



REPUBLIC OF KENYA



KENYA LAW
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**Trax Kenya Limited & another v Lwango (Civil Appeal E1468 of 2023)
[2025] KEHC 4410 (KLR) (Civ) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4410 (KLR)

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

CIVIL

CIVIL APPEAL E1468 OF 2023

LP KASSAN, J

APRIL 8, 2025

BETWEEN

TRAX KENYA LIMITED 1ST APPELLANT

KHIMJI JETHALAL 2ND APPELLANT

AND

DAN OTIENO LWANGO RESPONDENT

(Being an appeal from the judgment of C.A. Okumu (Adjudicator) (RM) Small Claims Court delivered on 24th November, 2023 in Nairobi Milimani SCCC No. E2054 of 2023)

JUDGMENT

1. This appeal emanates from the judgment delivered on 24/11/2023 in Nairobi Milimani SCCC No. E2054 of 2023 (hereafter the lower Court claim). The claim was filed by Dan Otiemo Lwango, the claimant before the lower court (hereafter the Respondent) as against Trax Kenya Limited and Khimji Jethalal, the respondents before the lower Court (hereafter the 1st and 2nd Appellant/Appellants) seeking inter alia general and special damages. It was averred that at all material times to the suit the Respondent was a pedal cyclist whilst the 1st Appellant was the registered owner of motor vehicle registration number KCK 596B (hereafter the suit motor vehicle) while the 2nd Appellant was the authorized driver or beneficial owner of the suit motor vehicle.
2. It was further averred that on or about the 04/02/2023 the Respondent was lawfully riding his bicycle along Parklands Road when 2nd Appellant so negligently drove, managed and or controlled the suit motor vehicle so carelessly that he failed to keep proper look out for other users thereby knocking the Respondent, a consequence of which the latter sustained serious body injuries and thus suffered much pain and loss. The doctrine of Res Ipsa loquitor was equally pleaded.



3. In response to the claim, the Appellant filed a statement of defence denying the key averments in the statement of claim meanwhile averred on a without prejudice basis to the averments in the defence that the accident was caused and or substantially contributed to by the negligence of the Respondent.
4. From the record of proceedings before the trial Court, it would appear that parties recorded a consent on liability in ratio of 85:15 in favour of the Respondent as against the Appellants and thereafter proceeded to canvass the issue of damages by way of filed documents and written submissions in accordance with Section 30 of the *Small Claims Court Act*. In its judgment, the trial Court entered judgment in favour of the Respondent in the total sum of Kshs. 846,843.10/- after apportionment of 15% liability, inclusive of costs and interest in the above sum.
5. Aggrieved with the outcome, the Appellants preferred this appeal specifically challenging the award on damages, premised on the following grounds -;
 - (i) That the learned Adjudicator erred in law in awarding the Respondent general damages amounting to Kshs. 950,000/- which award was inordinately high considering the findings of the doctor during the Respondent's re-exam that there was no post injury functional deficits and no permanent incapacitation.
 - (ii) That the learned Adjudicator erred in law and fact in failing to consider the medical report by Dr. Adegu produced by the Appellants.
 - (iii) That the learned Adjudicator misdirected herself by failing to consider the submissions by the Appellants while arriving at the judgment.
 - (iv) That the learned Adjudicator's award was incommensurate with injuries sustained by the Respondent.
 - (v) That the award on general damages was unreasonable and excessive. (sic)
6. The appeal was canvassed by way of written submissions of which this Court has duly considered alongside the memorandum of appeal, the record and supplementary record of appeal. This is a first appeal, specifically from the Small Claims Court. This Court has repletely observed and must iterate that the Small Claims Court is a specialized Court on accord of legislation that establishes the said Court. That said, Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the Small Claims Court to the High Court by providing that; -
 1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to in subsection (1) shall be final.”
7. Ordinarily on a first appeal, the appellate Court ought not to interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nonetheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and this Court must first satisfy itself that the appeal before it satisfies the prescription in Section 38 of the Act.
8. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, discussed its mandate on a second appeal, that is, on points of law only. Equally, in this appeal, albeit being a first appeal, the *Small Claims Court Act* prescribes that an appeal to this Court from the Small Claims Court be on matters of law only. In the foregoing case, the Court of Appeal made a distinction between matters of



law vis-à-vis matters of fact however emphasized that the scope of the Court on a second appeal which is on matters of law is to resist the temptation of delving into matters of facts but confine itself to matters of law 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. It warrants mentioning that Black's Law Dictionary defines the two concepts as follows; -

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and

Matter of law: A matter involving a judicial inquiry into the applicable law.”

9. The Court of Appeal in its subsequent decision in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, in addressing the question whether the memorandum of appeal, though on a second appeal, raised factual issues, recognized that an appellate Court when faced with a situation where a memorandum of appeal raises factual issues it is at liberty to strike out the offending ground(s) while retaining those that are compliant.
10. Having reviewed the grounds in the memorandum of appeal, only one ground partially appears to be a tacit invitation to this Court to re-visit factual issues and concomitantly uses the trouble-inviting pair of words, so to speak, “law and fact” in the face of a plain and straight-forward statutory exclusion of matters of fact pursuant to Section 38 of the *Small Claims Court Act*. Nevertheless, a purposeful examination of the grounds undoubtedly reveals the Appellants intent, as they impugned the trial Court's award on general damages for being excessive. Therefore, applying the dicta in *Bashir Haji Abdullahi* (supra), *Kenya Breweries Ltd* (supra) and having conscientiously examined the Appellant's grounds of appeal, the Court is convinced that the same raise issues of law within the strictures of Section 38 (1) of the *Small Claims Court Act* concerning the trial Court award on damages that necessitate this Court's interrogation of appeal.
11. As earlier noted, that Appellants appeal specifically assails the trial Court's award on damages. In considering the issues of damages canvassed vide grounds (i), (iii), (iv) & (v) of the memorandum of appeal, the Court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, 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 the damages.”

12. The same Court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 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”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001*; (2004) e KLR.

13. The Respondent pleaded that he sustained an injury to the “L1 vertebral body anterior wedge compression fracture, Multiple abrasion on the back and shoulders, multiple abrasion on the hands”.



In its judgment that trial Court while deciding the issue of awardable damages for the injuries sustained stated as follow:-

- “ 13. As regards the general damages the Claimant submitted on Kshs.950,000 whereas the Respondent submitted on Kshs.200,000
 14. The claimant relied on a P3 form that indicated the Claimant sustained grievous harm and also relied on a copy of the medical report dated 27th July, 2023 that confirmed the Respondent sustained an L1 vertebral body anterior wedge compressed fracture and laceration on the right shoulder. The degree of permanent incapacity was assessed at 15%.
 15. In *Rukia Mugoya v Johnson Juma Ogutu* [2007] eKLR where judgment was entered for the Plaintiff and against the two Defendants jointly and severally that Kshs. 12,425,000/- was awarded as general damages in respect of wedge compression, fracture, dislocation at C4, C5, facial paralysis both upper and lower limbs, loss of stool control and loss of sensation from the naval region downwards
 16. The Court find that Kshs.950,000 is sufficient general damages” (sic)
14. Upon review of both the Appellants and Respondent submissions before the trial Court, it would seem that both have relied on decisions that the lower Court did not have the benefit of considering while rendering its determination. That later is in clear disregard of the exhortation by Ochieng J (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR, of which this Court agrees with, that law on appeal process is intended to correct the errors made by the trial Court however the same is not an invitation upon this Court to assess a decision of the lower Court that was arrived at using a yardstick that was not made available to it.
 15. Confoundingly, the Appellants had urged before the lower Court that the award of Kshs. 200,000/- was sufficient however on appeal have urged an award of Kshs. 500,000/-. Nevertheless, a review of the impugned decision, there was no in-depth analysis and or consideration of the respective parties’ medical reports on record in respect of the Respondent’s injury. The trial Court seems to have only referred to the Respondent’s medical evidence to the exclusion of the 2nd medical report by the Dr. Adegü, as urged in the Appellants memorandum of appeal. Though a factual issue, per the exhortation in *Kenya Breweries Ltd* (supra) this Court may intervene where it is shown that trial Court failed to consider matters they should have considered. Further to the forestated, the trial Court seemed to have relied on the date decision in *Rukia Mugoya v Johnson Juma Ogutu* [2007] eKLR wherein the claimant sustained wedge compression, fracture dislocation at C4, C5; facial paralysis both upper and lower limbs, loss of stool control and loss of sensation from the naval region downwards with 100% incapacitation. Ex facie, the injuries in the latter decision were more severe than those sustained by the Respondent in the instant matter. It must also be stated that juxtaposing both Dr. Okere’s medical report (capturing 15 % incapacitation) and that by Dr. Adegü, (capturing no incapacitation) it would seem that although the Respondent must have endured much pain in the period of morbidity, he seems to have sufficiently recovered from his injuries with little attendant sequela.
 16. In this Court’s opinion the authority relied on by the trial Court was hardly on all fours with the instant case. However, this Court equally appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and a Court’s duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. From my own review of the material presented before the trial Court and comparisons with authorities relied on by the trial Magistrate, the Appellants



complaint in regard of the awarded damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available and attendant sequela. Reviewing the cases cited in the lower Court by the respective parties, the Court considers the case of Jimna Muthusi Kaloki v Rebecca Wanzila Musyoka [2020] eKLR cited by the Appellants as closely relevant however not on all fours with the injuries sustained by Respondent with the most severed thereof being a compressed fracture of the L1 vertebral.

17. It is useful at this juncture to bear in mind the applicable principles in the assessment of damages, and further the exhortation by the English court in *Lim Poh Choo v Health Authority* (1978) 1 ALL ER 332 as echoed by Potter, J.A in *Tayab v Kinany* (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added).

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd.* [2013] eKLR.

18. Thus, with the above in reserve, the Court is persuaded to disturb the award by the trial Court decreasing the same to Kshs. 850,000/- on general damages whereafter upon apportionment of liability of 15% the same would amount to Kshs. 722,500/- as the final award on general damages. The award on special damages was not challenged and the same is sustained as awarded.
19. In conclusion the Appellants appeal succeeds, to wit, the award of general damages by as awarded by the trial Court at Kshs. 805,000/- is hereby substituted with an award of Kshs. 722,500/- after apportionment of liability. The Appellants are equally awarded the costs of the appeal. Specials shall attract interests from the time the case was filed at the lower court and the general damages from the time the lower court judgment was read. Each party to bear own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Simiyu for the Appellant

Kimunto for the Respondent

Carol – Court Assistant

