



REPUBLIC OF KENYA



**Ogega & another v Maingi (Civil Appeal E271 of 2024)
[2024] KEHC 14472 (KLR) (Civ) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14472 (KLR)

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

CIVIL

CIVIL APPEAL E271 OF 2024

BK NJOROGE, J

NOVEMBER 21, 2024

BETWEEN

LUCY NABWIRE OGEGA 1ST APPELLANT

SIOGE INVESTMENT LIMITED 2ND APPELLANT

AND

EDWIN KIARIE MAINGI RESPONDENT

(Appeal arising out of the decision of the Hon. Adjudicator C.A. Okumu dated 26/1/2024. It was in respect to Milimani Nairobi Small Claim Court No. E648 of 2023.)

JUDGMENT

1. This is an Appeal arising out of the decision of the Hon. Adjudicator C.A. Okumu dated 26/1/2024. It was in respect to Milimani Nairobi Small Claim Court No. E648 of 2023.

The Background Facts

2. This Appeal arises out of a running down claim filed before the Small Claims Court. The Appellants were the Original Respondents while the Respondent was the Original Claimant, before the Small Claims Court.
3. The Appellants were the driver and owner of a motor vehicle KAQ 143Z. It was involved in a road traffic accident on 1/4/2023 at about 7.00 p.m. This was along the Thika Super Highway at Muthaiga, opposite Muthaiga Primary School.
4. The Respondent was riding a Motor Cycle KMGH 597J when he rammed into the rear of the Appellants' Motor Vehicle. He sustained injuries for which he claimed damages for pain and suffering. He also sought special damages.



5. The Appellants also Counter-claimed against the Respondent for the material damages suffered by the Motor Vehicle. They claimed a sum of Kshs.25,000/- for the repairs to the motor vehicle.
6. After hearing the parties, the Adjudicator proceeded to apportion liability at 50%:50% against the parties. In essence holding them both equally to blame for the accident.
7. The Adjudicator then proceeded to enter Judgment as follows;
 - a. Liability in the ratio 50:50
 - b. General damages Kshs.250,000/-
Less 50% contribution Kshs.250,000/-
Total Kshs.125,000/-
 - c. Special damages of Kshs.8,550/-
Less 50% contribution Kshs.4,275/-
Total Kshs.4,275/-
 - d. Interest on (b) and (c) above from the date of Judgment until payment in full.
 - e. Each party to bear their respective costs.As regards the Respondent's Counter-claim
 - a. Liability is apportioned in the ratio 50:50
 - b. Special damages of Kshs.25,000/-
Less 50% contribution Kshs.12,500/-
Total Kshs.12,500/-
8. It is this decision that has triggered this Appeal.
9. This matter was flagged down for the Rapid Results Initiative (RRI) for the month of September, 2024. The Appeal was admitted and parties directed to dispose of the Appeal by way written submissions.
10. The Court has seen the Appellants' written submissions dated 5th September, 2024. The Court has also seen the Respondent's written submissions dated 2/10/2024 with list of authorities. The Court has perused the submissions and authorities filed and is grateful to Counsel for their industry.
11. The Appellants have filed a Memorandum of Appeal dated 19th July 2024. It raises 3 grounds of Appeal as follows;
 - i. The learned trial Magistrate erred in law and in fact in apportioning liability at 50:50 against the weight of the evidence.
 - ii. The learned Magistrate erred in law and in fact in making an award that was highly excessive given the principles in law and the factors to be used to make a judgment.
 - iii. The learned magistrate erred in law and in fact by deciding the case against the weight of evidence.



Issues for determination

12. The Court having perused the Memorandum of Appeal and the submissions filed, frames 3 issues for determination as follows;
 - a. Whether the grounds raised in the Memorandum of Appeal are based on points of law or on evidence?
 - b. Whether the Appeal filed is meritorious?
 - c. What reliefs flow from this Appeal

Analysis

13. The Court proceeds to determine the 3 issues in seriatim as follows;
 - a. Whether the grounds raised in the Memorandum of Appeal are based on points of law or on evidence?

As per Section 38 of the [Small claims Court Act](#), an Appeal to this Court can only be on points of law.

“38. Appeals

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”

14. An Appeal to this Court is therefore not in the same manner as in the usual first appeal. The Court’s mandate is restricted to reviewing the decision of the learned Adjudicator on points of law. See *Mwaura v Wambua* (Commercial Appeal E003 of 2024) [2024] KEHC 13897 (KLR) (11 November 2024) (Judgment)

“This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the Small Claims Court Act which provides as doth:

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.

The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of *Mbogo and Another vs. Shah* [1968] EA 93, the court of appeal stated as doth:

“...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.”



However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but point of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appeal was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR:- “This is a second appeal. I am alive to my duty as a second appellate court to determine 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: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”

15. For what constitutes a point of law the court refers to the decision of *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR;

“Although the phrase ‘a matter of law’ has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney* (1947) 1 All ER 126. See also Khatib *Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013* (Court of Appeal), (Okwengu, M’inoti & Sichale, JJA) of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484.”

In *Peter Gichuki King’ara Vs Iebc & 2 Others*, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) of 13/02/2014, the Court of Appeal held as follows:

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law.”

A point of law is similar to a preliminary point of law but has a broader meaning. Justice Prof J.B. Ojwang J (as he was then) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”



16. The Court has perused the ground (i) and (iii) of the Memorandum of Appeal.
17. A simple perusal and re-look of the grounds show that they are based on evidence. They do not raise any points of law for this Court to ponder upon.
18. The Appellants seek that this Court in its Appellate jurisdiction, reviews the evidence adduced before the learned Adjudicator, and arrives at a different and independent conclusion. Indeed, the Appellants' Counsel submitted as follows, in their written submissions.

“This being a 1st appeal it is the duty of the Court to analyse the evidence on record and come up with an independent decision.”

19. Unfortunately, the jurisdiction of this Court under Section 38 of the Small Claims Act, is very similar to a 2nd Appeal. It does not call upon this Court to reach a conclusion on the issues of fact. That is the preserve of the Learned Adjudicator. The law mandated it that way.
20. The Court is of the considered opinion that these two grounds seek that this Court delves into issues of fact. Secondly, the Appellants seek that this Court reviews the manner in which the learned Adjudicator applied her mind to the weight of the evidence adduced. Unfortunately, the law does not allow this Court to do so.

b. Whether the Appeal filed is meritorious?

21. This leaves ground No. (ii) of the Memorandum of Appeal which challenges the quantum as excessive.
22. The Court is of the view that if the learned Adjudicator applied the wrong principles of law and arrived at an excessive award, then this is a point of law which subject to an appeal before this Court.
23. However, the Court warns itself that it should not rush to interfere with the discretion of the learned Adjudicator to award damages.
24. The Court refers to the following decisions *Butt v Khan (Civil Appeal 40 of 1977)* [1978] KECA 24 (KLR) (Civ) (1 February 1978) (Judgment)

“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.”

25. Similar injuries should attract similar awards. The Court will therefore be on the lookout for any outlier awards. They would tend to show as either manifestly low or excessive award. See the case of SM [Minor suing through Her mother and next friend JKAM] v Joel Obare Amenity (Civil Appeal 30 of 2007) [2019] KEHC 8902 (KLR) (29th March 2019) (Judgment).

“One of the cardinal principles in the assessment of general damages is that similar injuries should attract similar awards so as to maintain a level of consistency.”



26. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate Court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

27. The Respondent suffered the following injuries.

- a. Tender interior chest wall
- b. Fracture of the right middle finger at the proximal phalanx.

28. Such injuries have attracted the following awards.

- i. *Stejes Agencies Ltd v Makali (Civil Appeal E060 of 2021)* [2023] KEHC 22809 (KLR) (29 September 2023) (Judgment). An award of Kshs.350,000/- for the following injuries; cut wound on the forehead right side/ bruises to the face, blunt injuries to the forehead with formation of hematoma, deep cut wound on the anterior chest wall, blunt injuries on the lower back, fracture of the proximal phalangeal bone of right little finger, multiple bruises on the lower limbs and bruises on the upper limb.
 - ii. *Bolpak Trading Co Ltd & Geoffrey Michiera v Gilbert Onyango Odie (Civil Appeal 19 of 2021)* [2022] KEHC 1291 (KLR) (17 March 2022) (Judgment). An award of Kshs.250,000/= made for the following injuries; fractures of the 7th and 8th ribs.
29. The Appellant submits that the Court re looks at *Kenya Steel Fabricators Limited v Tom Moki (Civil Appeal 223 of 2012)* [2018] KEHC 9488 (KLR) (Civ) (27 September 2018) (Judgment) an award of Kshs.270,000/- made for similar injuries with a 4% residual disability. That since in the present case the disability was assessed at 2% the award ought to be halved. No legal basis has been presented before this Court for such a proposition. The Court is not persuaded that this is the correct position in law as to assessment of damages.
30. The Court notes that it is been asked to interfere with the assessment of general damages by the Learned Adjudicator.
31. The Court borrows from the decision in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, where the Court of Appeal held that:

“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.”



32. In this Appeal, the Appellant did not provide any comparable decisions for consideration by this Court. Looking at the above comparables the Court sees no sufficient reasons to interfere with the assessment made by the learned Adjudicator.

(c) What reliefs flow from this Appeal?

33. It is clear that the Court is not persuaded to interfere with the decision of the learned Adjudicator. The Appeal is therefore lost.

34. As to costs, the same follow the event. The successful Respondent is entitled to costs.

Determination

35. The Appeal is dismissed in its entirety.

36. The costs of the Appeal are awarded to the Respondent.

37. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024

NJOROGE BENJAMIN K.

JUDGE

In the presence of

.....for the Appellants

.....for the Respondent

Court Assistant.....

