



**Mweangayi v Kenya Wildlife Service & another (Civil Appeal
120 of 2020) [2023] KEHC 27583 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 120 OF 2020
F WANGARI, J
JULY 28, 2023**

BETWEEN

PAUL KIRIGA MWEANGAYI APPELLANT

AND

KENYA WILDIFE SERVICE 1ST RESPONDENT

ISSC ALIO HAPPY 2ND RESPONDENT

*(Being and appeal from the judgment and decree of Hon Mr. G. Kiage (SRM)
in Mombasa CMCC No. 1899 of 1998, delivered at Mombasa on 5th May 2020)*

JUDGMENT

1. The Appellant was the Plaintiff in the lower court filed a Memorandum of Appeal dated 26/8/2020 and filed on 27/8/2020. He appealed on the award of general damages and costs. He raised 2 grounds of appeal as hereunder;
 - a. The learned magistrate erred in law and fact in awarding a sum for general damages that were so inordinately low as to amount to a wholly erroneously (sic) estimate of damages.
 - b. The learned magistrate erred in law and in fact in failing to award costs to the appellant

Duty of the appellate court

2. 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.



3. This was aptly stated in the case of *Peters v Sunday Post Limited* [1985] EA 424 where, the court of Appeal 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...”

4. In *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was stated as follows;

“...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...”

5. The Appellant filed an amended plaint claiming general and special damages arising from the accident involving motor vehicle registration No. KAC XXXX owned by the 1st Respondent, and the 2nd Respondent was the driver. The Respondent filed its defence on 19th June 1998 denying the allegations by the Appellant.

6. It was the Appellant’s evidence that the accident was caused by the negligence of the 2nd Respondent. He sustained the following injuries;

- a. Cut wound on the right eye and leg
- b. Blunt injury to the back, head and neck
- c. Piercing wound on the left calf

7. After the medical examination, the Appellant as found to have had no permanent disability. The court found that 1st respondent 100% liable. The appellant was awarded Ksh. 50,000. He was also awarded Ksh. 1600 as special damages

8. The court did not award costs, he stated that it was due to the lackluster in which the case was prosecuted. The court noted that the matter took 22 years to prosecute. Each party was to bear its own costs.

9. The Appellant was dissatisfied with the award of damages and costs. In regard to damages, the Appellant urges the court, to set aside the award as it was inordinately low. The court cannot set aside damages unless, the same are so inordinately low or inordinately high as to amount to erroneous estimate of damages.

10. The court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Service v. 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.”

11. The foregoing statement had been explained 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 hereunder 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...”

12. For the appellate court to interfere with the award, it is not enough to show that the award is high/low, or had I handled the case in the subordinate court, I would have awarded a different figure.
13. The award of Kshs 50,000 was ex gratia given that after the doctor examined the Appellant, 14 years after the accident, it was concluded that he had suffered soft tissue injuries with no permanent disability. The medical report was given in 2014 for injuries suffered in 1995. The same cannot be said to be credible medical evidence. This is so for reasons that injures that had long healed. The award was thus within means. I dismiss an appeal on quantum in toto. It is unmerited
14. On costs, just like the award on damages, the award of costs is discretionary. In the case of *Mbogo and Another v. Shab* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

15. The award of costs is discretionary. The court ordered that each party bears its own costs. This was because the appellant had been negligent and lackluster in having a matter in court for 22 years. The court was generous. The court could have legitimately granted the Respondent costs for being dragged through court for 22 years. The court's exercise of discretion was proper.

Determination

16. In the circumstances the appeal is not meritorious. I make the following orders; -
- a. The appeal is dismissed for lack of merit
 - b. Costs to the Respondents
 - c. The file is closed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023

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F. WANGARI

JUDGE

In the presence of;



Maundu Advocate for Appellant
Kobole Advocate for Respondents
Abdullahi, Court Assistant

