



Case Number:	Civil Appeal 543 of 2008
Date Delivered:	20 Dec 2011
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Mary Atieno Ang'awa
Citation:	KENNEDY OKONGO ODHIAMBO v JAMES KARIUKI [2011] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 543 OF 2008**

**KENNEDY OKONGO ODHIAMBO.....**  
**APPELLANT/ ORIGINAL DEFENDANT**

**VERSUS**

**JAMES KARIUKI ..... RESPONDENT/**  
**ORIGINAL PLAINTIFF**

*(Being an appeal from the Judgment of Hon. A. Muchelule Esq, Chief Magistrate on  
15<sup>th</sup> September 2008 in Civil Case No. 1417 of 2007 at Milimani Commercial Courts at Nairobi)*

**J U D G M E N T**

**I. INTRODUCTION**

1. This appeal arises out of TORT. It is a running down matter whereby James Kariuki, the original plaintiff/respondent (herein referred to as the respondent) was cycling along the Komarock road when a lorry went onto a pavement that he was cycling on and ran him down.

2. That lorry was identified as motor vehicle lorry registration No.KAU 797S that was in the control of Kennedy Okongo Odhiambo (herein referred as the appellant.)

3. The respondent sustained injuries as a result of the accident. This was pleaded as:

- a) **Fracture of the right hip.**
- b) **Dislocation of the right hip joint.**
- c) **Fracture of the right mandible**
- d) **Loss of teeth**

4. The evidence of both the plaintiff respondent and the defendant appellant was heard together with their witness.

5. The trial magistrate came to the conclusion that the said appellant was vicariously liable for the accident at 100%.

6. The quantum was awarded as follows:

General damages

Pain and suffering                      Ksh. 1,200,000/-

Special damages

- a) Copy of record                      Ksh.     500/-
- b) Medical report                      Ksh.     2000/-
- c) Fracture medical expenses      Ksh. 20,000/-

Total    Ksh 1,222,500/-

7. Being dissatisfied with this award, the original defendant appellant filed this appeal to the High Court.

## II APPEAL

8. The memorandum of appeal outlined that the Hon. Magistrate erred in fact and law:

**8.1 ... by arriving at a decision that was wholly against the weight of evidence.**

**8.2 ... by finding the appellant liable for the accident when he was not the driver.**

**8.3 ... the plaintiff/respondent failed to prove negligence.**

**8.4 ... award of Ksh. 1.2 million was excessive.**

9. The appellant submitted that the appeal be allowed. The subordinate court case be dismissed.

10. He further stated that the award was excessive and should not be permitted.

11. In reply the respondent stated that the appellant was wholly liable for the accident. That the evidence before court was sufficiently proved to show that the accident occurred.

12. The assessment of damages was a matter of discretion of court.

## III OPINION

13. On looking at the evidence before court, the Hon. Magistrate was correct in reaching his verdict that the appellant defendant is liable for the said accident.

14. This liability is described as vicarious liable for the acts of your servant and or agents.

15. I would not interfere with the aspect of liability.

16. As to quantum, I would agree entirely with the appellant. There has been shown no basis to the court that this award of 1.2 million be given. It is too large and inordinate.

17. I would allow the appeal on damages of pain and suffering at

1.2 million and set aside the Hon. Trial magistrate's claim. I would substitute this with the sum of Ksh. 200,000/= taking into account the loss of teeth and fractures.

18. I would not interfere with the special damages award as none of the parties addressed me on this.

#### IV IN CONCLUSION

19. This appeal is allowed partially on the following terms:

19.1 Liability 100%

19.2 Quantum

General damages

i) Pain and suffering Ksh. 200,000/-

Special damages

i) Copy of record Ksh. 500/-

ii) Medical report Ksh. 2500/-

iii) Medical expenses Ksh. 20,000/-

Total Ksh. 23,000/-

19.3 Total Ksh. 223,000/-

20. I would enter judgment in favour of the plaintiff on the said sum above.

21. I would award interest from the date of the subordinate court's judgment 15<sup>th</sup> September 2008.

22. I would award interest on special damages from the date of filing suit.

23. I award the costs of this appeal to the appellant/original defendant. The costs of the subordinate court case to the respondent/original plaintiff.

DATED THIS 20<sup>TH</sup> DAY OF DECEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

*Advocates :*

*ii) G. K Matunda instructed by M/s Omwenga & Associates for appellant/original defendant*

*ii) F G Mungai instructed by M/s Munene Mwenga & Co Advocates for respondent/ original defendant*

**Editorial Summary**

1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

*TORT*

2.1 *Running down cause*

2.2 *Male adult cyclist.*

2.3 *Motor vehicle/cyclist*

*Collision with motor vehicle registration*

*KAU 797S*

2.4 *Cause of action*

*11<sup>th</sup> August 2006*

*Komarock road*

2.5 *Cyclist sustains injuries*

*Pleaded:*

a) *Fracture of right hip*

*(right acetabulum)*

b) *Dislocation of right hip joint*

c) *Fracture of right mandible*

d) *Loss of teeth*

2.6 *Judgment of court*

15<sup>th</sup> September 2008:

a) *Liability 100%*

b) *Quantum*

*General damages*

*Pain and suffering* Ksh. 1,200,000/-

*Special damages*

*Copy of record* Ksh. 500/-

*Medical report* Ksh. 2500/-

*Future medical expenses* Ksh. 20,000/-

*Total* Ksh. 1,222,500/-

3. *Appeal filed 13<sup>th</sup> October 2008*

3.1 *Memorandum of appeal*

*Hon. Magistrate erred in fact and law:*

a) *... arriving at a decision that was wholly  
against the weight of evidence.*

b) *... by finding appellant liable for  
accident when not driving.*



c) ... the plaintiff/respondent failed to  
prove negligence.

d) ... award of Ksh. 1.2 million was  
excessive.

3.2 *Appeal be allowed and substantive orders dismissing  
appeal.*

3.3 *In reply, respondent*

i) *Accident occurred*

ii) *Liability correct*

iii) *Appellant vicariously liable*

iv) *Amount of damages a matter  
of discretion.*

4. *Held:*

a) *Appeal allowed partially*

b) *General damages of 1 million excessive*

*reduced to Ksh. 200,000/-*

- c) *Costs to appellant in appeal court*  
*costs to respondent in subordinate court.*

5. *Case Law:*

- a) *Kenya Bus Services Ltd*

*Vs*

*Dina Kawira Humprey (estate of Josephat KenegeniM'daka)*

*CA 295/00*

*2003 Eklr*

*Omolo, Tunoi, Githinji JJA*

- b) *Automobile Association of Kenya*

*Vs*

*James Jaganga*

*CA 92/99 Eldoret*

*Dulu ag J*

- c) *Kimatu Mbuvi T/a Kimatu Mbuvi & Bro*

*Vs*

*Augustine Munyao Kioko*

*CA 203/2001 Nairobi*

*Omolo, Waki, Deverell JJA*

d) *Michael Hubert Kloss & Another*

*Vs*

*David Seroney & 5 Others*

*Bosire, Waki, Nyamu JJA*

6. *Advocates :*

i) *G. K Matunda instructed by M/s Omwenga & Associates for appellant/original defendant*

ii) *F G Mungai instructed by M/s Munene Omwenga & Co Advocates for respondent/ original defendant*



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