



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 19 OF 2018**

**MOMBASA MAIZE MILLERS LTD.....1<sup>ST</sup> APPELLANT**

**ABASS ATHMAN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROSE MERCY BONAYA.....RESPONDENT**

*(An Appeal from the Judgment of Hon. S. Wewa, Principal Magistrate*

*made on 5.3.18 in Malindi CMCC NO. 22 of 2017)*

**JUDGMENT**

1. The Appeal herein arises from the judgment of Hon. S. Wewa, Principal Magistrate, delivered on 5.3.18 in Malindi CMCC No. 22 of 2017, Rose Mercy Bonaya v Mombasa Maize Millers Ltd & Abass Athman. The Respondent, Rose Mercy Bonaya instituted the suit in the trial Court against the Appellants, Mombasa Maize Millers Ltd and Abass Athman claiming both general and special damages arising from a road traffic accident. The Respondent was on 7.3.16, travelling as a passenger in motor vehicle registration number KAZ 325J from Malindi to Kilifi which collided with motor vehicle registration number KBQ 549T driven by the 2<sup>nd</sup> Appellant from Mombasa to Malindi. The latter motor vehicle is owned by the 1<sup>st</sup> Appellant. By consent liability was apportioned at 85% to the Appellants. The Respondent was to bear 15% liability. At the conclusion of the hearing, the trial Magistrate entered judgment in favour of the Respondent for the sum of Kshs. 150,000/= in general damages less 15% contribution. The Respondent was also awarded special damages of Kshs. 2,000/=, costs and interest.

2. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the Honourable Magistrate erred in fact and in law in that she:

1. disregarded vital evidence adduced by the Appellants thereby arriving at a wrong finding.
2. failed to correctly evaluate the testimony of the defence witnesses thereby making an inordinately/astronomically high award to the Respondent.
3. disregarded and or failed to evaluate the evidence adduced by both the plaintiff and the Defendants in apportionment of liability putting in mind the entirety of the circumstances.
4. failed to consider the entirety of the circumstances of the case.
5. delivered judgment based on wrong principles of law and fact.

3. The Appellants prayed for the following orders:

- i) The appeal be allowed.
- ii) The judgment in favour of the Respondent be set aside and the suit against the Appellants be dismissed.

4. I have given due consideration to the record of appeal, the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle

and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

***An appeal to this court from a trial by the High 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 made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

5. Although the Appellant raised 6 grounds of appeal, the only issue to be determined is whether the learned Magistrate erred on quantum. As indicated above, the issue of liability was settled by consent of the parties in the trial Court.

6. The injuries sustained by the Respondent as enumerated in the medical report by Gama Medical Clinic are a cut on the left foot, blunt object injury to the head (scalp) and a blunt object injury to the chest.

7. The principles upon which an appellate Court may interfere with the discretion of a trial Court in the award of damages were stated by the Court of Appeal in the case of William J Butler v Maura Kathleen Butler [1984] eKLR as follows:

***In Zablon W Mariga v Morris Wambua Musila Civil Appeal No 66 of 1982 (unreported), this court said that the assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would or he has taken into consideration matters he ought not to have considered, or not taken into account those matters he ought to have considered and in the result, arrived at the wrong decision.***

8. In order for this Court to tinker with the damages awarded to the Respondent, the Appellants must demonstrate to the satisfaction of the Court that the trial Court in exercise of its discretion, acted on wrong principles. They must also show that the trial Court took into account matters it ought not have considered or failed to take into consideration matters which ought to have been considered resulting in a wrong decision, or that the award excessive.

9. In their written submissions, the Appellants dwelt at length on the issue of liability. Yet as stated earlier, liability had been determined by consent. On the issue of quantum, the Appellants merely submitted that in the case of Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR, the appellant therein had faulted the trial Magistrate for relying on wrong principles to arrive at a high award as compensation for soft tissue injuries, and that the appeal was allowed and the award was reduced from Kshs. 300,000/= to Kshs. 100,000/=. In the present case however, the Appellants have not stated what wrong principles of law were applied by the trial Magistrate. They have also not shown what matters were taken into consideration which ought not to have been considered, or what matters were not taken into account that ought to have been considered, resulting in a wrong decision. It is not enough for the Appellants to state that the trial Court arrived at a wrong decision on assessment of damages by applying the wrong principles. Having faulted the decision of the trial Magistrate, it was incumbent upon the Appellants to demonstrate to the satisfaction of this Court just how the trial Court applied the wrong principles of law in arriving at the decision that was made. This they did not do.

10. In Fredrick Masaghe Mukasa v Director of Public Prosecutions & 3 others [2019] eKLR, the Court of Appeal stated:

***In doing so, we shall be guided by the well-established principles as set out in Mbogo & another -v- Shah (1968) EA 93, where the predecessor of this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.***

***In order for this appeal to succeed, the appellant must bring himself within the ambit of the principles set out in Mbogo Vs Shah (supra). He must demonstrate to the satisfaction of this Court that the trial court exercised its discretion wrongly in making the conclusions that it did.***

11. To echo the words of the Court of Appeal in the Mukasa case (supra). The Appellants were required to bring themselves within the ambit of the principles set out in Mbogo v Shah in order for their appeal to succeed. To their loss, the Appellants did not, through their submissions demonstrate to the satisfaction of this Court that the trial Court exercised its discretion wrongly in the assessment of damages.

12. The Respondent on the other hand submitted that the amount awarded was neither excessive nor exaggerated. It was further submitted that, guided by the principle that similar injuries should invite similar awards, the judgment of the trial Court was within limits of similar awards. The Respondent relied on the case of Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR where Kshs. 300,000/= was awarded to the 1<sup>st</sup> plaintiff for injury on the left ankle, the legs and the chest, not dissimilar to those suffered by the Respondent herein.

13. As I consider the request for review of the award of general damages, I am guided by the following principle set out by Law J.A., in the case of Butt v Khan (1977) KAR 1:

***“An Appellate Court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.”***

14. The learned Magistrate noted that the Respondent sustained soft tissue injuries. My view therefore is that the sum awarded is reasonable and would be adequate to compensate the Respondent for the injuries suffered. Accordingly, I find no reason to interfere with the assessment and award of general damages and uphold the same.

15. The upshot is that the Appeal lacks merit. The same is dismissed with costs to the Respondent.

**DATED THIS 24TH DAY OF FEBRUARY 2020**

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**M. THANDE**

**JUDGE**

**SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF FEBRUARY 2020**

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**NJOKI MWANGI**

**JUDGE**

**In the presence of: -**

..... **for the Appellants**

.....**for the Respondent**

..... **Court Assistant**