



REPUBLIC OF KENYA



**Osida & another v Ondiek (Civil Appeal E036 of 2021)
[2024] KEHC 7280 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 7280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E036 OF 2021
MS SHARIFF, J
APRIL 30, 2024**

BETWEEN

BARACK OKELLO OSIDA & ANOR APPELLANT

AND

DAVID MADANJI ONDIEK RESPONDENT

*(Being an appeal from the judgement and decree of Hon R.K Sang (P.M)
in Nyando PMCC No. 260 of 2019 delivered on 30Th March, 2021)*

JUDGMENT

A. Case background

1. David Madanji Odiek instituted this suit at the subordinate court claiming damages for tortious negligence after he suffered bodily injuries on 4th August 2018 when the appellants' motor vehicle registration No KCG638 F a Faw Tipper lost control and ran him over whilst he was standing beside the road at Awasi stage. He attributed the accident to the 1st appellant's negligence and thus pleaded vicarious liability on the part of the 2nd appellant.
2. Whereas the appellants filed their statement of defence denying the claim the issue of liability was eventually settled amicably by an apportionment of contributory negligence at 10% against the respondent and 90% against the Appellants.
3. The trial court then proceeded to deliver judgment on quantum by awarding the respondent a sum off Kshs.450,000 on account of general damages and Ksh,360 for special damages. The quantum was subject to 10% contributory negligence.



B. Appeal

4. The appellants were aggrieved by the award on quantum and thus preferred this appeal which they premise on the following grounds:
 - a. The learned trial magistrate erred in law and in fact in awarding inordinately high and excessive general damages for injuries suffered which were mainly soft tissue with no permanent disability expected and had completely healed.
 - b. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice on award of damages.
 - c. The learned trial magistrate grossly misdirected himself in treating the evidence and submission on quantum together with the relevant authority before him superficially and relied entirely on the submissions and authorities cited by the respondent which were excessive in the circumstances, consequently coming to a wrong conclusion on the award of damages.
 - d. The learned trial magistrate proceeded on the wrong principles when assessing the damages to be awarded without considering the nature and extent of the injuries sustained, which were mainly soft tissue injuries.
 - e. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high and excessive.

C. Submissions

5. The appeal was disposed of by way of written submissions and both parties complied.
6. The appellant in support of the argument that the sum awarded in damages for pain and suffering was high relied on the decisions in *Edward Mutevu Maithya & Anor Vs Edwin Nyamweya* (2022)eKLR, *Ngungu Dennis Vs Ann Wangari Ndirangu & Anor* (2018) eKLR, and *Eva Karemi & Others Vs Koskei Kieng & Anor* (2020) eKLR, where the claimants had suffered soft tissue injuries and awards were made ranging from 65,000 to 100,000.
7. The appellants propose that the award on general damages be varied downwards to Kshs.100,000.
8. The appellants have also cited the case of *Kenya Power & Lighting Company Limited & Another Vs Zakayo Saitoti Naingola* (2008) eKLR, wherein the court set out the principles for assessment of general damages thus;
 - a. Damages should not be inordinately too high or too low.
 - b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenya Shillings, then at the time of judgment.
9. *Kenya Sugar Co. Ltd Vs Zebedayo Kivati Salamba* (2013) eKLR and proposed the sum of Kshs.100,000/-.



10. The respondent in support of the award cited *Kenya Power & Lighting Co. Ltd Vs Emmanuel Shapil Ndege & another (NCKK)* (2019) eKLR

Analysis and determination.

11. In a first appeal, the duty of the court was stated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect”

12. The issues raised in this appeal are of assessment of damages in a personal injury claim and more specifically damages awarded under the head of pain and suffering. It is a settled principle through case law that assessment of damages for personal injuries is a discretionary exercise which takes into account precedent and the injuries sustained. In *OMN (Minor Suing Through Next Friend EMW v Jasper Nchonga Magari & another)* [2021] eKLR, Nyakundi J expressed himself thus;

When examining the way in which the Courts interpret and apply the legal rules developed over time on assessment of damages, it is clear that there is no uniformity or consistency. Unfortunately, the decisions on assessment of damages remain in the realm of discretion. However, notwithstanding that dilemma, in so far as the exercise of discretion is concerned there are clear principles underpinning the assessment of damages

13. The learned judge in that case quoted from Wooding CJ in *Cornilliac V St Louis*(1965) 7 W.L.R 491 where it had been held;

.....to place certainty as far as this aspect of assessment of damages is concerned. The account is on the following;-

- a) The nature and extent of the injuries sustained
 - b) The nature and gravity of the resulting physical disability
 - c) The pain and suffering hence had to be endured
 - d) The loss of amenities suffered
 - e) And the extent to which consequentially the claimant’s pecuniary prospects have been materially affected. (See also *H. West & Son Ltd v Shephard*(1964)AC 326).
14. The respondent in this case produced a medical report by Dr. Mwiti where the following injuries are noted;

Right upper limb and hand;

Forearm and arm posteriorly -2nd degree burns

Dorsal aspect-2nd degree burns

Total body surface area is indicated as 9%

Trunk



Right side anteriorly-2nd degree burns

Total body surface area is 4 ½ %

Back

Right posterior-2nd degree burns

Total body surface area is 4 ½ %

Lower limbs

Legs and thigh-2nd degree burns

Total body surface area is 18%

15. The duty of this court then is to determine whether the amount of Kshs 3,000,000/- awarded in the circumstances was excessive. The circumstances under which an appellate court can interfere with such an award was discussed in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini V A. M. Lubia and Olive Lubia* [1982-88] 1 KAR 727 at p. 730 Kneller J.A said;-

“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, this amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.

16. The rationale for awarding pains for pain and suffering was stated in McGregor on damages (15th Edition)(1988) para 1517 as cited by Nyakundi J in *OMN (Minor Suing Through Next Friend EMW* (supra) that;

“on the expression pain and suffering is now a term of art so far as they can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequence upon it. It thus includes the pain caused by any medical treatment which the plaintiff might have to undergo. Suffering on the other hand denotes the mental or emotional distress which the plaintiff may feel as a consequence of the injury, anxiety, worry, fear, embarrassment and the like”.

17. In the instant case, the fact of the accident is not in dispute and the issue then is whether to disturb the award or affirm it. It is crucial to examine previous case to ascertain the awards in comparable injuries.
18. I have considered the authority in *Africa Spirits Limited v Stephen Gachuki Njuguna* [2021] eKLR where the respondent sustained deep burns on the forehead, upper and lower limb, trunk and abdomen. Classified as second-degree burns. The court awarded Kshs. 1 million in 2021.
19. Looking at the authorities cited by the appellant, it is clear that the award therein is extremely low. The respondent's of course is on the higher side considering that disability in the case was assessed at 65% which is not the case here.
20. In the circumstances, I set aside the trial magistrate's award on general damages for pain and suffering and thereby substitute therewith a sum of Kshs.1,500,000/-. The award on special damages remains undisturbed.
21. Each party shall bear its own costs of the appeal.



DELIVERED, DATED AND SIGNED AT KISUMU THIS 30TH DAY OF APRIL, 2024.

M. S. SHARIFF

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

