



**Ongwama v Afuodi (Civil Appeal E012 of 2021)
[2023] KEHC 20227 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E012 OF 2021
DO OGEMBO, J
JULY 12, 2023**

BETWEEN

GEOFFREY ONGWAMA APPELLANT

AND

YVONNE JOYCE AWINO AFUODI RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. Lester Simiyu (PM) delivered on 23-03-2022 in Siaya CMCC No. 112 of 2017)

JUDGMENT

1. The Respondent herein Yvonne Joyce Awino Afuodi, sued the appellant herein before the lower court seeking both General and Special damages. The lower court found in favor of the Respondent and entered judgment in the following terms: -
 - i. Liability as agreed apportionment at 10% : 90% against the Defendant.
 - ii. General damages - Kshs 250,000/=.
 - iii. Less contribution - Kshs 25,000/=.
 - iv. Net award - Kshs 225,000/=.
 - v. Costs of the cause and interests at court rates.
 - vi. There be a stay of 30 days.
2. The appellant, aggrieved of the said judgment, has appealed to this court on the quantum of damages as awarded. In the Memorandum of appeal filed on November 10, 2022, the appellant has raised upto 8 grounds of appeal as follows:



1. That the trial magistrate erred in law and in fact by awarding General damages for the alleged injuries sustained despite there being no treatment notes to prove them.
 2. That the trial magistrate erred in law and in fact by relying on the police abstract and P3 as a basis of the Respondent's injuries despite the P3 being dated 9 days after the occurrence of the accident.
 3. That the learned trial magistrate erred in law and in fact in the assessment of quantum by awarding Kshs 250,000/= for General damages, an award which was excessive and erroneous estimate of the damages awardable.
 4. That the learned trial magistrate erred in law and in fact in assessment of quantum by awarding Kshs 250,000/= for General damages, an award which was not supported by evidence on record.
 5. That the learned trial magistrate erred in fact and in law in failing to consider the Defendant's submissions and authorities supplied on the issue of quantum.
 6. That the learned trial magistrate erred in fact and in law in failing to consider the evidence that was tendered on quantum during the hearing of the suit.
 7. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the Defendant's submissions that were guiding in the amount of the quantum that is appropriate and applicable in similar cases as the case was deciding.
 8. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
3. The Appellant has urged this court set aside the learned trial magistrate's judgment on quantum and replace same with its own assessment and the costs of this appeal and that at the lower court be provided for.
 4. The Respondent opposes this appeal. Parties canvassed this appeal by way of written submissions pursuant to a consent order recorded by the court on May 8, 2023. From the appellant's side, it was submitted that the Respondent, as proof of injuries, produced a receipt of treatment from Sagam Hospital dated July 2, 2016, X-ray Report dated July 4, 2016 and also a P3 form dated July 12, 2016.
 5. Counsel relied on the case of *Daniel Odhiambo Ngesa vs Daniel Otieno Owino and Another* [2020] eKLR quoting *Caroline Waithira Kago vs Stephen Muiruri Njau & Another* [2016] eKLR, that a P3 form, duly filled is a medical report.
 6. Further, it was submitted that no outpatient register was produced to show the injuries complained about nor that same were as a result of the said accident (*Daniel Odhiambo Ngesa vs Daniel Otieno Owino and Another* [2020] eKLR). It was therefore submitted that the injuries by the Respondent were not as a result of the road traffic accident and the Respondent's also ought to be dismissed for non-injury.
 7. In the alternative, it was submitted that should the court find in favour of the Respondent, then the court should be guided by the case of *Lesagi Insurance Brokers Ltd and Another vs Joseph Josephat Achesa Chumbali* [2022] eKLR, in which an award of Kshs 300,000/= was substituted with one of Kshs 95,000/= for soft tissue injuries. Counsel urged that an award of Kshs 95,000/= would be sufficient to compensate the Respondent.



8. The court was otherwise urged to find that the injuries pleaded were not proved and that the court should set aside the award on quantum and allow this appeal with costs.
9. The Respondent filed their submissions on June 13, 2023. In the same, it was submitted that based on *Butt vs Khan* (1977)KARI, this court can only interfere with an award of damages, if;
 - i. The trial court took into account irrelevant factors or left out relevant factors when assessing damages; or
 - ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.
10. On the jurisdiction of this court, counsel relied on *Selle vs Associated Motor Boat Co* (1968) EA, that;

“this court must reconsider the evidence, evaluate it and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make the allowance in this respect.”
11. That the trial court herein took in account all relevant factors being the pleadings, evidence on record in terms of treatment documents and that the case was proved on a balance of probabilities. That the evidence of the Respondent (pages 148-151) was that she suffered the following bodily injuries:-

 - a. Chest pain
 - b. Injury on ribs
 - c. Pain and swelling on left knee
 - d. Cut wound on left knee
 - e. Headache

12. And that PW2, a clinical officer produced the medical documents including the patient's receipt, X-ray report and P3 form as exhibits. It was submitted that the appellant never raised the issue of lack of treatment notes, nor produce its own independent medical report. Counsel relied on several authorities including:
 - i. *Erick Juma & 2 Others vs Fredrick Gacheru & Another* [2016]eKLR, that it is true treatment notes are part of the evidence of involvement in an accident and injury, but that the argument that without treatment notes, involvement in an accident or injury cannot be proved is rejected.
 - ii. *Mwanzai Mwakitu vs Chandaria Industries Ltd* (2015), that absence of treatment notes was not fatal to the appellant's case. See also *James Mbaru Njoki -vs- Richard Kipkorir Langat* [2020] eKLR.
13. On quantum, the Respondent relied on the case of *Leah Nyaguthi Kamunya vs KBC*, NAI HCCC 1128 of 1993, in which a sum of Kshs 200,000/= was awarded for similar injuries in June 2009. And also *Eldoret Express Ltd and 2 Others vs Ann Khisa & Another*, Bungoma HCCC 13 of 2015, in which a similar amount was awarded in October 2018 for comparable injuries.
14. It was opined that in this case an award of Kshs 250,000/= less the 10% contribution, making a net award of Kshs 225,000/= awarded as general damages is reasonable. The Respondent has urged that this appeal be dismissed with costs.



15. I have considered the submissions made by the 2 parties and the authorities relied on and cited by the parties. It is clear from the submissions of the parties that the issue of liability was settled by consent of the parties at 10:90 in favour of the Respondent. The issue therefore for determination in this appeal is one of quantum of damages. And the appellant has raised this issue on 2 limbs that;
- i. That the Respondent did not sufficiently prove the injuries suffered, nor that the said injuries were sustained in the road traffic accident.
 - ii. That in any case, the award of the lower court was excessive.
16. On the 1st issue of proof of the injuries, it is worth noting that the parties duly recorded consent on liability. The import of this that there is no doubt that the Respondent was indeed involved in the road traffic accident as alleged. By entering the said consent, the appellant must therefore be taken to have acknowledged and admitted the fact that the Respondent was indeed involved in the road traffic accident. The appellant can therefore not be heard to deny the involvement of the respondent in the accident.
17. The appellant has made strong submissions that the Respondent failed to prove the injuries, if any, suffered as a result of the said accident. That the Respondent never produced any treatment notes nor any medical report. This has been admitted by the Respondent side, raising the issue of whether failure to produce the treatment notes would be fatal to the case of the Respondent.
18. The record of proceedings clearly show that the plaintiff (Respondent herein), produced a P3 form, and X-ray report as proof that he was injured. In my view, these are *prima facie* proof that indeed the Respondent was injured in the said accident. And that treatment notes would only further prove the fact of injury. The Respondent has referred this court to several authorities already discussed above concluding, *Erick Juma & 2 Others vs Fredrick Gacheru & Another* [2016]eKLR, *Mwanzani Mwakitu vs Chandaria Industries Ltd* (2015) and *James Mburi Njoki vs Richard Kipkorir Langat* [2020]eKLR, all of which are in agreement that whereas treatment notes are part of the evidence of involvement in the accident, and injury, the failure to produce the same or their absence is not fatal to the case of the claimant. I am persuaded and share the same view. That the failure to produce the treatment notes by the Respondent as prove of the accident and injury suffered cannot make case of the Respondent (claimant) fail in view of the other documentary proof produced including the P3 form and the X-ray report.
19. On the 2nd ground herein on the quantum, it is settled that an appellate court would not disturb an award of general damages unless it is so inordinately high or as to represent an entirely erroneous estimate. And that the appellant must also show 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. (See *Bashir Ahmed Butt vs Uwais Ahmed Khan*, quoted by the Respondent).
20. In this case, the Respondent pleaded the injuries suffered as follows:
1. Chest pain
 2. Injury on the ribs
 3. pain and swelling on left knee
 4. Cut wound on left knee
 5. Headache



These were basically soft tissue injuries. The appellant has referred this court to the case of Lusagi Insurance Brokers Ltd and Another vs Joseph Josephat Achesa [2022]eKLR on the issue of quantum and urged for an award of Kshs 95,000/=. I have considered the said authority. In the same, the only injury suffered was a cut wound (location not stated). Obviously, the injuries therein have little resemblance with those in our instance case.

21. I find the authorities cited by the Respondent, i.e. Leah Nyaguthi Kwamunya vs KBC, and Eldoret Express Ltd & 2 Others vs Ann Khisa & Another, as discussed above, similar in terms of injuries therein to our instance case. In both cases, the awards were given of Kshs 200,000/= in 2009 and 2018 respectively. Taking into account inflationary trends, I find the sum awarded by the trial court herein of Kshs 250,000 on 100% basis reasonable.
22. Suffice it to say that the appellant has not shown any proof that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect, nor that the aggrieved quantum awarded was inordinately high.
23. On a balance of probabilities, I am not convinced that this appeal of the appellant has any merits. I dismiss the same with costs to the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF JULY, 2023

D.O. OGEMBO

JUDGE

12.7.2023

Court:

Judgment read out in Open Court in the presence of Mr. Nyangweso holding brief for Mr. Okoth for Respondent and Ms. Ogato for Appellant.

D.O. OGEMBO

JUDGE

12.7.2023

Mr. Ogato:

We ask for 30 days stay.

Mr. Nyangweso:

We do not object.

We pray for copy of Judgment.

Court:

It is hereby ordered 30 days stay of this judgment and certified copies to be supplied to parties upon payment of requisite fees.

D.O. OGEMBO

JUDGE

12.7.2023

