PN Mashru Ltd v Ojenge (Civil Appeal 64 of 2020)
[2023] KECA 473 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KECA 473 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 64 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

PN MASHRU LTD ..... APPELLANT

AND

DANCAN OUMA OJENGE ..... RESPONDENT

(Being an appeal from part of the judgement of the Employment and Labour Relations Court at Mombasa delivered on 31st March 2017 by Hon Justice J. Rika in Mombasa ELRC Cause 167 of 2015)

JUDGMENT

1. The suit before the trial court, from which this appeal arises, was commenced by way of Memorandum of Claim dated 26th March, 2015 by the Respondent herein against the Appellant.

2. In summary, the Respondent was an employee of the Appellant from December, 2011 to 15th May, 2014, as a spray painter earning Kshs 16,000/- per month. According to the Respondent, though he was entitled to an additional sum on salary as house allowance, the same was never paid. He was dismissed on the allegations that he had stolen a computer box. According to the Respondent, this allegation was based on results of the rituals performed by a witchdoctor whose services were retained by the Appellant. As a result, the Respondent was arrested and detained at Mariakani Police Station overnight. The following day, he was released but was dismissed by the Appellant employer. Thereafter, the Respondent sought legal assistance from Kituo Cha Sheria and upon the intervention of Kituo Cha Sheria, the Appellant made an offer to him for his return to work. However, the Respondent declined the offer and instead opted to be paid his terminal dues.

3. According to the Respondent, the termination of his contract was unfair and unlawful. The Respondent therefore claimed for notice pay in the sum of Kshs 18,400.00; arrears of house allowance for the entire period worked at Kshs 64,800.00; annual leave pay for the entire period at Kshs 31,273.00;

the equivalent of 12 months' salary in compensation for the unfair termination at Kshs 192,000.00; punitive damages; certificate of service; and costs. The basis for his claim for punitive damages was that his name was soiled yet it was the electrician who was responsible for the removal of the computer box, before spray painting.

4. The Appellant's case, on the other hand, was that the Respondent was employed on casual terms, as a spray painter, from December 2011 to 15th May, 2014 at a salary of Kshs 16,000.00 inclusive of house allowance and that on 15th May 2014, he deserted employment. It was its case that the said computer box got lost while under the care of the Respondent and the matter was reported to the police who arrested the Respondent and held him in custody overnight. Upon the release of the Respondent, the Appellant offered to re-employ him but the Respondent absconded from duty without tendering his resignation. As a result, the Appellant summarily dismissed him. This evidence was based on the witness statements which was admitted by consent without calling the makers thereof for cross-examination. That consent was made on 8th December, 2016, in which it was agreed, inter alia, that the Respondent's case which had been closed when the Respondent failed to appear at the hearing on 23rd November, 2016 when the defence case was scheduled for hearing, would be reopened; that the Respondent's witnesses' statements on record would be admitted as Respondent's evidence; that the Respondent's documents would similarly be admitted as exhibits; and that the Respondent's case would be closed and a date taken for mention to confirm the filing of submissions.

5. In his judgement, the Learned Trial Judge found that the Respondent was employed by the Appellant as a spray painter between December, 2011 and 15th May, 2014 earning Kshs 16,000.00 monthly. The Learned Trial Judge believed the Respondent's evidence which was on oath and subjected to cross-examination as opposed to that of the Appellant which was never subjected to cross examination.

6. According to the Learned Judge, the resort by the Appellant to the use of witchcraft violated the Respondent's rights to fair labour practices under Article 41 of the *Constitution* as well as Sections 41, 43 and 45 of the *Employment Act* and was hence repugnant to justice and morality hence was inconsistent with the *Constitution* and the law. According to the Learned Judge, an employee who is offered his job back, as the Respondent was, has a discretion to take it or leave it. It was however noted that though Appellant acted unfairly, it made amends and mitigated its wrongful act.

7. Based on the foregoing, the Learned Judge found that as the remedy for compensation is purposed on redressing economic injury, any economic injury suffered by the Respondent, after he rejected to go back to work, is, by and large, self-inflicted hence his compensation, if any, should be minimal. He therefore assessed the Respondent's compensation for unfair termination to equivalent of 4 months' salary at Kshs 64,000.00. In respect of punitive damages, the Court found, based on the mode of investigation adopted by the Appellant, the claim was merited and he awarded the Respondent Kshs 450,000.00 in respect thereof. He however declined to grant the prayer for notice since it was the Respondent who declined re-employment. He declined the prayer for payment in lieu of leave since there was evidence that the Respondent went on leave. Since the Respondent's payslip showed that Kshs 1,500.00 was for house allowance, the claim for house allowance was similarly declined. He however directed that a Certificate of Service be issued to the Respondent and made no order as to costs.

8. Before us the Appellant has based its appeal on the following grounds:

    1) That the learned judge erred in fact and in law by concluding that the Appellant used witchcraft in dealing with the Respondent and in so doing awarded Kshs 450,000/- as punitive damages.

2) That the learned judge erred in fact and in law by awarding punitive damages of Kshs 450,000/-

3) That the learned judge erred in fact and in law by failing to consider and put weight on the Respondent's Statements contrary to Rule 25(3) of the *Employment and Labour Relations Rules*, as regards the allegations of witchcraft.

4) That the learned judge erred in fact and in law by failing to consider that witchcraft is a criminal offence, and that the allegation of witchcraft against the Appellant ought to have been heard and determined in a criminal court, where the burden of proof is that of beyond reasonable doubt.

5) That the learned judge erred in fact and in law by failing to appreciate that allegations of witchcraft is purely criminal in nature therefore the Employment and Labour Relations Court has no jurisdiction in that regard.

6) That the learned judge erred in fact and in law by failing to appreciate that the application of the *Witchcraft Act*, strictly fall within the jurisdiction of the Criminal Court.

7) That the learned judge erred in fact and in law by failing to adhere to the sanctions for witchcraft stipulated in the *Witchcraft Act*.

9. It was therefore sought that the appeal be allowed and that the award of punitive damages of Kshs 450,000.00 be set aside.

10. On behalf of the Appellant it was submitted that the Court disregarded the Appellant's evidence thus breaching the Appellant's fundamental right to a fair hearing when it reached the conclusion that the Appellant engaged in witchcraft. It was further the Appellant's case that the award of exemplary damages was irregular in that the case did not meet the threshold for awarding exemplary damages and the award was excessive in the circumstances.

11. According to the Appellant, the Rules governing procedure in the Employment and Labour Relations Court are the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and not the *Civil Procedure Rules*. In this regard reference was made to Rules 25 and 26 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and it was submitted that the attendance of a witness may or may not be required by the court as an affidavit or a witness statement is sufficient evidence in Employment Proceedings, unless the court requires the deponent to appear before it to be cross examined.

12. It was therefore submitted that both parties, having in mind the Rules as discussed here above consented to have the Witness Statements and Documents on record for the Appellant, admitted as the Appellant's evidence. By the Respondent expressly consenting to closing the Appellant's case without exercising its right to cross examine the Appellant's witnesses, it was submitted that the Respondent effectively abdicated its chance to cross-examine the witnesses presented by the Appellant.It was therefore submitted that the Learned Judge erred in fact and law when he completely disregarded the Appellant's evidence, specifically the overwhelming evidence as contained in the Witness Statements filed by the Appellant against the allegations of witchcraft as raised by the Respondent, on grounds that the evidence was untested.

13. On whether the allegations of witchcraft were proved, it was submitted that the evidence of witchcraft was specifically contradicted by the Appellant in the witness statements filed in court. It was submitted that the legal nature of witchcraft in our jurisdiction is that the same is criminally sanctioned under the *Witchcraft Act*, as such there are certain elementary requirements that a court of law should expect to be provided in evidence to prove such an allegation if raised even in a civil dispute. In this matter not only was there no such evidence produced, the evidence produced by the Respondent was directly contested by the Respondent.

14. It was submitted that the court ignored the overwhelming evidence by the Appellant in its witness statements contrary to the provisions of Rule 25(3) of the *Employment and Labour Relations Court (Procedure) Rules*. In the Appellant's view, the accounts as rendered by the Appellant were more probable. Therefore, it was submitted, the court completely failed to examine the evidence presented by the Appellant thereby reaching an erroneous decision.

15. On whether the Exemplary damages of Kshs 450,000/= awarded against the Appellant were excessive, reliance was placed *Rookes v Barnard and others* (1964) AC 1129 which case is heavily relied on in *Obongo v Municipal Council of Kisumu* [1971/ EA 91. It was submitted that this case does not fall within the yardstick set out in these cases and as such the award of punitive damages should not have been awarded. The Appellant in this case is not a Governmental Agency and neither can it be said that there was some financial benefit that the Respondent enjoyed in this case. Further the cause of action herein stems from an action in contract and not in tort.

16. It was further submitted that even if it were argued that the Learned Judge rightly awarded exemplary damages in this matter, the award given was extremely high and oppressive on the Appellant. According to the Appellant, it is trite law that where an action complained of is criminal, exemplary damages should not exceed the punishment which would have likely been given in criminal proceedings as was held in *Obongo v Municipal Council of Kisumu* [1971/ EA 91 while quoting *Rookes v Barnard and others* [1964] AC 1129. The reason for this, it was submitted, is because exemplary damages are meant to punish a defendant and never for compensating the Plaintiff. In this regard, the Appellant relied on *Kampala City Council v Nakaye* [19721 EA 446 at page 448. Simply put, it was submitted, since exemplary damages are a mode of punishing an offender, if an offence is set out in law the punishment imposed must also be what the law has prescribed for such an offence. In this regard reference was made to Section 7 of the *Witchcraft Act* which provides as follows; -

> Any person who employs or solicits any other person to name or indicate by the use of any non-natural means any person as the perpetrator of any alleged crime or other act—a complained of shall be guilty of an offence and liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding five years.

17. It was therefore submitted that even if the court were to insist despite the lack of evidence that the allegations by the Respondent were true, it ought to have stuck to the law providing for sanctions of such acts which in this case Section 7 of the Witchcraft provides for the maximum fine payable. According to the Appellant, it is trite law that a man can only be punished to the extent provided in law and therefore the learned judge in taking up such role of imposing punishment on the Appellant ought not to have exceeded the limit provided simply because the matter has taken up the nature of a civil dispute.Therefore, in the Appellant's view, the award of Kshs. 450,000/- for exemplary damages was not only irregular in this matter but also extremely exorbitant and contravened the principle of legality.

18. We were urged to allow the appeal with costs.

19. On behalf of the Respondent, it was submitted, while not disputing the provisions of the said *Employment and Labour Relations Court (Procedure) Rules*, 2016, that a distinction has to be drawn between a witness statement and an affidavit. It was submitted that there is not as yet any authority for a witness statement on its own being evidence. However, the Respondent contended that the said provisions of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 do not in any way bar the parties to the cause from calling to Court witnesses to tender evidence and produce documents in support of the party's case. According to the Respondent, the Appellant having filed witness statements in support of its case at the trial, it had an obligation to avail the said witnesses to tender evidence in support of its claim and also to further disprove the evidence that was tendered by the Respondent in support of his claim.

20. It was submitted that the Trial Court was presented with conflicting facts by each party to the suit from which there were issues which the Court was invited to make a determination on. It was therefore contended that the failure by the Appellant herein to produce the witnesses in Court to tender their evidence and be cross-examined on the disputed facts meant that the witness statements as filed remained "mere statements" with no evidential value. In this regard, reliance was placed on Petition No. 6 of 2013 - *Josai Taraiya kipelia Ole Kores v Dr. David Ole Nkedianye and 3 others* and Cause No. 68 of 2020 *Kenya Union of Sugar Plantation and Allied Workers v Kibos Sugar and Allied Industries Ltd*. 2022 eKLR.

21. Accordingly, as the witness statements were untested the Trial Court was right in finding that they were of no probative value and this Court was urged to find as such.

22. On whether the allegations of witchcraft were proved, the Respondent submitted that by failing to avail their witnesses adverse inference ought to have been drawn against the said witnesses. Reliance was placed on Civil Appeal No. 184 of 2018 - *Stanley Mombo Amuti vs Kenya Anti- Corruption Commission*, and *Elgin Finedays Ltd vs Webb* 1974 AD 744.

23. It was submitted that the Trial Court sufficiently examined the evidence tendered before it and arrived at a well-reasoned decision and we were urged to find the same.

24. On exemplary damages, it was submitted that the actions of the Appellant herein, were at all times calculated to procure it some profit or benefit which benefit need not be financial. The Appellant's actions, it was contended, not only succeeded in instilling fear on the employees, but also resulted in the exit from employment of some of the employees and by extension affording a benefit on the Appellant herein due to the said exit. It was also submitted that the said conduct was wilful and calculated and the same is properly a matter where punitive damages may be awarded.

25. It was therefore submitted that Trial Court was well within its right in exercising its discretion and awarding punitive damages in this case, for the use by the Appellant herein of unconventional means to solve an employment dispute, for the outright breach of the *Employment Act* and for the violation of the *Constitution*. It was the Respondent's submission that the amount awarded is not excessive and the same is commensurate to the wrong committed.

26. According to the Respondent, the award made by this Court was one made in exercise of its discretion and the Appellant herein has not adduced evidence that is sufficient to warrant this Court disturbing the same. In support of this submission, the Respondent relied on *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] eKLR.

27. According to the Respondent, punitive damages are not general damages but are payments to ensure compliance and in our case to ensure compliance with Employment Laws and Legislation. Punitive damages, it was submitted, are discretionary as regards the amount to be awarded and is not limited

by Statutory law as suggested. It was contended punitive damages are granted in addition to actual damages in certain circumstances as where a respondent's behaviour is found to be especially harmful and are aimed at reforming or deterring a respondent and others from engaging in conduct similar to that which formed the basis of the suit. Reference was therefore made to *D.K Njagi Marete vs Teacher Service Commission* [2020] eKLR and we were therefore urged to uphold the award.

Analysis and Determination

28. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate was re-affirmed in Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 where this Court held that:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

29. We have set out the respective cases for the parties at the beginning of this judgement. Before us it is contended that the Learned Trial Judge erred in failing to consider the evidence presented by the Appellant on the basis that the same was not tested by cross examination. According to the Appellant the course adopted by the parties was in line with 25(3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. That rule provides that: -

> Evidence before the Court may be given orally or if the judge so orders, by affidavit or a written statement and the Court may at any stage of hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.

30. In this case, the parties recorded a consent in which the witness statements and the documents filed by the Appellants were to be admitted and submissions made thereon. This was the parties own mode of adducing evidence. By so doing, the parties took a calculated risk and seemed to have left the decision as to what weight to attach to such statements purely in the hands of the Court. While the *Employment and Labour Relations Court (Procedure) Rules*, 2016 provide for a procedure where the Court may, instead of taking oral evidence, decide the matter based on affidavits or written statements, that decision is one that ought to be left to the Trial Court and being an exercise of judicial discretion, ought not to be thrust upon the Court, purportedly by consent of the parties.

31. Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court's process or exposes the adjudicatory process to ridicule, ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In our view whereas in adversarial systems like ours, parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote Oder, JSC in the case of *Gokaldas Tanna v Rosemary Muyinza & DAPCB* SCCA No. 12 of 1992 (SCU):

> " An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned

Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions."

32. The current system is that the Court must always be on the driving seat of litigation and this was appreciated by this Court in *Stephen Boro Gitiha v Family Finance Building Society & 3 Others* Civil Application No. Nai. 263 of 2009, where the Court expressed itself as follows:

> "on 23rd July 2009 both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner."

33. For avoidance of doubt the overriding objective is reproduced in Section 3 of the *Employment and Labour Relations Act*, though called "Principal Objective." Where one of the parties has adduced evidence on oath tested by cross-examination, and the other party opts to rely on bare statements without calling the makers thereof and giving the other party an opportunity to similarly subject them to cross-examination, it may well be unfair to treat both cases on the same plane. The purpose of cross-examination, according to *Maganlal v King Emperor* AIR 1946 Nagpur 126, is to test the veracity of the witness. Accordingly, where the Court is placed in a situation where it is unable to test the veracity of the statements filed due to a procedure adopted by a party, this Court cannot fault the Trial Court if it decides to believe the evidence whose veracity was tested before the Trial Court by a witness whose demeanour the Court was able to assess as opposed to cold-print statements. Parties and their legal advisers ought to take the advice of this Court in *James Njoro Kibutiri v Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 seriously in which the ingenious lawyers were advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In *Lehmann's (East Africa) Ltd v R Lehmann & Co. Ltd* [1973] EA 167 it was held that:

> "The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."

34. In these circumstances, we agree with the Learned Trial Judge in deciding to attach little or no weight to the witness statements filed by the Appellant.

35. On the award of punitive damages, in *Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd* Civil Appeal No. 132 of 2001, this Court citing *Obongo & Another vs. Municipal Council of Kisumu* [1971] EA 91 and *Rookes v Banard & Others* [1964] AC 1129 held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. The third scenario is, of course, where such damages are authorised by statute.

36. This Court while declining to award exemplary damages in *D K Njagi Marete v Teachers Service Commission* [2020] eKLR expressed itself as hereunder:

> " In the circumstances of this appeal, we are not satisfied that the respondent's actions were so arbitrary and oppressive as outlined in *Obonyo and Another v Municipal Council of Kisumu* (*supra*) so as to justify an award of exemplary damages. We are fortified in this finding due to the fact that the appellant went ahead to secure employment shortly after the termination of his employment. Our consideration of the circumstances herein alongside the case law on the subject as well as Section 49(f) and 49(g) of the *Employment Act* lead us to find that the claims for exemplary or aggravated damages must fail."

37. The Respondent has defended the said award on the ground that by its actions, the Appellant not only succeeded in instilling fear on the employees, but also resulted in the exit from employment of some of the Employees and by extension affording a benefit to the Appellant herein due to the said exit. It is clear that the benefit contemplated in award of punitive damages must not necessarily be financial. In this case, we must ask ourselves what the Appellant intended to achieve by resorting to the unorthodox method of investigation by engaging the services of a witchdoctor. Such unconventional and unlawful action undertaken by a sophisticated entity aptly described by the Learned Judge as "not a gullible simpleton, a village outfit, but...a major enterprise, resident in the resort city of Mombasa" must have been intended to achieve more than just vindicate a course of justice. In those circumstances we agree that the Appellant intended to derive some benefit from its action by resorting to "wizardry" as the Learned Judge termed its action.

38. Accordingly, we find no reason to interfere with the finding that the Respondent was entitled to punitive damages.

39. As regards the assessment of the said award, this Court in *Bell & Another v I. L. Matterello Limited* (Civil Appeal 72 of 2019) [2022] KECA 168 (KLR) (18 February 2022) (Judgment) reiterated the circumstances under which it would interfere with an award of damages and expressed itself as hereunder:

> " In *Ephantus Mwangi & Another v Duncan Mwangi* [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence, b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did; *Kiambu Dairy, Farmers Co-operative Society Limited v Rhoda Njeri & 3 Others* [2018] eKLR, - the extent of an award of compensatory damages lies in

the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles; *Kemfro Africa Limited v Lubia & Another* [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki v Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable; *Johnson Evans Gicheru v Andrew Martin & Another* [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum, (b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled; *Sumaria & Another v Allied Industries Limited* [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did; *Butt v Khan* [1981] KLR 349, - 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, (b) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low; *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevans Limited* [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss; (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass; (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass."

40. In that case, the Court reduced the award from Kshs 2,000.000.00 to Kshs 500,000.00. In this case there is no doubt that the respondent was subjected to the indignity of undergoing rituals in the hands of a witchdoctor. The Appellant's action was not only criminal but also demeaning and contrary to Article 28 of the *Constitution*. In the circumstances, we find no reason to interfere with the award since as was held in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance.

41. In the premises we find no merit in this appeal which we hereby dismiss with costs to the Respondent.

42. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR