



Omar v SD suing through mother and next friend KJ (Civil Appeal E004 of 2023) [2023] KEHC 17526 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E004 OF 2023
DKN MAGARE, J
APRIL 25, 2023**

BETWEEN

OMAR ALI OMAR APPELLANT

AND

SD SUING THROUGH MOTHER AND NEXT FRIEND KJ RESPONDENT

JUDGMENT

1. This matter came up for hearing today. Mr Arasa conceded on the claim over future medical expenses. He prayed that we award Kshs 100,000/= for the injuries suffered. I have noted the nature of the injuries. I note that the only dispute remaining is the issue of General damages awarded of Kshs 250,000/=.
2. The parties addressed the court on the Appeal. The issue is whether appeal on quantum is a point of law or fact.

Duty of the appellate court

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. In the cases of *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

6. The issues raised are issues of law. In dealing with issues of law, the court deals with the Appeal on points on law. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR

“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. The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie vs. A.M 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.

8. 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 vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs 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...”

9. For the 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.

10. The Court of Appeal in the locus Classicus case of *Mbogo & another v Shah* (1968) EA 93 Sir Charles Newbold, at Page 96 President of the East African Court of Appeal stated as doth:-

“The Appellate Court should not interfere with exercise of discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result, arrived at a wrong



decision or unless it is manifestly clear from the case as a whole that the Judge was clearly wrong in the exercise of discretion and that and as a result, has been a miscarriage of Justice.”

11. Where the Court exercised its discretion correctly, then the Appellate Court cannot interfere with such exercise. Sir Clement De Lestang, VP was succinct that the matters of discretion, where matters favour both parties, it is not enough that the Court itself would have come to a different conclusion for setting aside.
12. The adjudicator relied on the injuries suffered. He considered three authorities Edwin Masese Ougado v Teresa Gesare Masese where an award of Kshs 200,000/= was given for similar injuries. He used passage of time as the basis for award of Kshs 250,000/=.
13. The principal for ward of damages were discretionary. I do not find the Court applied wrong principal. The appeal is accordingly dismissed with costs.

Determination

14. I therefore make the following orders:
 - a. The Appeal is such bereft of merit. I dismiss the same with costs of Kshs 35,000/= payable within 15 days together with the decretal sum in the small claims court in default execution to issue.
 - b. Orders of stay hitherto issued are vacated.
 - c. The file is closed.
 - d. The primary file be remitted to the small claims court for execution.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Arasa for the Appellant

No appearance for Respondent

Court Assistant - Firdaus

