



REPUBLIC OF KENYA



KENYA LAW
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**M'abutu v Zacharia (Civil Appeal E471 of 2022)
[2025] KEHC 6177 (KLR) (Civ) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E471 OF 2022

JM OMIDO, J

MARCH 20, 2025

BETWEEN

MURIUNGI PIUS M'ABUTU APPELLANT

AND

ELLY OGWENO ZACHARIA RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. C.A. Muchoki Senior Resident Magistrate delivered on 31st May, 2022 in Milimani Commercial Courts CMCC No. E967 of 2021)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. C.A. Muchoki, Senior Resident Magistrate, delivered on 31st May, 2022 in Milimani Commercial Courts CMCC No. E967 of 2021.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 6th November, 2023, upon which he seeks to upset the judgement and decree of the lower court, are as follows:
 - i. The learned Magistrate in the matter herein delivered judgement on 31st May, 2022 in favour of the Respondent herein thus contrary to the law and facts availing before the Honourable Court.
 - ii. The learned Magistrate erred in fact and law in finding that the Respondent was entitled to damages of Ksh.252,585/- for injuries sustained by the Plaintiff (sic) that were too high in view of the fact that compared to the injuries suffered by the Respondent (sic).



- iii. The learned Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, precedent law thus bringing law into confusion (sic) and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
 - iv. The learned Magistrate erred in law and fact in failing to appreciate that the Respondent's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.
 - v. The learned Magistrate erred in law and fact in entering judgement in favour of the Respondent against the Appellant in spite of the Respondent's miserable failure to establish his case.
3. The Appellant proposes that the Appeal be allowed with costs to the Appellant and that the award for damages made in favour of the Respondent be set aside.
 4. The suit before the lower court was one based on tortious liability arising out of a road traffic accident that is said to have occurred on 2nd of December, 2020 in which the Respondent sustained injuries. The matter was defended and went to full trial.
 5. It is noteworthy from the grounds of appeal reproduced above that what the Appellant is challenging is the trial court's findings on quantum with regards to the head of general damages for pain, suffering and loss of amenities. The trial court's finding on liability is not challenged.
 6. In her judgement delivered on 31st May, 2022, the learned trial Magistrate entered judgement in favour of the Respondent (the Plaintiff before the lower court) and against the Appellant (the Defendant) j as follows: Liability – at the ratio 90% : 10% in favour of the Respondent. Special damages – Ksh.30,650/- (subject to apportionment of liability). General damages for pain, suffering and loss of amenities – Ksh.250,000/- (subject to apportionment of liability).
 7. The Respondents were also awarded costs of the suit and interest thereon at court rates and on the awards of damages.
 8. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.
 9. 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.
 10. 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.”



11. Turning to the evidence before the trial court, in so far as the matter relates to quantum (in respect of the head of general damages for pain, suffering and loss of amenities), the relevant evidence is that of the Respondent who testified before the trial court as PW1.
12. The Respondent adopted the contents of his witness statement that he filed before the trial court. He stated that the accident in question occurred on 2nd December, 2020 and that he sustained bodily injuries.
13. The Respondent produced documents which included a medical report that was prepared by Dr. W.M. Wokabi which documented the multiple soft tissue injuries that he sustained, as follows:
 - a. Blunt soft tissue injuries on the face and neck.
 - b. Blunt soft tissue injuries on the chest.
 - c. Blunt and abrasion injuries on the right shin.
14. Dr. Wokabi's projected that the Respondent would fully recover in a period of 3 to 4 months.
15. The Appellant, who was the Defendant in the trial court, did not call any witnesses.
16. I have considered the grounds of appeal as set out in the Memorandum of Appeal dated 29th June, 2020, the submissions by the parties herein and the record of the lower court. Although the Appellant listed 5 grounds of appeal in his Memorandum of Appeal, only one ground was pursued in the submissions that he filed.
17. The single issue for determination, as discernible from the submissions is whether the award of general damages for pain, suffering and loss of amenities was so inordinately high or excessive so as to reflect a wrong estimate of the Respondent's entitlement in recompense.
18. 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.”
19. 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.”

20. 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.”

21. In the present appeal, the Appellant merely stated that the award in compensation that was made in favour of the Respondent was too high. The Appellant did not proffer and/or demonstrate to this court the ground that the exercise of the discretion by the learned trial Magistrate was clearly wrong or that 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. If anything, the learned trial Magistrate was clear that she was guided by comparable trends in decided cases. There is therefore no basis upon which I can interfere with the discretion of the trial court in assessing damages.

22. Being of the foregoing persuasion, I reach the result that the appeal herein is without merit and I proceed to dismiss it wholly.

23. Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. To that end then, the costs of this appeal shall be borne by the Appellant.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 20TH DAY OF MARCH, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Ms. Kabita for Ms. Njuguna.

For Respondent: Ms. Kabiru.

Court Assistant: Mr. Juma & Mr. Ngoge.

Court: There shall be 30 days stay of execution, by consent of the parties.

JOE M. OMIDO

JUDGE

