

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E122 OF 2025**

**KITALE INDUSTRIES LIMITED ..... APPELLANT**  
**- VERSUS -**  
**LAWRENCE ODHOCH NGALA ..... RESPONDENT**

(Being an appeal from the judgment and decree of **Hon. G.C. Serem**  
**RM/Adjudicator** delivered on the 25/02/2025 in the **Ksm SCCCase No. E491 of**  
**2024, Lawrence Odhoch Ngala v Kitale Industries Limited**)

**J U D G M E N T**

1. The respondent filed a claim against the appellant seeking judgment in the sum of **Kshs. 532,900/-** for injuries sustained following a road traffic accident that occurred between a tuktuk in which he was a passenger and a lorry motor vehicle registration number **KAX 466C** belonging to the appellant.
2. The appellant entered appearance and filed a response denying the occurrence of the accident and claimed contributory negligence against the respondent.
3. In its judgment, the trial court found in favour of the respondent and entered judgment as follows: -

- a) Liability – 100% as against the appellant*
  - b) Material damages – Kshs. 352,900/-*
  - c) Loss of income – Kshs. 180,000/-*
  - d) Costs of the suit and interest from date of judgment.*
4. Being dissatisfied with the said judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **10/04/2025** and raised ten (10) grounds of appeal which can be summarized as follows: -
- a) The trial misdirected itself in treating the evidence and submissions on liability before it superficially thereby arriving at a wrong conclusion.*
  - b) The trial court erred in failing to adequately consider the claim for contributory negligence in light of the appellant’s evidence and submissions.*
  - c) The trial court erred in awarding damages of Kshs. 180,000/- for loss of earnings which was excessive in the circumstances.*
  - d) The trial court misdirected itself in treating the evidence and submissions on quantum superficially thereby arriving at a wrong conclusion.*

- e) *The trial court misdirected itself in ignoring the principles applicable and the relevant authorities relied on by the appellant.*
  - f) *The trial court erred in failing to take into account all the evidence presented by the appellant.*
  - g) *The trial court erred in failing to hold that the respondent had failed to prove negligence on the part of the appellant.*
  - h) *The trial court proceeded on wrong principles when assessing the damages awardable and failed to apply precedents and the tenets of the law applicable.*
  - i) *The trial court erred in awarding damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.*
  - j) *The trial court failed to apply judicially and adequately evaluate the evidence before it thereby arriving at a wrong conclusion.*
5. The parties agreed to dispose the appeal by way of written submissions. As at the time of writing this judgment, only the appellant had filed its submissions.

6. On liability, the appellant submitted that the respondent failed to call an eye witness to corroborate his evidence on how the accident occurred which omission was fatal to his case as held in the case of **Sally Kibii & Anor v Dr. Francis Ogaro [2012] eKLR.**
7. That the Police Abstract relied on by the respondent did not avail conclusive evidence as a abstract does not prove how an accident has occurred as was held in the case of **Nairobi HCCA No. 307 of 2008 – Peter Kanithi Kimunya v Aden Guyo Haro (2014) eKLR.**
8. That the trial court misapprehended the evidence on record and disregarded the appellant’s witness statement as consideration of the same would have led to a finding that the respondent contributed to his own misfortune.
9. On quantum, it was submitted that the respondent’s claim for material damage was a special damage claim that required to be specifically pleaded and proven but that the respondent failed to prove that he spent the monies claimed. It was urged that the appeal be allowed.
10. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

11. Before the trial court, the respondent testified as **Cw1**. He adopted his witness statement as his evidence in chief, which statement reiterated the claim in his statement of claim. In cross-examination, he told the court that the sum of **Kshs. 295,000/-** that he had claimed had not been spent but rather was an estimate on spare parts that were to be bought. That **Kshs. 38,400/-** was labour charge and that there was nothing to show that he was remaining with **Kshs. 2,000/-**. He produced, by consent, the Police Abstract dated **10/9/2024** as **CExh 1**, Certificate of Examination dated **13/7/2024** as **CExh2** and Valuation & Assessment report as **CExh 3**. The respondent then closed its case.
12. From the record, it is not clear whether the appellant called any witness in support of his case. A thorough check on both the lower court file and the CTS did not disclose any witness statement by any witness for the appellant. However, in the judgment, there is reference to the appellant testifying that he did hit the tuktuk from behind and that they were in opposite directions.
13. I have considered the evidence tendered before the trial court and the submissions made before me. This being an appeal from the Small Claims Court, it is important to point out that ***Section 38 of the Small Claims Court***

*Act* provides for the jurisdiction of this Court in determining appeals from the Small Claims Court. It provides thus; -

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. It is clear from the foregoing that, jurisdiction of this Court from the Small Claims Court is only on matters of law and not factual issues.
15. Consequently, the only issue of law that arises from the grounds of appeal raised by the appellant is whether the trial court erred in the exercise of its discretion thereby leading to erroneous apportioning of liability and subsequently, assessment of damages.
16. Judicial discretion is akin to a delicate balancing act, a solemn trust reposed in the courts to ensure justice is not only done but manifestly seen to be done. This discretion is not absolute, nor is it an open cheque to be wielded arbitrarily. The Court of Appeal in **Mbogo v Shah [1968] EA 93** cautioned against judicial overreach, stating that appellate intervention is warranted where a trial court has misdirected itself or considered extraneous factors.

17. Further, in **Hajar Services Limited v Peter Nyangi Mwita [2020] eKLR**, the Court reiterated that discretion must be exercised judicially, not whimsically.
18. In the present case, the appellant failed to demonstrate that the trial adjudicator failed to exercise her discretion judicially. This court has similarly gone through the proceedings by the adjudicator and has not come upon any instance of whimsical exercise of discretion.
19. The upshot of the above is that the Court finds the appeal to be unmeritorious and hereby dismisses the same with costs.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 19<sup>th</sup> day of **February, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**