

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E267 OF 2024

PIUS MUTUA MBUVI.....
APPELLANT

VERSUS

LAWRENCE MUTUKU KATUNDU

**(Suing as Personal Representatives of the Estate of JACOB
KATUNDU (Deceased).....)**
RESPONDENT

(Being an appeal from the Judgment of Hon. N. Ondieki (CM)
delivered on 17th September 2024 in Machakos Magistrates Case
No. 99 of 2020)

JUDGMENT

1. This is an appeal against both liability and quantum. In the trial court, the deceased sued the Appellant herein for special damages in the sum of Kshs.4,195/-, general damages for pain, suffering and loss of amenities and future medical expenses of Kshs.100, 000/=, costs of the suit and interest.
2. The claim as was filed by the deceased was that on 2nd April 2017, the appellant assaulted him, inflicting serious injuries. As a result. He suffered great loss and damage and was admitted to hospital for 11 days.
3. In their defence, the Appellant herein denied the claim. He admitted that he was charged in Machakos Criminal Case

No. 179 of 2017 and convicted to serve a two year imprisonment. However, the conviction was overturned by the High Court at Machakos in Criminal Appeal No. 88 of 2019 where he alleged that the charge sheet in Machakos Criminal Case No. 179 of 2017 which he had been charged was defective.

4. The matter proceeded to full hearing. At the time of de novo hearing, the deceased had passed away and he was substituted by his representatives, the Respondents herein. The trial court found that the Appellant was 100% liable and entered judgment in favour of the Respondent in the following terms:

- a) General damages for pain, suffering and loss of amenities of Kshs.65,000/= with interest at court rates from the date of the judgment until payment in full.
- b) Special damages of Kshs4,195/= with interest from the date of filing this suit until payment in full.
- c) Costs of the suit with interest at court rates from the date of the judgment until payment in full.

5. Being aggrieved by the Judgment, the Appellants filed this appeal citing grounds that the Learned Trial Magistrate erred in law by ordering that the Plaintiff was entitled to general damages amounting to Kshs.650, 000/= without considering the evidence adduced and what, in the circumstances, would constitute fair compensation to both the Plaintiff and the Defendant. They further urged that the

magistrate erred in finding that the Plaintiff was entitled to compensatory damages without bearing in mind the purpose of such damage is not to equate them to the actual loss or injured suffered. The appellants also contended that the award of general damages to the tune of Kshs 650,000/= was made without guidance from relevant precedents thereby prejudicing them, and that the finding holding the Defendant 100% liable for the injuries occasioned to the deceased was prejudiced to the Appellant.

6. The Appeal was canvassed by written submissions as directed by the court. At the time of preparing this judgment, only the Respondent had filed submissions dated 27th October 2025.

Respondent's Submissions

7. The Respondent opposes the appeal and addresses three principal issues; the competency of the appeal, liability and quantum of damages.
8. The Respondent begins by reiterating the duty of a first appellate court as set out in **Selle & Another v Associated Motor Boat Co. Ltd & Others**, namely that the court must reconsider and evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses.
9. On the competency of the appeal, the Respondent submits that the record of appeal is fatally defective for failure to include a certified copy of the decree appealed from

contrary to Order 42 Rule 2 and Rule 13(4)(f) of the Civil Procedure Rules. It is contended that the omission is jurisdictional and not a mere procedural technicality. Reliance is placed on **Rachael Wambui Nganga & another v Rahab Wairimu Kamau [2020] eKLR**, the Supreme Court decision in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR**, the Court of Appeal's decision in **Chege v Suleiman [1988] eKLR**, the case of **Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR** and on **Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & Another [2015] eKLR**. It is submitted that since no certified decree forms part of the record and the issue was not controverted by the Appellant, the appeal is incompetent and ought to be struck out with costs.

10. On liability, the Respondent submits that the evidence before the trial court established that on 2nd April 2017 the Appellant unlawfully assaulted the deceased causing serious injuries. The Respondent testified and produced documentary evidence. An eye witness, Philomena Mutua (PW2), testified that she saw the Appellant assault the deceased using a panga and a metal object, after which the deceased was taken to hospital. The Appellant filed a defence consisting of mere denials and called no witness. On cross-examination, he admitted knowing the deceased as his elder brother, acknowledged a land dispute between

them, admitted being angered by the deceased cutting his trees, confirmed hitting him and admitted that the deceased sustained injuries. He did not raise provocation or attribute blame to the deceased. The Respondent submits that the trial court properly found the Appellant 100% liable and that the success of the criminal appeal on a technicality did not negate the occurrence of the assault. The court is therefore urged to uphold the finding on liability.

11. On quantum, the Respondent submits that the deceased sustained blunt injuries to the back with bruises, a right supracondylar fracture, a fracture of the left humerus, a cut wound on the left elbow, blunt injury to the right thigh and limited joint movement. The medical report classified the injuries as severe soft tissue injuries and fractures. No contrary medical evidence was adduced by the Appellant. The Respondent submits that the award was proper and notes that the Appellant did not file submissions on quantum before the trial court. The Respondent relies on **Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982] 85 IKAR** and on the case of **Kemfro Africa Ltd t/a Meru Express Service v A.M. Lubia & Olive Luni [1987] KLR 30** which set out the principles governing interference with quantum, namely that the appellate court must be satisfied that the trial court took into account irrelevant factors, omitted relevant factors, or made an award so inordinately high or low as to represent

an erroneous estimate. It is submitted that none of these grounds have been demonstrated.

12. In conclusion, the Respondent urges the Court to dismiss the appeal with costs and to order payment of the balance of the decretal sum.

Analysis and Determination

13. This court has considered the grounds of appeal, the proceedings of the lower court and the Respondent's submissions. However, I must remind myself of the duty of this court as the appellate court.

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. This duty was succinctly stated by the Court of Appeal in the case of **Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424**). In summary, this court ought not to interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong either because the trial court misdirected itself or because it has acted on matters it ought not have acted upon or failed to take into consideration matters it

should have taken into account, thereby, arriving at an erroneous conclusion.

15. I am also guided by the Court of Appeal decision in **Ephantus Mwangi and another v Duncan Mwangi Civil Appeal No 77 of 1982 {1982 -1988} 1KAR 278** where the court stated that;

“A member of an appellate court is not bound to accept the learned judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

16. I therefore have a duty to delve into factual details and revisit the evidence presented before the trial court, analyze and evaluate it and arrive at my own independent conclusion, while bearing in mind that the trial court had the advantage of hearing the parties.

17. Having considered and analyzed the pleadings, the evidence adduced before the trial court and Respondent’s submissions in this appeal the following issues arise for determination;

(a) **Whether the appeal is incompetent for want of a certified decree**

- (b) **Whether the trial court erred in finding the Appellant 100% liable**
- (c) **Whether the appellate court should interfere with the trial court's findings on damages**

Whether the appeal is incompetent for want of a certified decree

18. The Respondent raised the issue whether the Appeal was competent and proper given that the Appellant had not attached a certified copy of decree.

19. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that: -

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say-

- a. The memorandum of appeal;**
- b. The pleadings;**
- c. The notes of the trial magistrate made at the hearing;**
- d. The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
- e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

f. The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal”

20. Section 65(1)(b) of the Civil Procedure Act provides:

“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact”.

21. The provision makes clear that, an appeal from a decree or part of a decree of a subordinate court shall lie to the High Court. **Section 2 of the Act** defines a decree as:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

a. any adjudication from which an appeal lies as an appeal from an order; or

b. any order of dismissal for default:

c. Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be

appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

22. It is evident from the proviso to definition of decree that it includes a judgment. The proviso further provides that a judgment shall be appealable regardless of whether a decree has been drawn up, or is capable of being drawn up. Order 42 Rule 13 stipulates the documents that must be on record before an appeal is admitted to hearing. Rule (13) (f) provides:

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(f) the judgment, order OR decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:(emphasis).”

23. An Appellant is therefore required to include in the record of appeal, the judgment, order or decree appealed from. The use of the word “or” is indicative of a disjunctive requirement. Accordingly, for purposes of an appeal, the filing of either the judgment, order or decree is sufficient. Furthermore, where an Appellant has not filed a certified

decree or order appealed against with the memorandum of appeal, the law allows the Appellant to do so subsequently, within the time allowed by the court. Order 42 Rule (2) provides:

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

24. Failure to file a certified order or decree appealed against is therefore not a fatal technicality and can be cured pursuant to Order 42 Rule (2) of the Civil Procedure Rules. The provision accords with the Constitutional imperative in Article 159(2)(d) of the Constitution, which requires that justice be administered without undue regard to procedural technicalities. Prescriptions of procedure and form should not override the primary objective of dispensing substantive justice. This also safeguards the right to a fair trial as guaranteed under Article 50 of the Constitution.

Whether the trial court erred in finding the Appellant 100% liable

25. The claim before the trial court was founded on assault.

The deceased alleged that on 2nd April 2017 the Appellant assaulted him, causing serious injuries. The evidence on record reveals that PW2 testified that she witnessed the Appellant assault the deceased using a panga and a metal object; that the deceased was taken to hospital and admitted for eleven days; the medical evidence confirmed fractures and soft tissue injuries and that the Appellant admitted knowing the deceased, his elder brother, acknowledged a land dispute, admitted being angered by the cutting of trees, confirmed hitting him and acknowledged that the deceased sustained injuries. Significantly, the Appellant called no witness and tendered no evidence to rebut the Respondent's case.

26. The Appellant also relied on the fact that his criminal conviction was overturned on appeal on account of a defective charge sheet. However, it is trite that criminal proceedings are distinct from civil proceedings. The standard of proof in criminal cases is beyond reasonable doubt, while in civil matters it is on a balance of probabilities. An acquittal or quashing of conviction on technical grounds does not ipso facto extinguish civil liability arising from the same facts.

27. This court has re-evaluated the entire record, the pleadings, the evidence tendered before the trial court and

the reasoning adopted by the learned magistrate in arriving at a finding of full liability against the Appellant.

28. The cause of action before the lower court was founded on assault. The learned trial magistrate correctly set out the legal framework governing assault and appreciated that for liability to attach, the Plaintiff was required to demonstrate that the impugned act was either intentional or if unintentional, negligent. The critical question on appeal is not whether the tort of assault exists, that is settled, but whether the evidence on record justified a finding of 100% liability against the Appellant.

29. The trial court concluded that the impugned act was intentional and inferred intention from the circumstances of the incident.

30. Upon further re-evaluation of the evidence, I concur with the trial Court that the Appellant was 100% liable for the injuries he inflicted upon the deceased. The Appellant's own admissions during cross examination materially corroborated the occurrence of assault. The record is silent on any possible contribution by the deceased, and no evidence of provocation, self-defence or contributory negligence was advanced.

31. The trial court cannot therefore be faulted for finding the Appellant 100% liable. I find no misdirection in its evaluation of evidence nor any omission of relevant factors.

Whether the appellate court should interfere with the trial court's findings on damages

32. It is an established principle of law that that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor, omitted a relevant factor, or where the award was so high or so low as to amount to an erroneous estimate, or where the assessment was not based on any evidence as was stated by court in the cases of **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).**

33. In the present appeal, the injuries sustained by the deceased included blunt injuries to the back with bruises; right supracondylar fracture; a fracture of the left humerus; cut wound on the left elbow; blunt injury to the right thigh; limited joint movement. The medical report classified the injuries as severe soft tissue injuries accompanied by fractures. The deceased was admitted for eleven days.

34. The trial magistrate awarded Kshs.650, 000/= general damages for pain, suffering and loss of amenities and Kshs.4, 195/= for special damages.

35. On general damages, the trial court undertook a detailed exposition of the law on pain and suffering and loss of amenities. It properly appreciated that awards must be

comparable, guided by Kenyan precedents and adjusted for inflation. The court compared the injuries with those in **Charo Karisa Randu vs Charo Kenga & Another, Nairobi HCCC Number 5821 of 1990** and rejected reliance on **Dr Wolfgang Farrugia vs. the Attorney General & Another, Nairobi HCCC Number 472 of 1988** as incomparable. The Learned Magistrate considered nature of injuries, comparative awards, passage of time and inflation. There is no indication that irrelevant considerations were taken into account. No comparable authorities were placed before this Court to demonstrate that the award was inordinately high. Moreover, the Appellant did not file submissions before the trial court on quantum.

36. In the absence of demonstrated misdirection or an award so high as to represent an erroneous estimate, this court has no basis to interfere. An appellate court does not substitute its own figure merely because it would have awarded a different sum.

37. As for special damages, the award of Kshs.4,195/= was strictly proved and is not contested on evidentiary grounds. There is no basis to interfere.

38. The foregoing analysis therefore renders the appeal devoid of merit. It is hereby dismissed with costs to the Respondents.

39. Orders accordingly.

Dated, signed and delivered at Machakos this 19th March, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

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