



**Nyongesa v Kariega (Civil Appeal E1273 of 2023)
[2024] KEHC 9644 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1273 OF 2023

H NAMISI, J

JULY 26, 2024

BETWEEN

FIDELIS MENASI NYONGESA APPELLANT

AND

ESTON MBOGO KARIEGA RESPONDENT

*(Being an Appeal against the Judgement of Hon. Kiongo Kagenyo,
Adjudicator delivered on 27th October 2023 in SCCC No. E2536 of 2023)*

JUDGMENT

1. This is an appeal against the judgement of Hon. Kiongo Kagenyo, Adjudicator, in which the Appellant has raised the following grounds:
 - i. That the Learned Hon. Adjudicator erred in law in awarding a sum in respect of damages which is inordinately low in the circumstances occasioning a miscarriage of justice;
 - ii. That the Learned Hon. Adjudicator grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the Claimant;
 - iii. That the Learned Hon. Adjudicator further erred in law by failing to consider the evidence filed in the Claimant's List and Bundle of Documents dated 5th June 2023 and the Claimant's further List and Bundle of Documents dated 21st July 2023;
 - iv. That the Learned Hon. Adjudicator also ignored our submissions where we relied upon the case of Nkuene Dairy Farmers Co-operative Society & Another v Ngacha Ndeiya [2010] eKLR where the Court of Appeal held that an assessment report was sufficient proof of repair costs in a material damage claim and that such special damages need not be shown to have been



incurred. The assessment report was filed in the Claimant's List and Bundle of Documents dated 5th June 2023.

- v. That the Learned Hon. Adjudicator erred in law in failing to consider conventional awards in cases of similar nature
2. Parties canvassed the Appeal by way of written submissions.
3. In his submissions dated 13th June 2024, the Appellant relied on several cases, including *Mohazo EPZ Ltd v New Wide Garments EPZ Ltd & Another* [2020] eKLR where the court opined thus:

“Whereas it would have been prudent for the Plaintiff to have produced the actual receipt for the payment of the assessor, in this case, there is no doubt that the Plaintiff retained the services of PW2 to undertake the assessment which was in fact carried out and the report produced before this court.”

4. On his part, the Respondent filed his submissions dated 4th June 2024 and submitted that the trial adjudicator applied his mind and the law correctly in finding and holding that the Appellant did not specifically plead and prove the special damages. The Respondent relied on several cases including *Christine Mwigina Akonya v Samuel Kairud Chege* [2017] eKLR and *Capital Fish Ltd v Kenya Power & Lighting Company Ltd* [2016] eKLR.
5. Section 38 of the *Small Claims Court Act* provides as follows:
 1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
 2. An appeal from any decision or order referred to in sub section (1) shall be final.
6. In the case of *Otieno, Ragot & Company Advocates v National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR).”

7. Similarly in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

“-“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”



8. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law. In the case of *J N & 5 Others v Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”

9. Turning to the grounds of appeal, the Appellant argued that the trial court in failing to consider the evidence filed by the Appellant awarded a sum in respect of damages that was inordinately low. In the impugned judgement, the trial court held that the repair costs of Kshs 118,560/= and the Assessment fees of Kshs 6,270/- were not proved.
10. To prove the two amounts, the Appellant produced an invoice from Midland Autocare Ltd dated 17th July 2020 for Kshs 118,560 as well as a Re-Inspection Report dated 8th July 2020 by Universal Assessors and Valuers Ltd indicating the total amount due to the repairers as Kshs 118,560/=. Similarly, at page 46 of the Record of Appeal, there is a Fee Note for Kshs 6,270/- from Integrated Motor Assessors Ltd in respect of professional services.
11. Based on the foregoing, I am guided by the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya* [2010] eKLR, where the Court of Appeal took the position that:

“Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counterchecked and either accepted or disproved. The Appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor’s report. The experience of the Assessor was not challenged...The Respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of *David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996* which Mr. Kaburu cited to us, does state that a motor vehicle Assessor’s report would provide acceptable evidence to prove the value of material damage to a motor vehicle... We agree with Mr. Charles Kariuki that the Assessor’s report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent’s claim...”

12. The upshot of the foregoing is that the Appeal succeeds. The judgement of the lower court is set aside and judgement is hereby entered as follows:

The Claimant is awarded the sum of Kshs 154,060/= to be subjected to 20% contribution and the resulting figure to accrue interest at the rate of 12% from 6th June 2023 until payment in full. Each party shall bear its own costs.



13. The costs of this Appeal of Kshs 35,000/- is awarded to the Appellant.

DATED AND DELIVERED AT NAIROBI THIS 26 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.....Sigei for the Appellant

....Mr. were..... for the Respondent

