



Ondimu & another v Commissioner of Police & 3 others (Civil Appeal E044 of 2022) [2023] KECA 1105 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1105 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E044 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

ALEX OTUKE ONDIMU 1ST APPELLANT

MOTOR WORLD LIMITED 2ND APPELLANT

AND

COMMISSIONER OF POLICE 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT 3RD
RESPONDENT**

JOSEPH MUTHUI KIRAGU 4TH RESPONDENT

(Being an appeal arising from the Judgement and Decree of the High Court at Nakuru (Ngetich. J) dated 30th March, 2022 In HCCC No. 223 of 2012)

JUDGMENT

1. This is the first appeal of Alex Otuke Ondimu and Motor World Limited, the 1st and 2nd appellants respectively, against the judgement of the High Court (Ngetich J), dated March 30, 2022. The Commissioner of police, the Director of Criminal Investigations, the Hon Attorney General and Joseph Muthui Kiragu are the 1st to 4th respondents respectively.
2. The backdrop of this appeal is that the appellants filed a Plaintiff dated June 22, 2012 and amended on December 8, 2020 in the High Court seeking orders that:
 - a. A declaration that the entry and search of the 1st plaintiff's house and the 2nd plaintiff's premises and subsequent seizure and detention of the motor vehicles registration No KBL xxx, KBN xxx and KBN xxx and the documents



was illegal, unlawful, arbitrary, capricious and malicious and was only meant to harass and intimidate the plaintiffs and violated the plaintiff's right to privacy and property protected and guaranteed under Articles 31 and 40 of the Constitution.

- b. Kshs 28,113,772 damages for loss of business and income.
 - c. A declaration that institution of Criminal Case No 188 of 2011 against the 1st plaintiff was illegal, arbitrary, capricious, malicious and abuse of power and/or authority and the 1st plaintiff's right to dignity and not be subjected to psychological torture guaranteed and protected under Articles 28 and 29 (d) of the Constitution have been violated by the respondents.
 - d. General damages for violation of rights under Articles 28, 29 (d), 31 and 40 of the Constitution.
 - e. Costs and interest of b and d.'
3. The 1st appellant is the managing director of the 2nd appellant. They pleaded that the 4th respondent acting on the instructions of the 1st and 2nd respondents, raided their premises on the 23rd and January 24, 2011. That the respondents entered and searched their premises, and towed away motor vehicles registration KBL xxxx, KBN xxxx and KBN xxx (suit vehicles). That they detained the vehicles up to February 5, 2011. Consequently, the 1st appellant was arrested and arraigned in court vide Criminal Case No 188 of 2011.
 4. As a result of the said actions, the appellants claimed that they lost income to the tune of Kshs 28,113,722. That there was a decline in sales from Kshs 54,450,000 in 2010 to Kshs 12,800,000 in 2011. Further, that the 1st appellant suffered mental anguish, trauma, anxiety and loss of reputation. They stated that the respondents' actions amounted to infringement and violation of their right to privacy which includes the right to a home, and property as envisaged in Article 31 (b) of the Constitution.
 5. In rebuttal, the respondents filed a defence dated August 28, 2013 and denied that they illegally or unlawfully towed the appellants' vehicles. They averred that if indeed the said motor vehicles were towed away by the police, it was as a result of investigations into a complaint lodged by the director of Speedboat Freighters Ltd.
 6. They pleaded that the 1st appellant was arrested and charged in Mombasa Chief Magistrate's Court in Criminal Case Number 188 of 2011, after the investigations were carried out and there was sufficient evidence to incriminate him. They denied the allegations and particulars of illegality, unlawful acts and malice pleaded by the appellants. They also denied that they caused the 1st appellant to suffer mental anguish, trauma, anxiety, loss of reputation and dignity as pleaded in the amended plaint.
 7. During the hearing the 1st appellant (PW1), Stanley Ivanko Mbeche (PW2) and Teresa Njambi Wachira (PW3) testified for the appellants, while No xxxx Sgt Joseph Muthui Kiragu testified as the sole witness for the respondents.
 8. The appellants' case was that they were involved in the business of selling motor vehicles. On January 23, 2011 Sgt Kiragu and other officers invaded PW1's house and on January 24, 2011 they raided his business premises. During the raids they towed away the suit motor vehicles from PW1's house and his business premises. Subsequently, Criminal Case No 188 of 2011 was instituted against him. PW1 testified that the whole ordeal cost him his business and profit as it ruined his reputation. As a result, he closed his business in 2014.



9. PW2, worked as an accountant for the 2nd appellant since 2010. He presented audit reports on the 2nd appellant and testified that the reports were based on a schedule of the summary of all the sales that had been done, and bank statements for the 2010, 2011 period. He testified that in 2010 the appellants' business had an annual turnover of Kshs 54,450,000/-, but in 2011 it dropped to Kshs 12,800,000. That in 2010 the company made a profit of Kshs 5,140,711/= which represented 9% of sales, while in 2011 it made a significant loss amounting to Kshs 28,113,722/= which represented a 314% of sales. Further, that legal costs in 2011 went up to 3.2 million and freight and loan interest also went high due to default. In cross-examination he admitted that loss in future income was based on his projection and was not factual.
10. PW3, the wife to PW1, and managing director of the 2nd appellant testified that on the night of January 23, 2011 she was at home at Naka Estate within Nakuru County, when Sgt Kiragu and other police officers raided their home. They said they were looking for her husband who was a dangerous criminal and since he was not at home they demanded for the logbooks of the two motor vehicles that were parked outside the house.
11. PW3 handed copies of the logbooks to the officers and they proceeded to ransack the house. In the end they towed two motor vehicles to Nakuru Central Police station. The following day at about noon, Sgt Kiragu stormed their offices with four officers and demanded the documents for all the motor vehicles that were in the showroom. All the documents were availed except those for motor vehicle registration KBN xxx, whose log book was in the process of being obtained. Sgt Kiragu ordered the said vehicle to be towed to Central Police Station.
12. For the respondent, DW1 testified that several complaints of fraud had been received in the Banking Fraud Unit against the appellants. That the DCI investigated the complaints and thereafter, charged the 1st appellant. He asserted that there was no malice to be imputed since he did not know the appellant before. Further, that the motor vehicles were impounded during the weekend and therefore, they could not have obtained a warrant and if they had waited for the warrant, the investigations would have been impeded.
13. DW1 stated that their investigations unearthed evidence implicating the 1st appellant in the offence of stealing by agent contrary to section 283 (c) of the *Penal Code*. Consequently, he was charged in the Chief Magistrate's Court at Mombasa. The appellants however, filed an application in the High Court at Nakuru and obtained orders that lifted the restriction on the impounded vehicles and also prohibited the Chief Magistrate's Court at Mombasa from continuing with the criminal prosecution.
14. In the opinion of DW1, the aforementioned instances of fraud could have contributed to the decline of the appellants' capital base, which eventually dwindled when the trading partners reported them to the police, or filed civil cases and ceased to do business with them. DW1 denied that their actions had any relationship with the alleged loss suffered by the appellants.
15. Upon considering the case before her, the learned Judge held that the failure by the respondents to inform the appellants of the seizure of the motor vehicles and call upon them to prove legal possession, rendered their actions a violation of the appellants' constitutional right. She however, held that other factors may have contributed to the losses listed by the appellants, and they could not be attributed solely to the respondents' actions. She awarded the appellants general damages of Kshs 3,000,000.



16. Aggrieved by the judgment of the High Court, the appellants decided to take a chance in the Court of Appeal. They filed this appeal alleging that the learned Judge of the superior court, erred in law and in fact on five grounds:
- a. 'In failing to attribute the appellants' loss of business and income solely to the respondents' actions.
 - b. In considering extraneous matters to deny the appellants an award of loss of business and income.
 - c. In failing to pronounce herself on all the reliefs sought by the appellants.
 - d. In awarding the appellants manifestly low general damages to redress violation of constitutional rights.
 - e. In rendering an ambiguous judgment and failing to award general damages for violation of rights to each appellant separately.'
17. This appeal was canvassed by way of written submissions that were orally highlighted during plenary in the virtual hearing. The firm of SM Omae & Co Advocates filed submissions dated October 3, 2022 on behalf of the appellants and Senior Litigation Counsel, Chepkirui Janet, appearing for the Attorney General, filed their submissions dated February 13, 2023.
18. The appellants urged that PW2, is a certified accountant whose evidence was in the form of audited accounts with supporting documents to prove the losses suffered by the 2nd appellant and the respondents did not offer expert evidence to controvert it. That PW2 had proved to the court that there was a decline in the sales in the year 2011 as compared to the year 2010. They faulted the learned Judge for expressing, in her judgment, that other factors affected their business, without attributing the losses to any particular factor.
19. Further, that the Judge never gave any reasons for her decision as required by Order 21 Rule 4 and 5 of Civil Procedure Rules. They cited the decision of Flannery v Halifax Estate Agencies Ltd (2000)1 All ER 373 to emphasize the importance of the court to give reasons for its decision. They urged that this Court has held severally that a decision without reasons cannot be allowed to stand.
20. The appellants also submitted that the superior court did not pronounce itself on the appellants' prayers that the criminal case instituted against the appellant was illegal, arbitrary, unlawful, capricious, malicious, and an abuse of the power and/or authority and that the 1st appellant's right to dignity and not to be subjected to psychological torture guaranteed and protected under Article 28 and 29(d) of the Constitution had been violated by the respondents.
21. The appellants contended that their claims as framed in the Amended Plaintiff raised different causes of action against the respondents, with each appellant presenting a separate and distinct claim against the respondents. Reliance was placed on the decision in Samura Engineering Limited & 10 Others v Kenya Revenue Authority (2012) eKLR, where the superior court made separate awards of general damages to companies and individuals who were their directors, whose rights were violated. That in the impugned judgment the appellants are left speculating as to what was awarded to each of them. It is their contention that due to the ambiguity of the impugned judgment the terms of Order 21 rules 4 and 5 of the Civil Procedure Rules were not met.



22. In conclusion they submitted, that upon the superior court finding that the respondent's actions had violated the appellants' rights under Articles 31 and 40 of the Constitution, the award of Kshs 3,000,000/= was made without giving any reasons on how it was arrived at. That there is no indication whatsoever in the judgment that the learned Judge considered the comparable awards cited by the appellants. In their view, the award was manifestly low and they invited this Court to interfere with it and in its place award Kshs 15 million and 25 million to the 1st and the 2nd appellants respectively with interest from the date of the judgment of the superior court.
23. In rebuttal, the respondents urged that the appellants were unable to prove their allegation that their business loss was solely attributable to the respondents' actions. In their view, impounding the motor vehicles for less than 15 days could not have reasonably and foreseeably led to the closure of the business in the year 2014. They agreed with the learned Judge's view that other factors that affect business could not be ruled out. They asserted that the trial court sufficiently took into account, the respondents' actions and the implications they had on the appellant's business, while awarding the general damages and urged us to let the Judge's decision stand.
24. The respondents urged that the learned Judge acted within her discretion by declining to grant an award specifically for loss of business and income and instead awarding general damages in the sum of Kshs 3,000,000/-, to cover the loss of business and income. They relied on the cases of *Mbogo & Another v Shab (1968) EA 93*, *Kemfro Africa Ltd t/a 'Meru Express Services (1978)' & Another vs Lubia and Another (No 2) [1985]* and *Johnson Evan Gicheru v Andrew Morton & Another (2005) eKLR*, to urge that the award of damages involves the exercise of discretion by the trial court and an appellate court will not readily interfere with the exercise of that discretion, unless it was wrongly exercised, was based on no evidence, or the court considered irrelevant factors, or failed to consider the relevant factors which resulted into an injustice.
25. On whether the award to redress violation of the constitutional rights was manifestly too low, this Court was urged to find and hold that the general damages awarded by the trial court was reasonable in the circumstances. Further, that there is no law requiring that the Judge must pronounce himself/herself on all the reliefs sought in a suit.
26. In conclusion they submitted that while it is true that the appellants' claims as framed in the amended plaint raised different causes of action against the respondents, the appellants failed to separately and distinctly seek reliefs in respect of the several different claims as required under Order 4 Rule 7 of Civil Procedure Rules.
27. That then is the case that was before the trial court and the arguments now before this Court, which we must render our decision on. This being the first appeal, our duty is to examine matters of both law and facts and to subject the whole of the evidence tendered before the trial court to a fresh and exhaustive scrutiny, before drawing a conclusion from the analysis. We must however, bear in mind the fact that we did not have an opportunity to see and hear the witnesses first hand and give allowance therefor. In *Peter M Kariuki v Attorney General (2014) eKLR*, this Court held as follows on the duty of the court on first appeal:

' We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *NGUI V REPUBLIC, (1984) KLR 29* and *SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No 38 of 2002 (unreported)*'



28. We have considered the grounds, the record of appeal, the contending arguments and the law. We collapsed the five grounds together and distilled the following three issues for our consideration:
- a. 'Whether the Judge erred in failing to attribute the appellant's loss of business and income solely to the respondents' actions,
 - b. Whether the general damages awarded to redress violation of the Constitutional rights were manifestly too low, and
 - c. Whether the Judge rendered an ambiguous judgment by failing to award general damages for violation of rights to each appellant separately.'
29. The appellants seek to convince this Court that the losses they incurred in the year 2011 and the subsequent closure of their business three years later in 2014, were attributable to the respondents' actions of impounding the suit vehicles and the 1st appellant's arrest and arraignment in court. They compare the losses they incurred in the year 2011, with the profit they made the previous year and attribute the losses to the actions of the respondents. The respondents on the other hand, refuse to carry the blame for the losses and subsequent misfortunes suffered by the appellants. They argue that impounding the vehicles for less than 15 days could not have possibly led to the mentioned misfortunes.
30. The superior court analyzed the foregoing arguments and had this to say:
- ' The plaintiff argue that they made losses after the actions of the defendants in arresting and prosecuting him on allegations of stolen motor vehicles which action ruined his business and he could not get clients due to loss of reputation. From data shown by the plaintiffs there is no doubt that the business was lower compared to the period before arrest. However, in my view, other factors affecting businesses cannot be ruled out and losses listed cannot solely be attributed to the defendants'
31. In their pleadings before the High Court, the appellants prayed for special damages in the specific sum of kshs 28,113,772/- for loss of income and business. These being a claim for special damages, the law is settled that special damages must not only be specifically pleaded, but must be strictly proved. The Supreme Court of Nigeria in *Union Bank of Nigeria PLC v Albaji Adams Ayabule & another (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011))*, Mahmud Mohammed, JSC, stated:
- ' I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff. Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.'
32. Also, in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR*, this Court held:
- ' It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.'



33. The appellants herein supplied the court with audit reports of the 2nd appellant's business as at December 31, 2010 and as at December 31, 2011, and bank statements from various banks for that period. The audit report as at December 31, 2010 recorded an interest of Kshs 5,140,711/- while the audit report as at 31st December, 2011 recorded a loss of Kshs 28,113,722/-
- . On expenditures, the appellants indicated that in 2010 they sold 66 vehicles at Kshs 51,110,000/-, but in 2011 they sold only 16 vehicles at Kshs 11,150,000/- . The cost of freight and off- loading was reflected as Kshs 1,350,500/- in 2010 and kshs 3,245,000/- in 2011. The cost of legal fees in 2011 was Kshs 3,823,000/-, while in 2010 it was nil. Financial costs in 2011 stood at Kshs 3,022,638/- while in 2010 it was Kshs 1,492,090/.
34. It is clear from the above tabulation that the appellants recorded a low turnover in their business in 2011 compared to 2010. The question that begs an answer is whether the appellants have proved that the low turnover in the business and its eventual close down are to be attributed solely to the actions of the respondents.
35. We have analyzed the evidence tendered by the appellants in support of their case and find that it raises more questions than answers. It is lacking in specificity on how it was the actions of the police that resulted in low sales of vehicles in 2011 compared to 2010 and eventually led to the closure of business. There is no evidence that any intending purchaser who, for example, had shown interest pulled out because they heard about the appellants' run in with the police. Our understanding of loss would be that the stock they had was sold at less than the purchase or landed cost, but not merely that they sold fewer cars yet the stock was still intact.
36. Whereas the cost of legal fees in 2011 was said to have stood at Kshs 3,823,000 the year 2010 had registered nil legal fees. We note however, that the appellants were involved in other suits such as Mombasa CM Criminal Case no- 977 of 2011 and Nakuru HCCC no- 249 of 2010 before the case that led to the present one. The record is silent on whether the amount claimed to have been spent on legal fees was in respect of the case that culminated in the present appeal, or it was for the other legal causes.
37. Financial costs were said to have escalated to Kshs 3,022,638/- in 2011, from Kshs 1,492,090/- in 2010. The nexus between the expenditures that 'rose' in 2011 compared to 2010, such as the cost of freight, off-loading and other financial costs and the respondents' actions is not discernible.
38. As stated in Union Bank of Nigeria PLC and Capital Fish Kenya Limited supra, special damages must be specifically pleaded and strictly proved. Applying the standard in the said decisions to the instant case, we are of the view that the appellants have not strictly proved the damages sought. The mere fact that they sold more cars in one year than in another year is not sufficient to apportion blame. After all, that is the nature of business. Sometimes it booms and sometimes it goes through dry spells depending on the vagaries of nature. We therefore, find no basis to fault the learned Judge's finding that the losses listed cannot be solely attributed to the respondents.
39. Turning to the award for general damages, it was the appellants' contention that the superior court did not consider the comparative cases that they cited when awarding the damages. That this resulted in an award that was manifestly too low. On the contrary, the respondents' view was that the general damages awarded by the trial court were reasonable in the circumstances.



40. The learned Judge agreed with the appellants that their constitutional rights were violated. She held as follows:

' In my view, the defendants were required to inform plaintiff of the alleged seizure of the motor vehicles and call upon him to prove legal possession of the vehicles and failure to do so renders their action a violation of the plaintiff's constitutional right'

She went ahead and awarded the appellants Kshs 3,000,000/- in general damages.

41. An award on general damages is an exercise of judicial discretion, and the circumstances in when an appellate court can interfere with an award of damages is firmly established. In *Price and Another vs Hilder (1996) KLR* the following guidelines were set-out:

' In considering the exercise of judicial discretion, as to whether or not to set aside a judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.'

42. In *Butt vs Khan (1981) KLR 349* it was also stated 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. 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'

43. This Court addressing itself to the issue of award of damages for constitutional violations by the state in *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*, looked at comparative jurisprudence in Trinidad and Tobago, Canada, the Caribbean and South Africa and pronounced itself thus:

' Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is 'appropriate and just' according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy consideration is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.'

44. By parity of reason, the award of general damages for the infringement of the constitutional rights of the appellants was not meant for their enrichment but for the vindication of the right that was violated. We are satisfied that the award given was proportional and rational in the circumstances of this case.



We find no justifiable reason to interfere with the discretion of the superior court in the award that it made and we therefore, uphold the decision of the superior court on the award of general damages.

45. Lastly, the appellants also argued that the impugned judgment was ambiguous on whether the award of damages was directed to the first and/or second appellant(s). The respondents on their part contended that as much as the appellants pleaded different causes of action against the respondents, they failed to separately and distinctly seek reliefs in respect of the several different claims as required by law.
46. Indeed, the 2nd appellant had a separate legal personality from the 1st appellant and the actions of the respondents violated the constitutional rights of both appellants. Order 4 Rule 7 of the Civil Procedure Rules provides that:

' Where the plaintiff seeks relief in respect of several distinct claims and causes of action founded upon separate and distinct grounds, they shall be stated as far as may be, separately and distinctly'

47. The award of general damages was not apportioned between the two appellants. The learned Judge pronounced herself in ambiguous terms stating; 'From the foregoing, I am inclined to award plaintiffs damages of Kshs 3,000,000.' without clarifying the portion of damages due to each appellant. We however, cannot fault the Judge in this respect firstly, because the appellants failed to plead different causes of action against the respondents and to separately and distinctly seek reliefs in respect of each of the several different claims as required by law. Secondly, the second appellant company closed down long before the suit was concluded and was not in existence at the time of determination.

48. Ultimately, this appeal fails on all grounds and is dismissed in its entirety.

Each party is ordered to bear its own costs.

Dated and delivered at Nakuru this 22nd day of September, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

