



**Gabriel & another v Kilonzo (Civil Appeal 27 of 2019)  
[2024] KEHC 7001 (KLR) (Civ) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7001 (KLR)

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

**CIVIL**

**CIVIL APPEAL 27 OF 2019**

**DKN MAGARE, J**

**JUNE 11, 2024**

**BETWEEN**

**WAGAKO GABRIEL ..... 1<sup>ST</sup> APPELLANT**

**DAVID NDUNGU MUGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANGELINE KAMANTHE KILONZO ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and decree of the Hon. Makau given on 7.12.2018 in Nairobi Milimani CMCC 5262 of 2015.
2. The Appeal is on quantum basis. The Appellant filed 5 grounds of appeal, of which 2 are not real grounds:-
  - a. That the Learned Magistrate erred in law and in fact in awarding General Damages at Kshs 850,000/= which award was excessive and unwarranted in light of the evidence adduced.
  - b. That the Learned Magistrate erred in law and in fact in awarding General Damages at Kshs 850,000/= which award was excessive and not commensurate with the injuries sustained by the Plaintiff.
  - c. That the Learned Magistrate erred in law and in fact in not finding that the special damages award of Kshs 32,465/= was not proved.
3. The Respondent filed suit claiming damages for the following injuries
  - a. Blunt injuries to the abdomen.



- b. Raptured Liver and haematoma formation.
4. The matter was heard and the court found the Respondent liable on 100% basis. The Respondent submitted a sum of Kshs. 70,000/=. The Respondent 2,000,000/=. Each had their own exaggerated version of the injuries.
  5. The court awarded Kshs. 860,000/= as General Damages and Kshs. 32,465 as Special Damages. The Appellant appealed against both.

### **Submissions**

6. In their submissions they maintained Kshs. 70,000/=. They relied on the case of Maji Mazuri Flowers v Bethwel Kiplagat [2015] eKLR. They quoted a different authority. The said case dealt with minor injuries. I do not know whether it's the heat of Mombasa or the cold in Nyeri that is making the world of difference in the understanding what a raptured liver is.
7. The Appellant was not candid and did not recognize that a liver is a factory that is more useful than a leg.

### **Duty of the court**

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
9. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
10. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
11. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.



12. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

13. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019]eKLR, Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

14. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

15. The foregoing was settled in the cases of *Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR* where the Court of Appealed held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

16. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

17. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

18. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure



of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

19. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
20. So my duty as the appellate court is threefold regarding quantum of damages: -
  - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
  - b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
  - c. The award is simply not justified from evidence.
21. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
22. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

23. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure. In *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held as hereunder:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

24. I must bear in mind that the principles that guide assessment of damages as espoused in *West (HI) and Sons Ltd v Shepherd*(1964) AC 326 which was adopted in the case of *Cecilia Mwangi& Another v Ruth Mwangi*CA 251 /1996, and in the *Nancy Oseko* case where the Judge adopted what Lord Morris said:

“But money cannot renew a physical frame that has been battered and shuttered. All that judges and courts can do is to award sums which must be regarded as giving reasonable



compensation. In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional.”

25. In the case of Kenya Power & Lighting Co.Ltd v Kenneth Lugalia Imbugua [2016] eKLR, Justice R.E. Aburili confirmed an award of Ksh 700,000/- in 2016 for loss of gall bladder and tear of the liver. This was more serious than in this matter but there is the element of inflation.
26. The authorities used were far off the mark. The award by the court was proper in this case. The court considered the evidence and the injuries suffered by the Respondent.
27. In the circumstances I find the award was low. It was not so low as to amount to an erroneous estimate of damages. The award was definitely not high. The court cannot be called to substitute its opinion with the lower court one.
28. The Appeal on General Damages are untenable. It is accordingly dismissed.
29. On special damages the Respondent pleaded: -
  - a. A Police abstract 200
  - b. Search fee 500
  - c. Medical Report 2,000
  - d. Medical Report 29,625
  - e. Postage 340
30. The last item is in the nature of costs. Whether it is not proved, the same is untenable. Secondly the police abstract is given free of charge. Any money paid has nothing to do with the abstract. It is also set aside.
31. The Appellant produced documents in a list filed on 4.9.2015. A cash receipt at page 25 shows Kshs 4,825 was paid on 3.9.2023. There are other receipts Kshs. 200 and 550/=. The accident had occurred on 3.9.2014. The receipt for 550 is for urinalysis. There is another for Kshs. 50. A medical report for Kshs. 2,000/= was produced. Other receipts were for 500. There was a receipt for Kshs. 4,000/=. The total receipts are for Kshs. 11,625/=-.
32. In The court erred in not adding the correct figures up. In In the case of David Bagine v Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi [1982-88] IKAR 681 at page 684: “....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”



32. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

“In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

33. Consequently, I set aside the award of Special Damages and in lieu thereof, I enter judgment for Kshs. 11,625/=.

#### **Determination**

34. In the circumstances I make the following orders: -

- a. Appeal on General Damages lacks merit and as such the same is dismissed.
- b. I allow the Appeal on Special Damages and set aside the award of Kshs. 32,665/- and in lieu thereof award a sum of Kshs. 11,625.
- c. The Appellant was largely unsuccessful. They shall bear 90% costs being, Kshs. 135,000/=.
- d. 30 days stay of execution.
- e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.**

**Judgment delivered through Microsoft Teams Online Platform.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

**Nyamwaya for the Appellant**

**Mr. Ochako for the Respondents**

**Court Assistant – Jedidah**

