



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ufrah Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021)  
[2023] KEHC 1285 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 1285 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 39 OF 2021  
DKN MAGARE, J  
JANUARY 27, 2023**

**BETWEEN**

**UFRAH MOTORS BAZAAR ..... 1<sup>ST</sup> APPELLANT**

**JAMES MBUTHIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HANNAH WANGUI KIBE ..... RESPONDENT**

**JUDGMENT**

1. This matter came up for hearing of an Appeal before me during the ongoing Rapid Results Initiative to reactivate the same.
2. The said appeal is on quantum only. The appellant argued the appeal before me through their advocates. The respondent did not attend court for hearing of the Appeal. The Appellant's counsel contested an award of Kshs 220,000 as general damages of was excessive.
3. The Court ought to have awarded a lesser amount as these were soft tissue injuries. I understood counsel to submit that the award was so excessive as to amount to an erroneous estimate of the damages. I was invited to thus interfere with the discretion of the court below.
4. The Appellant relied on their oral submissions and urged me to rely on both the record and the lower court file. I reserved the judgment for today February 27, 2023, which I have duly considered and will wish to render myself succinctly on points of law and fact involved.

**Determination**

5. The duty of the first Appellate Court is now settled. Clement De Lestang, VP, Duffus and LawJJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others [1968]*



*EA 123* set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth:- -

' An appeal from the High 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 demeanor of a witness is inconsistent with the evidence generally.'

6. In relation to this matter, this court has the se powers as the court of Appeal in relation to the High Court. This court therefore is to bear, in mind that it did not see nor hear witnesses. I will defer to the trial court on the demeanor and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.
7. On the other hand, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.
8. The issue of documents was discussed in the case of *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017]eKLLR* , where the Court of Appeal, Ouko, Kiage and Murgor JJA, held as doth;-

' Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed.'

9. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
10. The Respondent pleaded the following injuries; -
  - a) Soft tissue injuries of the right shoulder joint.
  - b) Soft tissue injuries of the chest.
  - c) Soft tissue injuries of the back.
  - d) Deep lacerations on the right hand arm, forearm and hand.
  - e) Soft tissue injuries of the knee joints
  - f) Soft tissue injuries of the right hip joint.
11. These same injuries are reflected in the report of Dr Wellington K. Kiamba dated August 17, 2019. As at May 17, 2019 she was complaining right shoulder joint pain.
12. The Appellant through Miss Mwangi argued only on quantum and award be rendered from Kshs 220, 000/= to Kshs 150, 000/=. She did not address the court Appeal on liability.



## Duty of the court

13. The duty of the Appellate Court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah v Mbogo & Another Versus Shah* [1968] EA 93, held as doth:-

' The (appellate Court) should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice.'

14. In one of the decisions used by the Appellant in the Lower Court, Justice DS Majanja on February 12, 2019 in [Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others \[2019\]eKLR](#) held as doth:-

' General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.'

15. It is thus settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

16. The foregoing was settled in the cases of [Butter v Butter Civil Appeal No 43 of 1983 \[1984\] KLR](#) where the Court of Appeal held as follows at paragraph 8.

' In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies should be taken into consideration.'

17. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously and capriciously. It is not my duty to substitute the lower court discretion with my discretion. The court cannot disturb damages unless the award is not too high or too low as to be an erroneous estimate of damages.

18. The High Court, pronounced itself succulently on these principles in [Kemfro Africa Ltd v Meru Express Servcie v AM Lubia & Another 1957 KLR 27](#) as

follows: -

' The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.'

19. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British



Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

' The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

20. Therefore, for me as an appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
21. So my duty as the appellate court is threefold regarding quantum of damages: -
  - (a) To ascertain whether the Court applied irrelevant factors or left out relevant factors.
  - (b) To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
  - (c) The award is simply not justified from evidence.
22. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
23. After addressing the issues of quantum above, I have a duty to reassess the evidence tendered by the parties and come with an independent opinion while recalling that I neither saw nor heard the said witnesses.
24. The report by Dr Wellington K Kiamba was of the view that the soft tissue injuries enunciated these healed with prominent permanent scars. She was to be given temporary disability of 6 weeks.
25. I have also perused the P3 Form at pages 13 and I note that the record is incomplete in that respect. However, I have perused the same document in the Lower Court file as produced same indicated bruises with tenderness on the high lumbar region, left chest wall on the higher shoulder joint, mid fore arm, right 5<sup>th</sup> finger, complained on tenderness with bruises on the left and knee right hip joint.
26. The injuries from the authorities above show damages of between Kshs 150, 000/= to Kshs 200,000/= . The same depend on the nature of the soft tissue injuries and the degree of permanent of the injuries. It may it thus may be well that the damages are high. The Appellant suggested that I award between Kshs 100, 000 to Kshs 150,000/= . Unfortunately, that is not my duty as the first Appellate Court.
27. It is to considers the award given vis-à-vis comparable awards as aforesaid. I therefore find and hold that although the award is slightly high if is not inordinately high to warrant my setting aside of the same. All circumstances considered, being the nature of the injuries.
28. I am satisfied that the award of Kshs 220, 000/= as general damages as ordered by the Court will adequately compensate the Respondent. The award did not take into consideration irrelevant issues and the court considered correct facts. I cannot find fault with the decision of the court below. Consequently, I dismiss the appeal with costs.
29. It is the true if I was sitting as the trial Court I could have awarded a different figure.
30. However, the issue is not whether I could have awarded a different figure. The question is whether the award is so excessively high or inordinately low as to amount to an erroneous estimate.



31. In exercise of the powers granted to the Court under Section 27 of the Civil Procedure Act, I award costs of the appeal of Kshs 57, 000/= payable to the Respondent within 30 days from the date hereof. In default execution to issue. It is so ordered.

**DATED, ISSUED AND DELIVERED AT NAIROBI, VIRTUALLY 27<sup>TH</sup> JANUARY, THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, NAIROBI**

**In the presence of;**

No appearance for the Appellant

No appearance for the Respondent

Nancy Bor - Court Assistant.

