



Pakin Alicia Matatu Sacco v Nanchang Foreign Engineering (Civil Appeal E1360 of 2023) [2024] KEHC 14538 (KLR) (Civ) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14538 (KLR)

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

CIVIL

CIVIL APPEAL E1360 OF 2023

AM MUTETI, J

NOVEMBER 6, 2024

BETWEEN

PAKIN ALICIA MATATU SACCO APPELLANT

AND

NANCHANG FOREIGN ENGINEERING RESPONDENT

*(Being an Appeal against Part of the Ruling and Orders of Honourable
H.M Ngángá (Mr) – Principal Magistrate in Milimani Chief Magistrate’s
Court Civil Suit Number E5327 of 2020 delivered on 2nd June, 2023)*

JUDGMENT

Introduction

1. The appeal arises out of an order for compensation for a loss of user which the appellant claims to have been inordinately low in the circumstances.
2. The appellant was awarded the sum of Kshs.200,000 as a damages inclusive of loss of user.
3. The sum was paid to the appellant’s counsel. The appellant has appealed on the following grounds:-
 1. The Learned Magistrate erred in law and in fact in his assessment of the general damages and loss of user/income incurred by the Appellant as a result of wrongful attachment and sale of its PSV motor vehicle by the Respondent’s Auctioneers and in the process proceeded to award an inordinately low amount of Kshs. 200,000/-.
 2. In awarding the aforesaid inordinately low amount as general damages inclusive of loss of user/ income, the learned Magistrate erred in law and in fact by failing to consider the averments of the Appellant’s Chairman in his Supporting Affidavit sworn on 16th February, 2023 at



the lower courts, that the Appellant's motor vehicle that had been impounded and sold by Auctioneers was a commercial PSV Matatu that generated a daily income ranging between Kshs. 6,000/- to 10,000/-.

3. In awarding the a forestated inordinately low amount, the learned Magistrate erred in law and in fact in failing to appreciate and consider that as at the time of issuing the Ruling (2nd June, 2023) and as at the time (2nd July, 2023) the Respondent herein was supposed to have compensated the Appellant herein with the amount awarded in the said Ruling, the Appellant would have incurred a substantial amount of loss of income totalling up to at least five (5) months from the date (7th February, 2023) when the motor vehicle was impounded and sold by the Auctioneers.
4. In awarding the aforesaid inordinately low amount, the learned Magistrate erred in law and in fact in failing to consider the averments by the Appellant's Chairman in his Supporting Affidavit sworn on 16th February, 2023, that the reason why the Appellant's vehicle was jointly owned with Co-operative Bank of Kenya was because the Appellant had a loan facility with the said bank and used the income generated from the PSV Matatu to service the loan facility.
5. In awarding the a forestated inordinately low amount as general damages inclusive of loss of user/income, the learned Magistrate erred in law and in fact in failing to consider the receipts of proof of income generated by the Appellant's PSV Matatu annexed to the Supporting Affidavit sworn by the Appellant's Chairman on 16th February, 2023 as well as the Certificate of Insurance showing that the motor vehicle was a PSV Matatu.
6. The Learned Magistrate erred in law and in fact by handling the matter irregularly in awarding the aforesaid inordinately low amount as general damages inclusive of loss of user/income.
4. The issue that arises in this appeal is whether the amount awarded by the learned Honourable Magistrate was inordinately low thus warranting a review by this Court.
5. It is clear therefore that the issue of liability is uncontested.

Analysis and Determination

6. An appeal on quantum of damages awarded by a Court is an appeal inviting the appellate Court to interfere with the exercise of judicial discretion.
7. The appellant must as of necessity be able to persuade the judge that the Lower Court erred in the exercise of judicial discretion.
8. The exercise of judicial discretion is defined in the *Blacks's Law Dictionary* (Tenth Edition) as
“ the exercise of judgment by a judge or Court based on what is fair under the circumstances and guided by rules and principles of Law, a courts power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
9. The Courts in this country have settled the position of law regarding interference with exercise of judicial discretion. The same is not to be undertaken willy-nilly.
10. A party seeking to have the exercise of judicial discretion interfered with must demonstrate that the judge or magistrate in arriving at the decision in issue misdirected himself on the principles of law applicable to the matter or proceeded on the basis of consideration of irrelevant matters or failed to take into account relevant matters in arriving at the decision – *Mbogo v. Shab* [1968] at Page 93 followed.



11. It is also permissible to interfere with exercise of judicial discretion where the appellant or party seeking such a review demonstrates that there was an error apparent on the face of the record. Such errors must however be obvious that their correction cannot generate any controversy regarding the judgment or decision of the Court.
12. The Supreme Court in Civil Application No.E019 of 2023 *Florence Wairimu Mbugua & Sylvia Murungi Mbugua (Suing as the administrators of the estate of Joseph Kiarie Mbugua & Another v Timber Manufacturers & Dealers Limited* reiterated its position in the *Fredrick Otieno Outo case* in the following words:-
 - “(85) This section as quoted, embodies what is ordinarily referred to as the ‘Slip Rule’. But its nature, the Slip Rule permits a Court of Law to correct errors that are apparent on the face of the Judgment, Ruling or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy regarding the judgment or decision of the Court. By the same token, such errors must be such nature that their correction would not change the substance of the judgment or alter the clear intention of the Court. In other words, the Slip Rule center upon a Court, any jurisdiction or powers to sit on appeal over its own judgment, or , to extensively review such judgment as to substantially alter it.”
13. The appellant in the present appeal has not presented a case for the invocation of the Slip Rule. He seeks to have the decision reviewed substantively to alter the award in damages and loss of user significantly.
14. The duty therefore is on the appellant to demonstrate in what sense the trial magistrate misapplied the principles of Law in assessment of the quantum or took into account irrelevant matters or failed to take into account relevant matters.
15. The gist of the appellants case is that the evidence presented to the magistrate by way affidavits was not taken into account. In his view therefore the Magistrate arrived at the wrong figure not due to a mathematical error but a misapprehension of facts.
16. Appellant submits that this Court should be minded to increase the award significantly to the sum of Kshs.1,440,000 up from Kshs.200,000.
17. The matter in the Lower Court proceeded by way of affidavits and in his Ruling the Magistrate ordered that the appellant be compensated in the sum of Kshs.200,000.
18. The order for compensation was made on 22nd June 2023 and the respondents have since paid.
19. The appellant has urged this Court to rely on the case of *Sheikh Mushtaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others* [1986] eKLR in which the Court had increased an award based on the evidence that parties had submitted.

The Court of Appeal held:-

“The Appellate Court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an Appellate Court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent



ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

20. In the present case the appellant has not demonstrated in what sense the magistrate misapprehended the evidence presented by them.
21. The respondent on his part has urged this Court to note that this appeal was actually an after thought and not borne out of a genuine grievance. The appeal was lodged five months after the Ruling, long after payment of the Kshs.200,000.
22. The respondent has placed reliance on *Butt v. Khan* [1978] eKLR on the principles to be considered when a Court of Appeal is to Consider interfering with an award in damages. The decision lays a firm principle that it must be shown that the magistrate acted on wrong principles or that he misapprehended the evidence in some material respect and arrived at a figure which was either inordinately low or high.
23. I have scrutinized the Lower Court file and the record of appeal herein in to determine whether there is any evidence that suggests that the Lower Court may have paid little attention to detail and arrived at an erroneous assessment of damages.
24. The appellant's application dated 10th February 2023 was supported by an affidavit of one Patrick Kivuya Mukiri. In the affidavit at paragraph 9 he stated the average daily income from the vehicle as ranging between Kshs.6000- 10,000 per day.
25. It is not however clear how the figures of daily income were arrived at so as to form a basis for the Court to act on the suggested figure in assessing damage.
26. In the absence of any hard evidence such as banking slips for daily deposits or any other evidence such as books of accounts to support the figure the chain by the appellant would only pass as a generous estimation by the motor vehicle owner desirous of recovering lost earnings.
27. The Court in my view is not wholly bound to accept the suggested sum of daily earnings without anything substantive to support it.
28. It was thus entirely within the discretion of the Magistrate to award that which he deemed fit in the circumstances. The sum of Ksh. 200,000 was a fair estimate.
29. The Court is therefore not inclined to review the figure for there is absolutely no factual basis to do so. It would have been different if this Court found actionable evidence that would establish daily income lost by the appellant.
30. In the end I find that this appeal has no merit.
The same is dismissed with costs to the respondents.
31. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant



Matiba for the Appellant

S. M. Chege Absent for the Respondent

