



**Otswongo & another v Ludenyo (Civil Appeal E003 of 2023)
[2025] KEHC 7014 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CIVIL APPEAL E003 OF 2023**

**RB NGETICH, J
MAY 29, 2025**

BETWEEN

FREDRICK OTSWONGO 1ST APPELLANT

PATRICK MAKONGO MAVUNYUNGO 2ND APPELLANT

AND

JOSEPH LUDENYO RESPONDENT

JUDGMENT

1. The Respondent who was the plaintiff in the trial court filed suit vide amended plaint dated 16th August 2021 seeking general and special damages for injuries he sustained on 17th April, 2015 while travelling in the 1st Appellants/Defendant's motor vehicle registration number KBZ 694 Z which lost control and veered off the road.
2. By judgment delivered on 27th July, 2023, the Appellants/Defendants were held 100% liable for the accident and Respondent/Plaintiff awarded General damages of Kshs. 450,000/=, special damages of Kshs. 41,000/= and future medical expenses of Kshs 20,000/= making total award Kshs 474,100/= plus costs and interest.
3. Being aggrieved and dissatisfied by the decision of the trial court, the Appellants filed Memorandum appeal dated 22nd August, 2023 on the following grounds: -
 - i. Whether the learned trial magistrate applied the correct principles of law and available facts in finding the appellants 100% liable.
 - ii. Whether the learned trial magistrate applied the correct principles of law and available facts in assessment of damages payable to the Respondent.



- iii. Whether the learned trial magistrate's determination on the amount payable to the Respondent was inordinately high as to present an entirely erroneous estimate of compensation to which the Respondent was entitled.
4. The court directed that the Appeal be canvassed by way of written submissions.

Appellant's Submissions

5. The appellant submitted on quantum and listed the following as injuries sustained by the Respondent/Plaintiff.
 1. Fracture of ribs
 2. Subcutaneous emphysema.
 3. Right pneumothorax
 4. Recurrent chest pains.
 5. Surgical scar on the right upper axillary.
6. The Appellant urged this court to re-evaluate quantum as the Plaintiff suffered injuries that were properly managed and have since healed. The Appellant submits that it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise but the discretion must be exercised judicially, with wise circumspect and upon legal principles and award can be disturbed if the trial court took into account an irrelevant factor or Left out of account a relevant factor or, short of the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
7. That it is also trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards and relied on the case of *Kigaraari v Aya (1982-88) 1 KAR 768*, as quoted by Kamau J in *Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR*.
8. The Appellants urge this Court to disturb the award of Kshs. 450,000/- in general damages as the same is inordinately high on the ground that both doctors confirmed that the Plaintiff suffered injuries which have healed and propose an award of Kshs. 250, 000/= as reasonable compensation for injuries sustained by the plaintiff. The Appellant urged this court to be guided by the case of *Bolpak Trading Co Ltd & another v Gilbert Onyango Odie [2022] eKLR* where the claimant sustained 7th right rib fracture, 8th right rib fracture, chest contusion, bruises on the face, blunt trauma to the lower back, right knee and left hand and was awarded Kshs. 250,000; and the case of *Morris Miriti v Nahashon Muriuki & another [2018] eKLR* where the plaintiff sustained tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilatera haemophreino thorax, left lung contusion and fracture of the right scapula and was awarded Kshs 300,000/-for general damages.
9. The appellant submit that they cited the above authorities in the trial court and proposed an award of Kshs. 300, 000/= and in light of the passage of time and inflationary trends prevailing in the country, they propose a maximum award of Kshs. 300,000 and pray for costs of this Appeal as per Section 27(1) of the [*Civil Procedure Act*](#).



Respondent's Submissions

10. The Respondents submits that Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that 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.
11. The Appellant submits that in the trial court, he testified that on 17th April 2015, he was as a passenger in motor vehicle registration number KBZ 694Z when it lost control and overturned occasioning him severe body injuries and that the vehicle was driven carelessly and recklessly that it rammed into third party motor vehicle causing the accident.
12. The Respondent submit that the appellant did not call any witness to controvert his evidence and urged this court to be persuaded by the reasoning of Justice G.V. Odunga in *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR on the consequences of a party failing to call evidence and the case of *Motex Knitwear Mills Limited Milimani HCC 834/2002* where Honourable Lessit J citing *Autar Singh Bahra & Another v RajuGovindji HCC 548of 1998* stated as follows:-

“ Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail....” Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”
13. And submit that the Respondent he could not be blamed for failure to control the vehicle and the trial court was right in holding the appellant 100% liable for the accident.
14. On assessment of damages, the Respondent submit that it is not in dispute that he suffered bodily injuries as particularized in the Respondent's pleadings and corroborated by the medical report by Dr. Cyprianus Okoth Okere dated 1st July 2019. The Respondent suffered Fracture of ribs, Subcutaneous emphysema, Right pneumothorax, Recurrent chest pains and Surgical scars on right upper axillary.
15. That in his testimony before trial court, the Respondent confirmed that indeed she sustained injuries to her shoulder and recurrent pains and in written submissions before the trial court, it was the Respondent prayer that an award of Kshs. 1,800,000/= was reasonable and sufficient to compensate her and relied on the case of *A.M (minor suing through next friend M.A.M) v Mohamud Kaliye* 2014 Civil Case 2019 of 2010, where the claimant suffered fractured ribs on the left side, extensive friction burns on the chest and abdominal injuries and the high court awarded of Kshs.800,000 but the learned trial magistrate upon considering the cited injuries and authorities cited found award of Kshs. 450,000/- as reasonable and appropriate
16. Counsel submits that the assessment by the trial magistrate applied the correct principals of law and available facts and the decision was not based on the wrong fact nor too high to warrant interference. The Respondent urged this court to be persuaded by determination in the case of *Peter Namu Njeru v Philemone Mwangoti* [2016] eKLR, Civil Appeal 132 of 2012 and dismiss the Appellants' appeal with costs as the same is unsustainable and devoid of merit and uphold the learned trial magistrate's decision as the same remains considerate, reasonable and just in the circumstances.



Analysis And Determination

17. This being a first appeal, this court is under a duty to 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 demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court was stated in the case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the court stated as follows:-

“.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

18. In view of the above, I have perused and considered evidence adduced before the trial court, grounds of this appeal and submissions filed herein. In respect to liability, the Respondent was a passenger in the 1st Respondent’s vehicle and could not have therefore contributed to negligence. That aside, the appellant did not submit on Liability. What I consider to be in issue is whether the award of general damages of Kshs. Kshs.450,000/= was excessively high so as to arrive at a decision that the assessment was based on wrong principles.

19. As provided by Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya 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. From the plaint particulars of injuries sustained by the plaintiff are as set out hereunder: -

1. Fracture of ribs
2. Subcutaneous emphysema.
3. Right pneumothorax
4. Recurrent chest pains.
5. Surgical scar on the right upper axillary.

20. It is trite law that assessment of damages is a matter of discretion and an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. In the case of *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja v *Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal stated as follows:-

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt v Khan* [1981] KLR 349)



21. Similarly, in *Jane Chelagat Bor v Andrew Otieno Oduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, it was held: -

“...In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency...”

22. In *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR, the principles to be considered when awarded general damages were reiterated by the Court of Appeal thus:

- a. each case depends on its own facts;
- b. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politic);
- c. comparable injuries should attract comparable awards;
- d. inflation should be taken into account; and
- e. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

23. Further as was pointed out by Chesoni Ag. JA (as he then was) in *Mariga v Musila* [1982 – 88] KAR 507:-

“No two cases of motor accidents are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason, past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities.”

24. In view of the above, I have compared the Respondents injuries with injuries suffered by claimants in the cited authorities and upon taking into consideration relevant factors including the inflationary trends now obtaining, I am of the considered view that the award of Kshs. 450,000/= to the Respondent was reasonable in the circumstances. I therefore find that there is no sufficient reason to interfere with assessment of damages by the trial court. I proceed to find this appeal unmerited and dismiss with costs to the Respondents.

25. Final Orders: -

1. This appeal is dismissed.
2. Costs to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 29TH DAY OF MAY 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Ms. Mwira holding brief for Mr. Kingori for Appellants.

Mr. Avumi for Respondent.

Elvis/Momanyi – Court Assistants.

