REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E003 OF 2025

DAVID KIMATHI KAIRITHIA........ ....APPELLANT

VERSUS

LILIAN ACHIENG...RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. G. C. Serem, Resident Magistrate/Adjudicator delivered on and dated 13th December, 2024 in Kisumu SCCCOMM No. E259 of 2024 Lilian Achieng v David Kimathi Kairithia.

JUDGEMENT

1. This appeal emanates from the judgement and decree of **Hon. G.C. Serem** Resident Magistrate/Adjudicator delivered on 13th December, 2024 in *Kisumu SCCCOMM No. E259 of 2024 Lilian Achieng v David Kimathi Kairithia.*

2. The grounds of appeal presented by the Appellant vide the memorandum of appeal dated 7th January, 2025 upon which he seeks to upset the judgement and decree of the lower court are as follows:

    i. **That the learned trial Magistrate erred in law in awarding the Respondent general damages in the sum of Ksh.500,000/- an award which was excessive and not commensurate to the injuries sustained at the accident.**

ii. **That the learned trial Magistrate erred in law by overly relying on the Claimant's/Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the evidence adduced hence occasioning a miscarriage of justice.**

3. The Appellant proposes that the appeal be allowed and that this court sets aside the trial court's findings on general damages and proceeds to re-assess the same.

4. From the above grounds of appeal, it is clear to me that the appeal is only on the issue of quantum. The same does not challenge the trial court's finding on liability.

5. This being the first appellate court, I am required under *Section 78* of the *Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to re-assess, re-analyze and re-evaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

6. In ***Selle***, **Sir Clement De Lestang** observed that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it***

should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

7. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of ***Peters v Sunday Post Limited [1958] EA 424*** in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

   "i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

   ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

   iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have

reached different results if it were hearing the matter for the first time."

8. Notably however, this is an appeal from the Small Claims Court and *Section 38* of the *Small Claims Court Act* provides that a person dissatisfied with a decision or order of the Small Claims Court may appeal to the High Court only on matters of law, not on questions of fact, and that once the High Court determines such an appeal, its decision is final.

9. I will proceed to re-assess, re-analyze and re-evaluate the evidence adduced before the trial court and reach my own findings while abiding by the principles set in ***Selle.*** While doing so. I will limit myself to the issue of quantum.

10. The matter before the trial court, based on tortious liability arising out of a road traffic accident that is said to have occurred on 19th January, 2024 in which the Respondent (the Claimant before the trial court) sustained bodily injuries. The Respondent sued the Appellant vide the statement of claim dated 20th March, 2024 seeking to recover damages for the injuries sustained, claiming that the accident occurred due to the negligence of the Appellant and/or his servant and/or agent.

11. The Respondent listed the following particulars of injuries in her pleading:

i. Injury to the back.
ii. Chest tenderness.
iii. Fracture of the right radial bone.
iv. Swollen and bruised left knee joint.
v. Stitched cut wound on the right leg.

12. The Respondent testified before the trial court and adopted the contents of her witness statement dated 20th March, 2024 as her evidence-in-chief. In her statement, she restated that she suffered the above-listed injuries in the accident and was treated at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH). She further stated that she was issued with a P3 form, which was completed by a medical practitioner. She sought compensation for the injuries.

13. The Respondent produced the following documents in support of her case:

- Copy of national identity card.
- Police abstract.
- Treatment notes.
- P3 form.
- Medical report.
- Copy of records.
- Demand letter.

14. On being cross-examined, the Respondent told the trial court that she had not fully recovered at the time of testifying and that she was still using pain killers.

15. The Appellant did not call any witnesses.

16. In the trial court's judgement, the learned Adjudicator found the Appellant to be 100% liable for the accident and proceeded to assess general damages at Ksh.500,000/- and special damages at Ksh.550/-.

17. The learned Adjudicator rendered herself as follows, on quantum:

> ***"8. The Claimant stated that she sustained injuries. The injuries particularized by the Claimant in the statement of claim was*** (sic) ***injury to the back, chest tenderness, fracture of the right radial bone, swollen and bruised left knee joint and stitched cut wound on the right leg. These injuries was*** (sic) ***confirmed by the treatment document from Kisumu County Hospital which stated that the injuries was*** (sic) ***soft tissue injury with a fracture of the right hand. The same injuries were corroborated by the P3 form and the medical report by George Mwita.***
>
> ***9. The court has given due consideration to the case law quoted and provided by the parties herein and made comparisons to the injuries that the plaintiffs therein sustained and those the Claimant herein sustained. I am***

accordingly guided by the decisions of the superior courts in determining how much the Claimant should be awarded as compensation. They were soft tissue injuries and a fracture of the radial bone. The court has equally considered the passage of time and rate of inflation and finds Ksh.500,000/- to be sufficient compensation. The court relies on the case of <u>Mary Akinyi Atella v Omondi Beatrice Monica [2021] eKLR</u> where the appellate court awarded similar damages for the similar injuries of the Claimant in this matter."

18. The present appeal was canvassed by way of written submissions. I have had the occasion of perusing and carefully considering the submissions by the two sides.

19. The issue presented by the Appellant in his submissions is that the amount that the trial court awarded on the head of special damages for pain, suffering and loss of amenities was manifestly excessive and that the learned Adjudicator applied the wrong principles in reaching the awarded amount, for the reason that the court did not consider the Appellant's authorities. The Appellant proposed an award of Ksh.200,000/- as being apt for the injuries suffered by the Appellant.

20. The Respondent urged in her submissions that the appeal on quantum was not one on an issue or point of law and could therefore not be allowed in light of *Section 38* of the *Small Claims Court Act.* The Respondent's position was that an

assessment of damages is a point of fact and that the present appeal should on that basis fail.

21. The Respondent further submitted that the trial court properly assessed damages and applied the required legal principles in so doing and that the award was not excessive or inordinately high as the same was reached upon the court making a comparison with and being guided by previously determined cases of superior courts.

22. Having carefully considered the memorandum of appeal, the rival submissions by the parties, the record of the trial court and the applicable statutory and jurisprudential framework governing appeals from the Small Claims Court, I am of the considered view that the appeal turns on two broad and interrelated issues:

   a. First, whether an appeal challenging the quantum of damages awarded by the Small Claims Court raises a question of law as contemplated under *Section 38* of the *Small Claims Courts Act.*

   b. Second, if the answer to the first issue is in the affirmative, whether the award of general damages in the sum of Ksh.500,000/- was arrived at through the application of wrong principles of law or was so manifestly excessive as to warrant interference by this

court in the exercise of its limited appellate jurisdiction.

23. This appeal arises from proceedings conducted before the Small Claims Court, a forum whose decisions are subject to a tightly circumscribed appellate regime.

24. As we have seen above, *Section 38* of the *Small Claims Courts Act* expressly limits appeals to the High Court to matters of law only, and further provides that the decision of the High Court on such appeal shall be final.

25. The effect of this provision is to bar this court from re-opening disputes on pure questions of fact or from substituting its own factual conclusions for those of the trial adjudicator merely because it would have reached a different outcome.

26. That said, it is equally well established that not every challenge touching on damages is necessarily a question of fact. While the assessment of damages is largely discretionary, the exercise of that discretion is governed by well-defined legal principles.

27. Where it is alleged that the trial court misdirected itself in law, applied the wrong principles, failed to take into account relevant considerations, took into account irrelevant considerations or arrived at an award that is so inordinately

high or low as to amount to an erroneous estimate in law, the challenge, in my view, ceases to be purely factual and crystallizes into a question of law.

28. I recently addressed this position in the case of ***Credit Watch Investment Limited v Mbugua & 2 others (Civil Appeal E014 of 2024) [2024] KEHC 13703 (KLR)***, where my persuasion was that where an Appellant demonstrates that the adjudicator's discretion was exercised on the basis of incorrect legal principles or resulted in a manifestly unjust award, the issue is one of law and not fact. I respectfully remain of that opinion and adopt it for purposes of this appeal.

29. In the present matter, the Appellant contends that the learned Adjudicator overly relied on the Respondent's submissions and authorities, failed to properly interrogate the evidence and ultimately awarded damages that were excessive and not commensurate with the injuries proved.

30. These complaints, when properly interrogated, raise the question whether the correct legal principles governing assessment of damages were applied. I therefore find and hold that the appeal is properly before this court as it raises a point of law within the meaning of *Section 38* of the *Small Claims Courts Act.*

31. The second issue for me to address is whether the award of general damages warrants appellate interference.

32. The principles governing appellate interference with an award of damages are long settled in Kenyan jurisprudence. In ***Butt v Khan [1981] KLR 349***, the Court of Appeal held that 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, or unless it is shown that the trial court proceeded on wrong principles of law or misapprehended the evidence in some material respect.

33. This principle was further expounded in ***Kemfro Africa Ltd t/a Meru Express Services v Lubia & another [1982–88] 1 KAR 727***, where the court emphasized that an appellate court must resist the temptation to substitute its own assessment with that of the trial court merely because it would have arrived at a different figure.

34. Turning to the present case, the record shows that the Respondent sustained multiple soft tissue injuries as well as a fracture of the right radial bone. These injuries were pleaded, testified to and supported by contemporaneous treatment notes, a P3 form and a medical report.

35. The Appellant did not adduce any evidence to challenge the authenticity of these documents, the nature of the injuries or

the extent of the Respondent’s suffering. Indeed, the Appellant elected not to call any witnesses at all.

36. In assessing damages, the learned Adjudicator expressly identified the injuries sustained, considered the medical evidence placed before the court and undertook a comparative analysis of decided cases involving similar injuries.

37. The trial court further took into account the passage of time and the prevailing economic conditions, including inflation, before arriving at an award of Ksh.500,000/-. The reliance on ***Mary Akinyi Atella v Omondi Beatrice Monica [2021] eKLR*** demonstrates that the adjudicator was alive to the principle that like injuries should, as far as possible, attract like awards, subject to adjustment for temporal and economic factors.

38. Applying the reasoning in ***Credit Watch*** (supra), I find no indication that the learned Adjudicator applied the wrong legal principles or abdicated her judicial duty in favour of the Respondent’s submissions.

39. The mere fact that the Appellant proposed a lower figure does not, without more, establish an error of law. While reasonable minds may differ on the precise quantum to be awarded, the figure of Ksh.500,000/-for soft tissue injuries accompanied by a fracture of the radial bone cannot be said to

be so inordinately high as to fall outside the acceptable range of awards or to amount to an erroneous estimate in law.

40. In light of the foregoing analysis, I am satisfied that although the appeal properly raised a point of law within the confines of *Section 38* of the *Small Claims Courts Act,* the Appellant has failed to demonstrate that the learned Adjudicator misdirected herself on the law or exercised her discretion injudiciously in the assessment of general damages. This court therefore has no lawful basis to interfere with the award.

41. Being of the foregoing persuasions, the result that I reach is that the appeal before me lacks merit. It is accordingly dismissed and the judgement of the Small Claims Court awarding general damages in the sum of Ksh.500,000/- is hereby upheld.

42. Costs of the appeal shall be borne by the Appellant, which I assess at Ksh.30,000/-.

43. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 9th day of February, 2026.

JOE M. OMIDO

JUDGE

FOR APPELLANT: No appearance.

FOR RESPONDENT: No appearance.

COURT ASSISTANTS: **Mr. Ngoge** & **Mr. Juma.**