



**Njogu v County Government of Uasin Gishu (Civil Appeal
12 of 2020) [2025] KECA 1040 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1040 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 12 OF 2020
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
JUNE 5, 2025**

BETWEEN

GEORGE NJOROGE NJOGU APPELLANT

AND

COUNTY GOVERNMENT OF UASIN GISHU RESPONDENT

*(Being an appeal against the judgement/decree of the High
Court at Eldoret (O. Sewe, J) dated 17th October 2029)*

JUDGMENT

1. The appeal before us arises from the judgement of the High Court at Eldoret in High Court Civil Appeal No. 130 of 2015 in which the learned Judge (Sewe, J), in determining the first appeal by the respondent herein against a judgement in Eldoret Chief Magistrate's Court Civil Case No. 842 of 2014, allowed the appeal and dismissed the appellant's case but with no order as to costs. Aggrieved by that decision, the appellant is before us in this second appeal seeking to have that decision set aside and the decision by the trial court reinstated.
2. To put the matter in context, the appellant filed a suit against the respondent claiming loss of business at the rate of Kshs. 4,000/= per day from 4 August 2014 along with interest and costs. It was his case that he was arrested, harassed and or intimidated by the respondent on two occasions and that, on both occasions, he was discharged under section 35(1) of the *Penal Code*. As a result of the said harassment, he claimed, he lost business for 112 days and therefore lost Kshs. 448,000/= in income.
3. In his judgement, the learned trial magistrate found that the appellant's unchallenged evidence was that he was arrested by the respondent and that the court directed the respondent to allocate him an alternative site to conduct his business. According to the learned trial magistrate, it was not enough for the respondent to state that they had directed the appellant to move to Iten road but they ought to have allocated the appellant a specific place along that road where he could conduct his business.



The appellant, according to the learned magistrate, proved his case on a balance of probabilities and was awarded damages for loss of business for 30 days which, in the view of the learned magistrate, was sufficient time within which the plaintiff could have found another work to do or another site to conduct his business. The daily loss of income, as assessed by the learned magistrate, was Kshs. 4000 which translated to Kshs. 120,000 which he awarded together with costs and interest.

4. The appeal before the High Court was based on the grounds: that the learned magistrate erred in law and in fact in finding the respondent liable for the appellant's loss of business; that the learned magistrate erred in law and in fact in awarding damages that were manifestly high as to amount to an erroneous estimate of the damages in the circumstances of the case; and that the learned trial Magistrate erred in law and in fact in failing to consider the evidence on record and the legal principles applicable in awarding special damages. On the basis of those grounds, the respondent prayed that the judgement of the trial court be set aside and a proper finding be made by the High Court and that the costs of the appeal be awarded to it.
5. In the impugned judgement, the learned Judge, appreciative of her role as a first appeal, found: that from the evidence placed before the lower court, there was no dispute that the appellant was, at all material times, a licensed trader holding a valid Single Business Permit for the year 2014; that in the course of the year 2014, the appellant was twice arrested by the respondent's enforcement officers and arraigned before court in Eldoret Chief Magistrate's Criminal Case No. 1718 of 2014 and Eldoret Chief Magistrate's Criminal Case No. 2355 of 2014; and that on both occasions, the appellant pleaded guilty to the charge and was discharged under section 35(1) of the [Penal Code](#).
6. According to the learned Judge, the only issue for determination was the question whether, in the circumstances, the appellant was entitled to compensation for loss of business; and if so, whether the award by the lower court was defensible.
7. It was the finding of the learned Judge: that the indubitable fact emerging from the pleadings and the evidence adduced in support of the appellant's case was that the appellant was on the wrong and that he admitted as much; that he was arrested for flouting the law and pleaded guilty and was dealt with as by law provided; that the question was whether, in the circumstances, he would be entitled to compensation for loss of business. On the authority of the cases of *Holman v Johnson* [1777] 1 Cowp 341 and *Scott v Brown, Doering, McNab & CO*, (3), [1892] 2 QB 72, the learned Judge found that in those circumstances, the appellant was not entitled to compensation since no court should enforce obligations alleged to arise out of illegal transactions. The learned Judge therefore found that the learned trial magistrate fell into error by making an award in favour of the appellant in the face of his clear and unequivocal admission of guilt and conviction and that it mattered not that on both occasions, extenuating circumstances contributed to the appellant's unconditional discharge under section 35(1) of the [Penal Code](#).
8. On quantum, the learned Judge found: on the authority of the case of *Hellen Waruguru Waweru* (Suing as the legal representative of *Peter Waweru Mwenja v Kiarie Shoe Stores Limited* [2015] eKLR, that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award; that in his evidence before the lower court, the appellant made no attempt to justify the number of days set out in his plaint; that since the two criminal cases filed against him were disposed of in a summary manner that led to his immediate discharge, the respondent was not expected to lay a claim for more than four days, assuming that he his arraignment before court may not have taken place on the dates of his arrest; that it was on account of this lacuna in his evidence that the trial court opted to reduce the number of days from 112 to 30 days; and that there was no basis to support a claim for loss of business in excess of one month and the learned magistrate could be faulted for coming to that conclusion; and that there



was therefore no justification as to why the appellant did not relocate immediately or make any attempt to mitigate his loss. In conclusion, the learned Judge was of the view that had the claim succeeded, an award of not more than Kshs.12,000/= for 4 days' loss of income at the rate of Kshs. 3,000/= per day would have been appropriate since the appellant admitted that he was earning less than Kshs. 4,000/= per day.

9. On the whole, the respondent's appeal was found merited and was allowed resulting in the setting aside of the trial court's judgement and dismissal of the appellant's suit.
10. We heard the appeal on 13th March 2025 when the appellant appeared in person while there was no appearance for the respondent despite due service of the hearing notice.
11. In his submissions, the appellant contended: that the learned Judge did not consider his submissions; that he had indicated that he was not given a notice; that the learned Judge did not consider the law in determining the issues of quantum; and that the learned Judge did not consider the fact that it had been directed that he be allocated an alternative plot.
12. We have considered the submissions made by the appellant.

This being a second appeal, our mandate is restricted by section 72 of the [Civil Procedure Act](#) which provides that:

1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
 - a. the decision being contrary to law or to some usage having the force of law;
 - b. the decision having failed to determine some material issue of law or usage having the force of law;
 - c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
 2. An appeal may lie under this section from an appellate decree passed ex parte.
13. The above provision does not seem to distinguish between whether the decision appealed from confirmed the decision of the trial court or reversed it. This Court, while appreciating the remit of its jurisdiction as a second appellate court, held in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR that:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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. In the case of *Stephen Muriungi and another v Republic* [1982-88] 1 KAR 360, Chesonji Acting JA (as he then was) said at page 366:

“We would agree with the view expressed in the English case of *Martin vs Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first



appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

14. The appellant complains that the learned Judge did not consider his submissions. It is true that the appeal before the High Court was canvassed by way of written submissions. It is also true that an appellant, on a first appeal, is entitled to expect the evidence, as a whole, to be submitted to a fresh and exhaustive examination. (See *Selle v Associated Motor Boat Co.* [1968] EA 123). An allegation that the first appellate court failed to do that which the law enjoins it to do is clearly a matter of law and this Court, exercising its jurisdiction as a second appeal is entitled to interrogate such an allegation. In this appeal, however, we have considered the judgement by the learned Judge which extensively considered the submissions made by the parties before arriving at its decision. The submissions of both parties were considered and the evidence adduced before the trial court scrutinised and evaluated. Whereas a first Appellate court is expected to scrutinise and make an assessment of the evidence, this does not mean that the court, on appeal, should write a judgement similar to that of the trial court. What is required is an analysis and re-evaluation of the evidence as opposed to a reproduction of the same. On our part, we are unable to fault the learned Judge as regards the analysis and the re-evaluation of the evidence as well as her consideration of the submissions made by the parties before her.
15. On the issue of whether or not the appellant was given a notice, that being an issue of fact, we are precluded from venturing into it. In any case, that issue was not raised before the learned Judge in the first appellate court and we cannot deal with it for the first time in this appeal since we do not have the benefit of what the first appellate court would have found, had it been raised.
16. As to whether the learned Judge failed to consider the law in determining the issues of quantum, the learned Judge acquainted herself very well with the legal principles guiding award of damages including the need to not only plead damages but to also adduce evidence in support of the pleaded facts. In this case we agree with the learned Judge that the appellant did not adduce sufficient evidence to support the number of days for which the claim was made. Plaintiffs must understand that if they bring actions for damages, it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, “this is what I have lost, I ask you to give me these damages”. They have to prove it. See *Idi Ayub Omari Shabani & Another v City Council of Nairobi & Another* [1985] 1 KAR 681.
17. On the issue that the learned Judge did not consider the fact that it had been directed that the appellant be allocated an alternative plot, we agree with the learned Judge that the appellant having been found criminally culpable, on his own plea, could not benefit from that wrongdoing. We reiterate the words of Lord Mansfield CJ in *Holman v Johnson* (supra) that:

“... No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own standing or otherwise, the cause of action appears to arise ex turpi causa [“from an immoral cause”], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff...”
18. We have considered this appeal which we find it devoid of merit.
We dismiss the same but with no order as to costs as the respondent did not appear.
19. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE, 2025.



J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C. Arb, FCIArb.

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

