Kasembe & another v Olela (Civil Appeal E173 of 2023)
[2025] KEHC 10890 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E173 OF 2023

JM OMIDO, J

JULY 3, 2025

BETWEEN

EDWIN KASEMBE ..... 1ST APPELLANT

PETER OKOTH OUMA ..... 2ND APPELLANT

AND

CAREN ANYANGO OLELA ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. G.C. Serem, Resident Magistrate delivered on 25th May, 2023 in Kisumu CMCC No. 146 of 2015)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. G.C. Serem, Resident Magistrate delivered on 25th May, 2023 in Kisumu CMCC No. 146 of 2015.
2. The grounds of appeal presented by the Appellants vide the Memorandum of Appeal dated 18th October, 2023 upon which they seek to upset the judgement and decree of the lower court are as follows:
    i. The learned Magistrate erred in law and in fact in holding the Appellants 100% liable for the occurrence of the accident.
    ii. The learned Magistrate erred in law and in fact in awarding damages in favour of the Plaintiff without any legal and/or evidential justification.
    iii. The learned Magistrate erred in law and in fact in failing to take into consideration the submissions by the Defendants more so that the Plaintiff filed a frivolous claim.

iv. The learned Magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.

v. The learned Magistrate erred in law and in fact in awarding Ksh.200,000/- as general damages without any legal and/or evidential justification.

vi. The learned Magistrate erred in law and in fact in failing to appreciate as follows:That the evidence adduced in support of the Plaintiff's case was incongruous with pleadings.That the Plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages awarded.

vii. The learned Magistrate erred in law and in fact by awarding excessive damages beyond the scope of evidence and/or legal entitlement.

viii. The learned Magistrate erred in law and in fact in entering judgement in favour of the Plaintiff against the Defendant in spite of the Plaintiff's miserable failure to establish his case.

3. The Appellants propose that the appeal be allowed and that this court sets aside the trial court's judgement and decree and substitutes the same with an order for the dismissal of the suit before the trial court and/or reassesses the damages awarded by the trial court.

4. 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 *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

6. The matter before the trial court, based on tortious liability (a personal/bodily injury), was commenced by the Respondent by way of a plaint dated 25th November, 2014.

7. The Respondent pleaded that she was involved in a road traffic accident at Rabuor area along the Kisumu – Ahero Road on or about the 26th of August, 2014 and sustained injuries. The accident involved a collision between motor vehicle registration numbers KBQ 047P that belonged to the 1st Appellant and was being driven and/or controlled by the 2nd Appellant and motor vehicle registration number KBY 117G aboard which the Respondent was travelling as a fare paying passenger.

8. The Respondent pleaded that the 1st Appellant's motor vehicle was carelessly and or negligently driven and/or controlled by the 2nd Appellant as a result of which it collided with motor vehicle registration number KBY 117G. The Respondent listed in her pleading the particulars of negligence that he attributed to the Appellant.

9. The Respondent pleaded that she sustained the following injuries in the accident:

    a. Injury on the head.

    b. Injury on the chest.

    c. Injury on the back.

    d. Fracture of the left arm.

    e. Fracture of the left tibia on the left leg.

    f. Degloving injury on the left and right legs.

10. The Respondent sought the following reliefs before the trial court:

    a. General damages for pain, suffering and loss of amenities.

    b. Special damages.

    c. Costs of the suit.

    d. Interest on a, b and c at court rates.

11. The Appellants resisted the claim by filing a joint statement of defence dated 16th August, 2016, denying the Respondent's claim in its entirety. The Appellants denied that motor vehicle registration number KBQ 074P belonged to the 1st Appellant and that the same was being driven by the 2nd Appellant. The Appellants further denied the allegations of the occurrence of the accident and that the Respondent sustained the injuries pleaded. The two denied that they were liable for the occurrence of the accident.

12. The Appellants, in the alternative pleaded that if indeed the alleged accident occurred, the same was solely caused by and/or substantially contributed to by the Respondent and the driver of motor vehicle registration number KBY 117G. The Appellants listed in their statement of defence the particulars of negligence that they attributed to the Respondent and the said driver. The two sought that the Respondent's suit be dismissed in its entirety, with costs.

13. The Respondent testified before the trial court and adopted the contents of her undated statement filed in court on 2nd April, 2015 (although the proceedings of the trial court indicate that the same was filed on 8th April, 2015). The Respondent stated in her statement that on 26th August, 2014, she was a passenger aboard motor vehicle registration number KBY 117G, a matatu, which was travelling along the Kisumu – Ahero Road. That on reaching Rabuor area, motor vehicle registration number KBQ 074P veered off its path/lane and onto the matatu's path/lane and collided with the latter, as a result of which the Respondent sustained injuries. She was rushed to hospital and received treatment. The accident was reported to the police.

14. The Respondent thus blamed the Appellants (as owner and driver respectively of motor vehicle registration number KBQ 074P) for causing the accident.

15. The Respondent called Police Constable Samson Biwott of Kisumu Central Police Station, Traffic Base, as her witness. The witness told the court that the accident in question occurred on 26th August, 2014 and was reported to the police and police action taken. The officer stated that the accident involved three motor vehicle, registration numbers KCA 780b, KBY 117G and KBQ 074P. Investigations were conducted and it was noted that the driver of motor vehicle registration number KBQ 074P embarked on overtaking another vehicle without first ensuring that it was safe to do so, as

a result of which the vehicle collided with the other two, which were being driven from the opposite direction. Several people were injured in the accident, one fatally.

16. The officer told the trial court that the 2nd Appellant, who was the driver of motor vehicle registration number KBQ 074P was wholly to blame for the accident and was charged with the traffic offence of causing death by dangerous driving contrary to Section 46 of the *Traffic Act*, Cap 403 Laws of Kenya.

17. The following documents were produced in support of the Respondent's case:A copy of the Respondent's national identity card.Discharge summary.Treatment notes.X-ray request form.Police abstract.P3 form.Demand letter.Copy of records for motor vehicle registration number KBQ 074P.Medical report prepared by Dr. Manasseh Omondi.Receipt for Ksh.1,500/- for the medical report.Receipts for Ksh.19,874/- for treatment.

18. The Respondent closed her case at that stage. The Appellant did not call any witnesses.

19. The trial court went on to render its judgement on 25th May, 2023 in favour of the Respondent as follows:

    a. Liability – at 100% against the Defendants.

    b. General damages – Ksh.800,000/-.

    c. Special damages – Ksh.1,500/-.

    d. Plaintiff is equally granted costs of the suit and interest is awarded at court rates from the date of judgement.

    e. Defendants are granted 30 days stay of execution.

20. Now to the present appeal, the Appellant's challenge the trial court's findings on both liability and quantum. So then, the issues I am tasked to determine are as follows:

    a. Whether the learned trial Magistrate reached the proper finding that the Appellants were 100% liable for the occurrence of the accident.

    b. Whether the learned trial Magistrate properly and/or appropriately assessed and awarded damages to the Respondent.

    c. The court's determination as to costs.

21. In respect of the first issue for determination, which is whether the learned trial Magistrate reached the proper finding that the Appellants were 100% liable for the occurrence of the accident, the trial court, in its judgement delivered on 25th May, 2023, in determining liability, rendered thus:

    9. On liability, the Plaintiff blamed the Defendants for the accident and further produced the abstract to confirm that the accident occurred. PW2 who was the police officer stated that he blamed the Defendants for the said accident and a party had been charged. The Defendants in their pleadings blamed KBP 117G, however, the said party was not enjoined (sic) and the Defendants further did not adduce any evidence to prove their case.

    10. It is trite law that he who alleges must prove. Under Section 107 of the *Evidence Act*;

        1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

        2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

11. Under Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person.

12. In the case of *Kimatu Mbuvi v Benson Ngale* [2012] eKLR, Lenaola J. (as he then was) held:

"Liability cannot be challenged where a party calls no evidence to rebut the allegation of negligence and hardly challenge the circumstances of the accident".

13. In *CMC Aviation Limited v Cruise Air Limited* [1978] E.A., 103, Madan J. stated:

"Pleadings contain averments of those concerned until they are proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."

14. The Defendants did not call any witness or produce any evidence to controvert the evidence that was adduced by the Plaintiff or prove their averments in the defence. On those grounds the Defendants are held 100% liable for the accident."

22. With that, the learned trial Magistrate went on to find that the Appellants were wholly to blame for the occurrence of the accident.

23. It is instructive from the record of the trial court that the only evidence available as to how the accident occurred is that of the Respondent and the police officer. The Respondent stated that the 1st Defendant's motor vehicle veered off its lane and onto the lane of the matatu in which the Respondent was travelling and collided with the same. The police officer stated that the 2nd Appellant, who was the driver of motor vehicle registration number KBQ 074P, embarked on overtaking another vehicle without first ensuring that it was safe to do so, as a result of which the vehicle collided with the other two, which were being driven from the opposite direction.

24. The officer produced a police abstract as proof that the accident occurred and that the Respondent was among those injured in the misfortune. The abstract indicates that the 2nd Appellant was the driver of motor vehicle registration number KBQ 074P and that the said driver was found to be at fault and charged with the offence of causing death by dangerous driving in Traffic Case No. 05 of 2014. The copy of records confirms that the 1st Appellant was the owner of the said vehicle.

25. The Appellants did not call any witness or provide any evidence that would rebut the evidence of the Respondent. They only claimed in their joint statement of defence that the driver of the matatu and the Respondent were to blame for and/or substantially contributed to the accident. The Appellants did not take out a third-party notice against the said matatu driver. As we have seen above in the case of CMC Aviation Limited (supra), the contents of a pleading are not evidence. Such contents can only be established or proved through evidence.

26. There being no evidence to rebut the position proffered by the Respondent as to causation and negligence, it is my persuasion that the learned trial Magistrate reached the proper finding that the 2nd Appellant was wholly to blame for the accident and that the 1st Appellant bore vicarious liability, to the same extent.

27. The second issue for this court to determine is whether the amount assessed and awarded as compensation to the Respondent was in error and/or inordinately high or excessive, as claimed by the Appellants.

28. With regard to quantum, the present appeal did not challenge the court's finding and award on special damages. The challenge is with regard to the award of Ksh.800,000/- made under the head of general damages for pain, suffering and loss of amenities.

29. The injuries that the Respondent pleaded have been reproduced above, under paragraph 9 of this judgement. The Respondent produced a medical report, treatment notes and a P3 form to prove the said injuries, evidence that was not controverted by the Appellants.

30. In considering making the award, the learned trial Magistrate observed as follows in her judgement:

> 16. The court has considered the submissions of the parties and has stated (sic) an amount of Ksh.800,000/- is sufficient compensation for the injuries suffered by the Plaintiff. The court relies on the case of Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR where the appellate court awarded similar damages for similar injuries as the Plaintiff's in this case."

31. 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."

32. 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.
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> It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:
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> "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."

33. 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."

34. In the present appeal, the Appellants merely state that the award in compensation that was made in favour of the Respondent under the head of pain, suffering and loss of amenities was too high.

35. The Appellants did not proffer and/or demonstrate to this court the ground that the exercise of the discretion by the trial court 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.

36. If anything, in reaching her decision, the learned trial Magistrate relied on an authority of a superior court in which the court dealt with comparative injuries. There is therefore no basis upon which I can interfere with the discretion of the trial court. I find no ground to fault her assessment and award.

37. Being of the foregoing persuasion, the result I then reach is that the appeal lacks merit and I proceed to dismiss it in its entirety.

38. With regard to costs, Section 27 of the *Civil Procedure Act* dictates that the same shall follow the event. To that end, the Appellants shall jointly and severally bear the Respondent's costs of this appeal, which I assess at Ksh.40,000/-.

39. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 3RD DAY OF JULY, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: Mr. Ombese.

For Respondent: Ms. Okoth for Ms. Odieny.

Court Assistants: Mr. Ngoge & Mr. Juma.