



Wanjiru v Kiilu (Civil Appeal 90 of 2023) [2024] KEHC 8881 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 90 OF 2023
MA OTIENO, J
JULY 19, 2024**

BETWEEN

ANTHONY IRUNGU WANJIRU APPELLANT

AND

LUCY MUTHEU KIILU RESPONDENT

*(Being an appeal from the Judgment of Honourable R. OTIENO, RM)
delivered at Thika on 11th May 2022 in Thika SCC No. E014 of 2022)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 11th May 2022 in Thika Small Claims Court (SCC) No. E104 of 2022. The claim was as a result of a road traffic accident which was pleaded to have occurred on 28th October 2021 in Ruiru. In the claim, the Appellant, then a Claimant, sought for compensation in the nature of general damages, special damages and costs of the suit.
2. The Appellant in his statement of claim of 9th February 2022 averred that on 28/10/2021 while he was riding his motorbike registration number KMFB 923P, motor vehicle registration number KCH 871W, which was being driven carelessly and negligently by the Respondent, took a right turn, without caution or care to the Appellant, causing the Appellant's motorbike to collide with the Respondent's motor vehicle thereby injuring the Appellant.
3. The Respondent in her response dated 7th March 2022 denied any negligence on his part and proceeded to assert that the Appellant was the author of his own misfortune.
4. After hearing the evidence from both parties, the trial court vide its Judgment of 11th May 2022 dismissed the claim with costs in favour of the Respondent. The trial court found that the Appellant had failed to establish negligence on the part of the Respondent.



5. Dissatisfied with the outcome, the Appellant vide his memorandum of appeal dated 9th June 2022 preferred this appeal challenging the whole of the trial court's judgment based on the following grounds; -
- i. That the learned trial Adjudicator erred in fact and in law and misdirected himself in finding that the Claimant had not established any negligence on the part of the Respondent.
 - ii. That the learned trial Adjudicator erred in fact and in law and misdirected himself in finding that the Respondent was not negligent at all in causing the accident which occurred on the 23rd October 2021.
 - iii. That the learned trial Adjudicator erred in fact and in law and misdirected himself in ignoring the principles applicable in awarding quantum and damages and liability cited in the written submissions presented and filed by the Appellant.
 - iv. That the learned trial Adjudicator erred in fact and in law and misdirected himself in awarding general damages of Kshs. 600,000/- had the claim succeeded.
 - v. That the learned trial magistrate proceeded in wrong principles when assessing damages and liability to be awarded to the Appellant.
 - vi. That the learned trial magistrate failed to apply himself judicially, and to adequately evaluate the evidence and exhibits rendered on quantum and liability thereby arriving at a decision unsustainable in law
 - vii. The learned magistrate in arriving at the said decision
 - viii. That he learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature
 - ix. finding that the Claimant had not established any negligence on the part of the Respondent
6. The appellant prayed that the appeal be allowed and that the judgment of the trial court dated 11th May 2022 on quantum and liability be set aside and liability be entered in his favour. That in the alternative, the Judgment by the trial court be set aside and the suit be heard de novo.

Submissions

7. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 23rd May 2024 whilst the Respondent's submissions are dated 3rd June 2024.
8. Having perused the submissions, it is evident that the Appellant's appeal is on both quantum and liability. On liability, it was the appellant's case that the trial court totally ignored his evidence on the issue of liability. In particular, the appellant asserted that the trial court failed to appreciate the import of the police abstract which indicated that the matter was still pending investigations.
9. Relying on the case of Mbogo and Another v Shah [1968] EA 93 the Appellant urged this court to set aside the decision by the trial court on the basis that the trial court clearly misdirected itself on the issue of evidence and liability and that the finding by the trial court was plainly wrong. That the court acted on matters on which it should not have acted, while ignoring matters which it should have taken into consideration, thereby arriving at the wrong conclusion.
10. On the issue of quantum, the Appellant's argument was that the learned trial Adjudicator failed to apply himself judicially and to adequately evaluate the evidence and exhibits rendered on quantum



thereby arriving at a decision unsustainable in law. According to the Appellant, the Kshs. 600,000/- awarded by the trial court was inordinately low and did not take into account the injuries suffered as well as comparable cases. Restating the authorities relied on at the trial court, the Appellant submits that a sum of Kshs. 800,000/- ought to have been awarded.

11. Though not mentioned as a ground of appeal, the Appellant introduced, in his submissions in the appeal that the Small Claims Court lacked jurisdiction to deal with this case. Citing the case of *Ogwari v Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) (3 July 2023), the Appellant argued that the case being an unquantified claim, arising from a road traffic accident, the matter fell out of scope of the Small Claims Court.
12. Defending the trial court findings, the Respondent maintained in her submissions that the Claimant did not prove any negligence on the part of the Respondent and therefore the finding by the trial court on the issue of liability was correct.
13. On the issue of quantum of damages, the it was the Respondent's position in this appeal that the finding by the trial court was correct. In the circumstances, the Respondent urged this court to maintain the holding by the trial court on the issue of quantum as well.

Analysis and determination

14. This court has considered the memorandum of appeal, the record of appeal as well as the submissions by the parties herein.
15. Being an appeal from the Small Claims Court, Section 38 of the *Small Claims Court Act* under which the appeal has been made provides as follows; -

“(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.”

16. It therefore follows that appeals originating from the Small Claims Court to this court can only on the points of law. Consequently, this court cannot, in appeals emanating from that Court, entertain an invitation to interfere with the factual findings of the trial court. The duty of this court when dealing with such appeals, is therefore equivalent to that of the Court of Appeal in its capacity as a second appellate court.
17. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact and stated that: -

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.” [Emphasis added].



18. Again, in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact of the lower court. The appellate Court should not interfere with the decisions of the trial court on the factual issues ‘unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law’. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, 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. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

19. Applying the above decisions to the instant appeal, it is therefore clear that when dealing with this appeal, this court will only confine itself to the issues of law as raised in the memorandum of appeal. That the findings of the trial court are to be accepted, unless it becomes apparent, on evidence, that the conclusions on facts reached by the trial court, are so unreasonable that no reasonable court or tribunal could arrive at the same conclusion.
20. The first issue of law raised by the Appellant is that of jurisdiction. The Appellant argued, in his submissions, that his Claim, being an unquantified one, falls out of scope of the Small Claims Court and for that reason, he pleaded with this court to set aside the Judgment of the Hon. Adjudicator and thereafter direct that the suit be heard de novo before a competent trial court. In support of his position, the appellant cited the case of *Ogwari v Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) (3 July 2023) where the court stated that; -

“30. When a claim is unquantified it is not a small claim. It is a claim at large. In the case of *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019) eKLR Hon Justice D.S Majanja on 21st February, 2019 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.”

31. General damages cannot be quantified in advance. Therefore, there is no need of quantifying damages that are at large...”

21. The Respondent’s position on the issue of jurisdiction of the trial court was that the question of jurisdiction was not pleaded in the memorandum of appeal and cannot therefore be competently brought up in submissions at appeal. According to the Respondent, parties are bound by their



pleadings. The Respondent cited the Court of Appeal decision in *Coastal Bottlers Limited vs. George Karanja MBSA CA 13 of 2015* where the court stated that; -

“It is trite law that pleadings are not only binding on the court but on the parties as well (see. *Galaxy Paints Company Ltd vs. Falcon Guards Ltd, Civil Appeal No. 219 of 1998*, where this Court held that:-

“It is a firmly established rule of evidence that the evidence produced in court to prove a claim must flow from the pleadings.”

This applies not only to pleadings and proceedings before the trial court, but to appeals as well. An appellate court is bound by the issues pleaded in the memorandum of appeal and ought not address any issues extraneous to the grounds pleaded (see. *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR).

22. Before turning to the Small Claims Act to establish whether the trial court had jurisdiction to deal with the suit, it is important to point out that contrary to the Respondent’s submissions, the issue of jurisdiction can be raised at any time and in any manner. It need not have been raised in the initial pleadings or even in the memorandum of appeal. the position taken by the Respondent is therefore not correct when it comes to the question of jurisdiction. This position is supported by the Court of Appeal decision in *Kenya Ports Authority v Modern Holdings* [E.A] Limited [2017] eKLR, where the court stated that; -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

23. In the circumstances, I find and hold that the mere fact that the question of jurisdiction was taken up by the Appellant, either at the trial stage or in the memorandum of appeal, the issue is one which can be competently raised in the submissions and be dealt with by the court in this court’s judgment.

24. It is an established principle that a court’s jurisdiction is conferred either by *the Constitution* or other written law or both. Accordingly, a court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. See the Supreme Court decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court stated the following on the question of jurisdiction; -

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of



the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

25. Section 12 of the *Small Claims Act* confers jurisdiction on the Small Claims Court. It provides as follows; -

- “(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
- a. a contract for sale and supply of goods or services;
 - b. a contract relating to money held and received;
 - c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - d. compensation for personal injuries; and
 - e. set-off and counterclaim under any contract.
- (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
- (3) The pecuniary jurisdiction of the Court shall be limited to one million shillings.
- (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit. [Emphasis added]

26. The claim before the trial court related to personal injuries suffered by the Claimant as a result of a road traffic accident. The claim was however unquantified. A simple reading of Section 12 (1) (d) of the *Small Claims Act* clearly indicates that the claim is housed thereat, non-quantification of the claim notwithstanding. To my mind, all claims qualify to be handled by the court, except those expressly excluded under section 13 (5) of the Act, provided that the monetary value is not beyond the one million shillings prescribed under Section 12(3) of the Act.

27. By didn't of section 13(5) of the Small Claims Act, the only disputes expressly excluded from the jurisdiction of the court, irrespective of their monetary value, are those relating to defamation, libel, slander, malicious prosecution and those falling under the jurisdiction of specialized courts pursuant to Article 162 (2) of *the Constitution*. Apart from those expressly excluded under Section 13 of the Act, the rest of the claims fall within the jurisdiction of the Small Claims Court, with the only limitation being the monetary value of shillings one million. Section 13 provides as follows; -

“13. Exclusion of jurisdiction



1. If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the—
 - a. proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
 - b. claim before the other Court has been withdrawn.
 2. A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.
 3. Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.
 4. For the purposes of this section, a claim is deemed to have been lodged with the Court in any case where section 23 has been complied with.
 5. A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations. [Emphasis added]
28. I have perused the Statement of Claim dated 9th February 2022. I note that the Claimant stated in his Statement of Claim that he was seeking compensation for personal injury as a result of a road traffic accident, which is within section 12 (1) (d) and that his claim was not beyond the one million shillings prescribed under section 12(3).
 29. Having so established, I find and hold that the trial court had jurisdiction to deal with this matter.
 30. A perusal of the *Ogwari v Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) (3 July 2023) judgment cited by the Appellant in support of his argument for ousting the trial court’s jurisdiction does not really speak to that conclusion. In that case, the learned judge merely warned litigants with unquantified claims to take note of the monetary jurisdiction of the court before commencing proceedings thereat. That nothing absolutely wrong with a claimant with an unquantified claim commencing proceedings in the small claims court where they are certain that the award will not be in excess of the prescribed one million shillings.
 31. Further, this court of the view that even in a personal injury claim commenced at the Small Claims Court, the mere fact that damages are eventually assessed to be in excess of the one million prescribed does not of itself oust the jurisdiction of the court. The claimant having elected to commence proceedings in the court, will bound by the monetary limitation and will only be entitled to sums up to one million shillings, as full and final settlement of the claim.
 32. The second issue taken up by the Appellant in the appeal is that of liability. The appellant submitted that the trial court erred in fact and in law in finding that the Appellant had not proved any negligence on the part of the Respondent arising from the accident.
 33. I have perused the proceedings and the judgment of the trial court regarding the issue of liability. I note that the trial court after evaluating the Appellant’s evidence came to the conclusion that the Claimant had not established any negligence on the part of the Respondent. The court therefore dismissed the Appellant’s claim.



34. As indicated elsewhere in this judgment, my duty in this appeal is to confine myself to the issues of law, which included the trial court's conclusion on factual issues, especially, where the conclusions are perverse.
35. Section 107 of the Evidence Act provides that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that 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 any law that the proof of that fact shall lie on any particular person.
36. In Njeru (Suing as the personal representative of the Estate of Kennedy Mukundi Njiru v Machikine Holdings Limited (Civil Appeal 21 of 2022) [2023] KEHC 585 (KLR) the court stated the following regarding the burden of proof; -
- “It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
37. It therefore follows that to prove negligence on the part of the Respondent, the initial burden of proof in this case lay on the Claimant. He needed to prove to court that the accident which was the subject matter of this suit was caused by the Respondent's negligent act or omission.
38. The question therefore that I need to answer in this Judgment is whether the appellant in discharging the burden of proof placed on him by the law, proved his claim of negligence against the Respondent to the required standards.
39. The Appellant filed his claim and pleaded negligence against the Respondent. He also filed his list of documents and witness statements and to which evidence was led. On her part, the Respondent filed her response to the claim, including supporting documents denying the averments in the Claim. She instead blamed the Claimant for negligence.
40. The Hon. Adjudicator upon consideration of the facts and law, delivered a judgment on 11th May 2022, dismissing the Appellant's claim and further awarded costs of the to the Respondent.
41. From the evidence on record, I note that the Appellant, who testified as PW1 stated that it was his motorcycle that hit the Respondent's vehicle. The Respondent on the other hand testified as DW1 and told court that she had packed her car off the tarmac when the accident happened and that it is the Appellant who hit her motor vehicle. Her testimony was corroborated by DW2, the Respondent's daughter who was at the time of the accident on the passenger's seat.
42. Having reviewed the proceedings and the trial court's finding on the evidence adduced thereat, I find that the conclusions reached by the trial court on the issue of liability was not erroneous as to warrant the attention of this court, exercising its appellate jurisdiction in matters such as this. Consequently, I sustain the conclusion reached by the trial court on the issue of liability and hereby uphold the judgment.
43. The final ground taken up by the Appellant in his submissions was that of quantum of damages. The trial court, in its judgment indicated that a sum of Kshs. 600,000/- would have been awarded to the



Appellant had he succeeded on liability. The appellant's argument was that the amount so assessed was inordinately low and did not take into account the nature of injuries he suffered.

44. The general principle is that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low [See *Butt v Khan* [1981] KLR 470].
45. According to the Appellant, a sum of Kshs. 800,000/- would have been assessed. I have looked at the injuries as particularized in the Statement of claim. According to the statement of claim, the appellant suffered the following injuries; -
 - i. A deep cut on the right lateral orbital area
 - ii. Bruised forehead
 - iii. Right side chest pains with difficulty in breathing
 - iv. Swollen upper chest wall with tenderness
 - v. Traumatic homothorax
 - vi. Sequale of fracture of skull and facial bones
 - vii. Pain on the limbs and both knees
46. Having noted the injuries and taking into account of the authorities cited by both parties at the trial stage, as well as those cited by the Appellant in this appeal, I find that the amount of Kshs. 600,000/- assessed by the trial court in general damages is not inordinately high as alleged by the Appellant.
47. Due to the foregoing reasons, I find the appeal is not merited and therefore dismiss the same with costs to the Respondent.
48. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Wanjru Mwangi..... for the Appellant.

Stower h/b for Mbingi.....for the Respondent.

