



REPUBLIC OF KENYA



**Obure v Arati (Civil Appeal E108 of 2024)
[2025] KEHC 1058 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E108 OF 2024
DKN MAGARE, J
FEBRUARY 26, 2025**

BETWEEN

ISAAC OUNDU OBURE APPELLANT

AND

HARON GETUI ARATI RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.M. Moguche (RM) dated 29.5.2024 arising from Etago PMCC No. E086 of 2023. The Appellant who was Defendant in the lower court entered appearance and filed defence denying the averments in the Plaintiff.
2. The appeal is on quantum only. The Memorandum of Appeal dated 19.6.2024 seeks to set aside the lower court's award of general damages.

Pleadings

3. The Plaintiff pleaded Ksh. 78,100/= as special damages and injuries as follows: -
 - a. Scalp lacerations
 - b. Lacerations on the upper mouth lip
 - c. Abrasions on the right forearm
 - d. Compound bimalleolar fractures on the right ankle joint
 - e. Degloving injury to the right ankle joint.
4. It is unnecessary to go into the pleadings regarding liability as the appeal is on quantum. The only rider is that this appeal arises from an accident on 18.3.2021 at Tendere area along Kisii-Kilgoris road. It involved motor cycle registration number KMF 360H.



Evidence

5. The Plaintiff testified and relied on his witness statement and bundle of documents both dated 29.7.2024 which he produced in evidence. It was his case that he suffered the injuries as pleaded in the plaint and proved by the medical report. He testified that he had not healed and prayed for damages.
6. Both parties then closed their respective cases. The court delivered its judgment on 12/4/2022. The judgment was as follows:-
 - a. Liability 100% in favor of the Plaintiff
 - b. General damages Ksh. 1,200,000/=
 - c. Special damages Ksh. 47,830/=Total Ksh. 1,247,830/=

Submissions

7. On the quantum of damages, the Appellant submitted that Ksh. 250,000/= would be adequate compensation to the Respondent. He cited a number of authorities. I have seen them and noted that all relate to soft tissue injuries without a fracture as is the case in this case. Parties have to be realistic in similar fact cases.
8. On the part of the Respondent, it was submitted that Kshs. 1,500,000/= was adequate compensation. Reliance was placed on Nyamira HCCA No. E060 of 2021 – TB Distributors v Josephat Motuka Ogana where it was submitted Kshs. 1,000,000/- was awarded for similar injuries and Kisii HCCA No. 39 of 2021- Wilfrida Nyakundi v BOM Mukuyu Sec School where it was submitted Kshs. 800,000/- was awarded for similar injuries.

Analysis

9. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“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 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 demeanour of a witness is inconsistent with the evidence in the case generally.”



10. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of *Kenya Bus Services Limited v Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

11. This appeal being on quantum only, the principles guiding this court as the first appellate court have crystallized. This is in recognition that the award of damages is discretionary. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a “Meru Express Services [1976]” & another v Lubia & another (No 2) [1985]* eKLR as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.

12. The foregoing statement had been ably elucidated by Sir. Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v 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.’

We find the words of Lord Denning in *West (H) & Son Ltd (1964) A.C. 326* at page 341 on excessive awards on damages important to replicate herein thus:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

13. The words of Lord Denning were reiterated by Nyarangi, JA. in *Kigaragari v Aya* [1985] eKLR thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed



on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

14. 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 Bamed 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.”

15. 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.....”

16. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.
17. The lower court in this case awarded Kshs. 1,200,000/- in general damages. The Plaintiff suffered the following injuries:
- a. Scalp lacerations
 - b. Lacerations on the upper mouth lip
 - c. Abrasions on the right forearm
 - d. Compound bimalleolar fractures on the right ankle joint
 - e. Degloving injury to the right ankle joint.
18. The injuries were supported by the medical report of Dr. Daniel Amayio Nyameino dated 18.3.2021 and produced in evidence, albeit without calling the author. The medical report confirmed the injuries as pleaded and assessed permanent disability at 5%. The Appellant on the other hand did not file any medical report to challenge the report filed by the Respondent. I therefore find no basis to doubt the medical report relied upon by the Respondent.



19. Comparable injuries should attract comparable awards for consistency in judicial awards. In the case of *Easy Coach Limited v Emily Nyangasi* [2017] eKLR the court opined that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (*Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others* [2004] eKLR).
20. I have already dismissed the cases relied on by the Appellant as they do not depict the actual injuries the Respondent suffered. They are not similar fact cases on the injuries. The Respondent, on the other hand, relied on *Nyamira HCCA No. E060 of 2021* and *Kisii HCCA No. 39 of 2021*. The injuries in *HCCA No. E060 of 2021* (supra) are dissimilar to this case as the Plaintiff therein suffered fractured 3rd and 4th ribs and tibia and fibula, among other soft tissue injuries. The case of *Kisii HCCA No. 39 of 2021* (supra) also does not present similar injuries as the injuries involved a fractured pelvis, and I dismiss it.
21. The lower court applied *Ben Mwita Matinde v Salina Kosgey* (2020) eKLR, in which the plaintiff suffered a fractured humerus distal third and fractured tibia near the ankle joint and was awarded Kshs. 1,000,000/-. This was in error as the injuries are quite unrelated and dissimilar.
22. In the case of *Mwangi v Siloma* [*☞ another \(Civil Appeal E102 of 2022\)*](#) [2023] KEHC 26140 (KLR) (27 November 2023) (Interim Judgment), the High Court enhanced an award by the lower court of Ksh. 800,000/= to Ksh. 1,200,000/= for the plaintiff who suffered the fracture of the distal end of the right tibia and fibula, fracture of left lateral malleolus of the left ankle joint, fracture left medial malleolus of the left ankle joint, blunt injury to the lower back leading to soft tissue injuries, blunt injury to the left hand leading to post-traumatic radial nerve palsy, fracture proximal end of the left humerus, soft tissue injury of the right leg and soft tissue injuries of the left ankle joint.
23. The above authority, *Mwangi v Siloma* (supra), presents comparable but more severe injuries and so suggests that the award of Ksh. 1,200,000/= herein was inordinately high. In the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR the court upon considering injuries in the nature of fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain in the injured areas, with a permanent incapacity of 18%, awarded the sum of Kshs.600,000/= on appeal. Notably, the degree of permanent incapacity in was so far higher than the 5% assessed in this case.
24. In the case of *DG (Minor suing through her next friend MOR) v Richard Otieno Onyisi* [2021] eKLR, the court awarded general damages in the sum of Kshs.400,000/= for a left tibia fracture, bruises on the left foot, and bruises on the left leg, with no assessment being made on permanent incapacity.
25. Given inflation, degloving injury, and 5% permanent disability, an award of Kshs. 700,000/- would be adequate compensation in general damages for the Respondent herein, who suffered a compound right ankle joint bimalleolar fracture and multiple soft tissue injuries with 5% disability.
26. The Appellant did not challenge the special damages awarded by the court, and they will remain undisturbed. 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.

27. 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.”

28. The Appellant is successful. In the circumstances, I award the Appellant costs of Ksh. 45,000/-.

Determination

29. In the upshot, I make the following orders:-

- a. The award on general damages is set aside and substituted with Kshs. 700,000/=.
- b. The Appellant shall have costs of the appeal of Kshs 45, 000/=.
- c. 30 days stay of execution.
- d. 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. Nyongesa for Makora for the Appellant

Mr. Nasongo for the Respondent

Court Assistant - Michael

M. D. KIZITO, J.

