Pleadings

3. The Respondent filed suit on 10/12/2021 for an accident on 5/8/2021 along Kisii-Nyamira road at Top Gas Petrol Station. The Respondent is alleged to have been walking on the verge of Kisii-Nyamira road. The accident involved motor vehicle Reg. No. KBN 311R and the Respondent who was a pedestrian. He is said to have suffered the following injuries:
 - i. Scalp contusion
 - ii. Chest contusion
 - iii. Back contusion
 - iv. Dislocation of the right shoulder
 - v. Fractures of the right tibia/fibula bones

Evidence

4. PW1 testified on 5/10/2022. He was a pedestrian. He produced documents. He stated he still experienced pains in his chest, back, and legs. On cross-examination, he stated that he looked at the rider but not too much.
5. Daniel Nyameino testified that he was a Clinical Officer at Kisii Teaching and Referral Hospital. He examined the Respondent on 16/8/2021 for the accident of 5/8/2021. He had injuries on the hind part of the head, blunt injuries to the chest and back, dislocation of the right shoulder, and fracture of the right tibia and fibula. He stated that he is likely to develop post traumatic arthritis. X-rays showed the injuries.
6. PC Kenneth Walumbe was PW3. He produced an abstract. He stated that an accident occurred at Top Gas Petrol Station at 10.38 hours involving motor vehicle Registration No. KBM 311R. The abstract was filled the following day 6/8/2021. The vehicle hit the pedestrian and took him to Nyanchwa SDA Hospital.
7. DW1 testified and adopted his statement. He stated he was driving on the said date. A pedestrian appeared, staggered and stopped in the middle of the road. As he was swerving to the extreme left, he collided with him. The pedestrian was from the right side of the road, hence the swerve to the left. Cross-examination was mainly conducted on the insurance company. The defence closed its case.
8. The court found the Appellant liable at 100%. He also awarded general damages of Kshs. 850,000/=. The court did not rely on any authority. He awarded special damages of 27,470/=.

Submissions

9. Parties filed submissions which I shall subsume in this appeal. The Appellant submitted that the Respondent did not establish liability of 100% against the Appellant. On quantum, it was submitted that the injuries were not proved and the award on general damages was inordinately high. It was



submitted that Ksh. 350,000/= would be adequate compensation. Reliance was placed inter alia on *Civicon Limited v Richard Omwancha & 2 Other* (2019) eKLR.

10. For the Respondent, it was submitted that the court was accurate in its finding of 100% liability. On quantum, it was submitted that the award of Ksh. 800,000/- was not inordinately excessive. Reliance was placed on *Nyamira HCCA No. E060 of 2021- TB Distributors v Josephat Motuka Ogana*.

Analysis

11. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

12. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

13. 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...”

Special damages

14. A sum of Kshs. 200/= for police abstract, Kshs. 6,500/= for a medical report, service Kshs. 500/= and treatment expenses of Kshs. 20,970/= were pleaded. Special damages must not only be pleaded but specifically proved. In the case of *David Bagine Vs Martin Bundi* [1997] eKLR, the court of appeal stated as follows:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it”



15. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal reiterated that special damages must not only be specifically pleaded but also strictly proved with as much particularity as circumstances permit.
16. In this case, the damages were not only particularized but also specifically proven. The court was correct in awarding Kshs. 27,470/= as special damages. Thus, an appeal on special damages is dismissed.

General damages

17. General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of injuries as held in *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, where Justice D.S. Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

18. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured public must be at the back of the mind of the trial court. In the case of *Butler vs. Butler* Civil Appeal No. 43 of 1983 (1984) KLR, 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).

19. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion, the exercise should be done judiciously in the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.



20. The court of Appeal, pronounced itself succinctly on these principles 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 Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

22. Therefore, for me to interfere with the award it is not enough to show that the award is high or low or that had I handled the case in the subordinate court, I would have awarded a different figure.

23. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. To ascertain whether the award is simply not justified from evidence.

24. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

25. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

26. This court has to consider that the actual injury suffered is the objective part of the assessment in establishing whether the lower court erred in its assessment. In the case of *Kilda Osbourne v George*



Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

27. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 (supra) where it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

28. In the case of *Butler vs. Butler* Civil Appeal No. 43 of 1983 (1984) KLR, 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).

29. The injuries suffered were fractures of the right tibia/fibula and dislocation of the shoulder, back contusion, chest contusion, and scalp contusion. The award of Kshs. 850,000/= was not based on any



precedence. In *Ndwiga & Anor –v- Mukimba L.M. Njuguna* an award of Kshs. 500,000/= was given for similar injuries.

30. Justice J. N. Njagi gave 450,000/= for more serious injuries in *Munene –v- Mbarire*; and D.S. Majanja awarded Kshs. 400,000/= in similar injuries in *Kiama –v- Mutiso* [2020] eKLR. Given the inflation and the degree of permanent disability, I find that the award of Kshs.850,000/= was excessive and amounts to an erroneous estimation of damages. I set aside the award of Kshs. 850,000/= and substitute with a sum of Kshs. 600,000/=.

Liability

31. The burden of proof is on whoever alleges. This is provided for in Sections 107-109 of the [Evidence Act](#) as follows:

“ 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

32. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

33. This was further enunciated in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions* [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot



decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

34. The burden of proof lies on whosoever alleges. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

35. The burden is not on the Plaintiff or the Defendant, it is on the party who alleges. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

36. Both parties gave their version of the story. The court believed that the Respondent stopped in the middle of the road. He, however, shifted the blame for that staggering and confusion to the Appellant. It did not come out that the Appellant was at high speed. The Respondent stated: "I was crossing the road when the accident happened. I did look at the side, but not too much." Ipso facto, this was an admission of recklessly crossing the road. The Appellant attempted and swerved.

37. However, it appears he was equally to blame for being on a high speed. It was not so high as not to control the vehicle. I find both parties equally to blame. I, therefore, set aside the award of 100% liability and substitute with 50:50 liability.

Costs

38. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has 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– those 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.

39. The Appellant is partially successful. They shall have costs of Kshs. 45,000/=.

Determination

40. The upshot of the foregoing is that I make the following orders: -

- a. I set aside the finding of 100% liability. In lieu thereof, I enter liability at 50:50.
- b. I set aside the award of Kshs. 850,000/= and substitute with a sum of Kshs. 600,000/= subject to contribution.
- c. Special damages Kshs. 27,470/=. Special damages shall attract interest from the filing date and are not subject to contribution.
- d. General damages attract interest from 18/10/2023, the date of Judgment in the lower court.
- e. The Appellant shall have costs of Kshs. 45,000/= for the appeal.
- f. The Respondent shall have the costs of the suit in the lower court.
- g. 30 days stay of execution.
- h. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipyegon for the Appellant

Mr. Nasongo for the Respondent

Court Assistant – Michael

