



REPUBLIC OF KENYA



**Malik Boeki Company Limited v M'Mwaki (Suing on Behalf of EM (Minor)) (Civil Appeal E066 of 2023) [2025] KEHC 472 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 472 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E066 OF 2023  
JM OMIDO, J  
JANUARY 23, 2025**

**BETWEEN**

**MALIK BOEKI COMPANY LIMITED ..... APPELLANT**

**AND**

**JOSEPH NKUNJA M'MWAKI ..... RESPONDENT**

**SUING ON BEHALF OF EM (MINOR)**

*(Being an Appeal from the Judgement and Decree of Hon. Tito Gesora, Chief Magistrate delivered on 6th October, 2022 in Maua CMCC No. E014 of 2021)*

**JUDGMENT**

1. This appeal was preferred by Malik Boeki Company Limited (hereinafter referred to as “the Appellant”) against the judgement and decree of Hon. Tito Gesora, Chief Magistrate delivered on 6<sup>th</sup> October, 2022 in Maua CMCC No. E014 of 2021, which was a tortious liability claim.
2. In the matter before the lower court, the Appellant herein was the Defendant while the Respondent herein was the Plaintiff.
3. Judgement on liability in the lower court was entered in favour of the Respondent at 100% against the Appellant. The trial court proceeded to assess and award the Respondent special damages of Ksh.10,000/- and general damages for pain, suffering and loss of amenities at Ksh.700,000/-. The Respondent was also awarded costs of the suit and interest.
4. Being aggrieved with the judgement of the trial court on the quantum, particularly the award made under the head of pain, suffering and loss of amenities, the Appellant presented the following grounds of appeal vide the Memorandum of Appeal dated 27<sup>th</sup> April, 2023:
  1. The Learned trial Magistrate erred in law and in fact in awarding the Respondent Ksh.700,000/- in general damages for pain and suffering which are inordinately high and



wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.

2. The Learned trial Magistrate erred in law and in fact in awarding Ksh.10,000/- special damages by failing to consider that the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps.
  3. The Learned trial Magistrate erred in law and in fact by finding the Appellant 100% liable for the accident which is wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
  4. The Learned trial Magistrate erred in law and in fact by failing to consider the Appellant's authorities in their submissions on liability and quantum hence arriving at an erroneous decision.
  5. The Honourable trial Magistrate erred in law and in fact in failing to consider the Appellant's documents that were filed and produced in court.
  6. The Honourable trial Magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
  7. The Honourable trial Magistrate's judgement as a whole is not supported by the evidence that was tendered in court by the parties.
5. This court directed that the appeal be canvassed by way of written submissions and both parties filed their respective submissions.
  6. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
  7. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
  8. One will notice from the above grounds of appeal that the appeal challenges the findings of the trial court on both liability and quantum. I however note from the submissions filed by the Appellant that only the challenge on quantum was addressed and/or prosecuted. I will in the premises limit myself to the issue of quantum.
  9. Going to the record of the trial court, the relevant evidence as concerns quantum is that the Minor on whose behalf the suit was filed by the Respondent was involved in a road traffic accident and sustained bodily injuries.



10. The Respondent testified before the trial court and stated that the injuries that the Minor sustained, as per the medical report prepared by Dr. Mwit, M.K. included a cut (8cm) on the right-hand ulnar side, painful swollen right knee, painful swollen right elbow, bruises on the lateral aspect of the left forearm, fracture of the right small finger and fracture of the left ulnar bone distal.
11. The treatment that the Minor received included suturing of the cut on the right hand, application of POP on the right upper limb for the fractures, surgical toileting of the bruises. The Minor was given analgesics and antibiotics and tetanus toxoid administered.
12. At the time of examination, Dr. Mwit observed that the Minor had scars on the right knee, left forearm and right hand, soft tissue pains and right lower limb pains.
13. The Respondent produced the following documents to support his case: Demand notice. Receipts for the demand notice. Medical report prepared by Dr. Mwit. Receipt for the medical report. P3 form. Police abstract. Treatment notes. Copy of motor vehicle records.
14. As stated above, the only issues for this court to determine is in respect of the award of Ksh.700,000/- under the head of pain, suffering and loss of amenities, which the Appellant complains was inordinately high and the award of Ksh.10,000/- under the head of special damages which the Appellant states was not proved.
15. The first issue for this court to determine then is whether the amount assessed and awarded as compensation to the Appellant under the above head was in error and/or inordinately high.
16. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of *Price & another v Hidler* [1996] KLR 95 as follows:

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

17. Further, in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297.

It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so 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 was either inordinately high or low.”

18. There is also the authority of *Mbogo & Another v Shah* [1969] EA 93, where it was held, inter alia, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

19. In the matter before the lower court, the Appellant submitted and proposed an award of Ksh.700,000/- for pain, suffering and loss of amenities and relied on the High Court authorities of *Catherine Wanjiru King'ori & 3 others v Gibson Theuri Gichubi Nyeri HCCC No. 320 of 1998* and [\*Habiba Abdi Mohamed v Peter Maleve Nairobi HCCC No. 950 of 1998\*](#).

20. With regard to the first authority, the Respondent submitted that a party who sustained comparable injuries was awarded Ksh.300,000/- in that case. I however note from the lower court record that the Respondent did not present a copy of the said decision for the court's consideration and its relevance cannot be verified as it is unreported.

21. In respect of the second authority, the court awarded Ksh.400,000/- to a party who sustained injuries on her left arm, head and face.

22. On their part, the Appellant submitted that an award of Ksh.100,000/- would adequately recompense the Minor for the injuries that he sustained under the head of pain, suffering and loss of amenities. The Appellant relied on the authorities of *Wilfred Okemwa Mwamba v Total Security Surveillance* [2016] eKLR in which the High Court made an award of Ksh.300,000/- where the party sustained injuries that included a fracture of the skull, fracture of the proximal phalanx of the middle finger with permanent disability of 3%.

23. The Appellant also relied on the decision of *Patrisia Adhiambo Omolo v Emily Mandala* [2020] eKLR in which a party who sustained a fracture of the left forearm radius and ulna bones, colles fracture of the left arm, swollen deformed distal aspect of the left forearm, multiple bodily injuries and injuries on the left forearm with swelling was awarded Ksh.180,000/- in 2020.

24. With respect to both sides, the authorities relied upon were not apt for the reason that they were in respect of injuries that were of a different nature from those that the Minor sustained.

25. When a court is confronted with a situation in which the authorities that the parties present do not provide a suitable guidance, it obligates the court to proceed to find suitable decisions that aptly guide it. I will in the premises take guidance from decided cases on comparable injuries, as guided by the Court of Appeal decision in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR where it was held that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”



26. Generally, the Minor in the present case sustained multiple soft tissue injuries, a fracture of the right small finger and fracture of the left ulnar bone distal.
27. As we have seen above, a court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account irrelevant factors or failed to take into account relevant factors, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see also *Butt v Khan* [1982-88] 1 KAR 1 and *Mariga vs Musila* [1982-88] 1 KAR 57).
28. As I proceed to determine whether the award made in general damages was appropriate, it must be recalled that no two cases are exactly similar (see *Stanley Maore v Geoffrey Mwenda* [2004] eKLR).
29. Having said as much, I think that the authority of *Mwangi & another v Gachui (Civil Appeal 60 of 2023)* [2024] KEHC 10978 (KLR) (9 September 2024) (Judgment) is a useful guide in determining the compensation for the injuries that the Minor sustained. In that case, the Respondent suffered soft tissue injuries to the left knee, and chest and a fracture and subluxation of wrist ulna bone. The High Court reassessed general damages at Ksh.300,000/- for the injuries in a judgement delivered on 9<sup>th</sup> September, 2024.
30. It is my considered view that an award of Ksh.500,000/-, based on the above comparable decision would aptly recompense the Minor. I have taken into consideration that the Minor also sustained a fracture of the right small finger.
31. Accordingly, I do find that the trial magistrate did err in awarding damages of Ksh.700,000/= as he relied on precedents that were not relevant as they did not address comparable injuries. In relying on incomparable cases, the trial magistrate acted upon the wrong principles and his award must be reviewed downwards for being manifestly excessive.
32. With regard to the award made on the head of special damages, the rule applicable is that the same must be specifically pleaded and strictly proved. In that respect, the Respondent pleaded Ksh.5,000/- for the demand notice, Ksh.5,000/- for the medical report and Ksh.500/- for the copy of records. He produced receipts for the demand notice and the medical report. The total amount in the two receipts is Ksh.10,000/-. The same was pleaded and proved and the learned trial Magistrate cannot be faulted for awarding that amount.
33. Being of the foregoing findings, I will allow the appeal only to the extent that I set aside the award of Ksh.700,000/- made by the learned trial Magistrate in favour of the Respondent under the head of general damages for pain, suffering and loss of amenities and substitute the same with an award of Ksh.500,000/-.
34. The Respondent will bear the costs of this appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**JOE M. OMIDO**

**JUDGE**

For The Appellant: Mr. Murimi.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

