



**Mulei v Sinohydro Corporation & another (Civil Appeal
E033 of 2023) [2025] KEHC 4637 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E033 OF 2023
LW GITARI, J
MARCH 26, 2025**

BETWEEN

BRAMWELL MUNYOKI MULEI APPELLANT

AND

SINOHYDRO CORPORATION 1ST RESPONDENT

ANTHONY MUTUAL MALUO 2ND RESPONDENT

JUDGMENT

1. This appeal is based on the following grounds:
 1. That the learned Magistrate erred in law and in fact by apportioning liability in the ration of 80% - 20% while the Consent was of the ration 85% - 15%.
 2. That the learned Magistrate erred in law and in fact by awarding the Plaintiff a quantum of Kshs. 300,000/= plus costs which is manifestly low to amount to an error in the circumstances.
 3. That the learned Magistrate's award of damages was inordinately low in that it was an erroneous estimate of damages without due regard to the injuries sustained by the Appellant.
 4. That the learned Magistrate erred in law and in fact by reaching at a conclusion that is contrary to the evidence before the Court and Appellant's submission.
 5. That in all circumstances of the case, the findings of the learned Magistrate were characterized by misapplication of the law and fact and wrong exercise of discretion.
2. The appellant prays that the appeal be allowed the Judgment and the decree issued in the lower court be set aside. That the Judgment on liability be as per the consent of the parties which was 85% against the defendant and the plaintiff to bear 15%. That the court do set aside the award of damages and



proceed to re-assess the damages. That the costs of the appeal and of the proceedings in the lower court be awarded to the appellant.

Background

3. The appellant had filed the suit in the Chief Magistrate's Court at Kitui vide a plaint dated 26/3/2021 claiming
 - a. General damages
 - b. Special damages amounting to Kshs. 5,500,000.00
 - c. Costs of the suit
 - d. Interest from the date of filing the suit

The suit was against the respondents and the appellant had blamed them for negligence arising from a road traffic accident which had occurred on 26/8/2020 involving the appellant who was riding a motor cycle and a motor vehicle registration number KCM 289J owned by the 1st defendant and driven by the 2nd respondent. The appellant blamed the respondents for negligence in the manner in which the motor vehicle was being driven at the material. The defendants denied the allegations of negligence in their statement of defence dated 21/5/2021.

4. From the record, the proceedings parties entered a consent on liability before the trial Magistrate on 22/2/2023 as follows:
 1. Judgment be entered against the defendant in favour of the plaintiff at 80% - 20%.
 2. Documents be produced without calling witnesses.
3. Parties to file submissions on quantum.”

Thereafter, the learned Magistrate entered Judgment in the sum of Kshs. 300,000/- general damages and special damages of Kshs. 5,550/= less 20% appellants contribution on liability. The appellant was dissatisfied with the Judgment and filed this appeal.

The Appeal

5. The appeal was canvassed by way of written submissions. The appellant contends that liability was apportioned in the ration of 85% to 15% in favour of the appellant as against the respondent. The appellant further contends that the award of damages was inordinately too low as to present an entirely erroneous estimate of the compensation which the appellant was entitled.
6. The respondent has opposed the appeal and contends that consent on liability was 80:20 in favour of the appellant as per the court record. On the issue of damages, the respondents submit that the award reached by the learned Magistrate was based on the principles laid down in the law. That the damages awarded were reasonable and within the precedents set by the courts in matters involving the same cause of action. The respondent submits that the appeal has no merits and ought to be dismissed with costs.

Analysis And Determination

7. I have considered the appeal. The issues which arise for determination as articulated by the parties are:
 1. Whether the learned Magistrate erred in apportioning the liability at 80:20.



2. Whether the learned magistrate erred in awarding general damages which were inordinately too low.
8. This is a first appeal. The law on first appeal to this court is anchored under Section 78 of the [Civil Procedure Act](#) which provides as follows:
 - “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
9. The duties of the first appellate court has been discussed in various authorities of this court and the Court of Appeal. In *Selle & Another -vs- Associated Motor Boat Company Limited* (1968) E.A 123 it was stated that:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court by the High Court by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsidered the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it was neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judges finding of fact it appears either that he has clearly failed on some point to take account of particular circumstances or possibilities materially to estimate the evidence or of the impression based on demeanor of a witness is inconsistent with the evidence generally.”
10. See also *Mwanasokini -vs- Kenya Bus Services Ltd* (1982 – 88 1 KAR 278 for the same proposition. This court exercise jurisdiction to consider the facts and the law on a first appeal and to come up with its own independent finding but to leave room for the fact that it did not have an opportunity to see and hear the witnesses when they testified.
11. Bearing this in mind, I will proceed and determine the issues for determination.
 1. Whether the learned Magistrate erred in apportioning the liability at the ration of 80:20
The issue of liability was settled by consent of the parties. The law on consent Judgments in civil disputes is provided for at Section 67(2) of the [Civil Procedure Act](#) which provides that, “no appeal shall lie from a decree passed with the consent of the parties”. It is well settled in law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify settling aside a contract or if certain conditions remain to be fulfilled, which are not carried out. See court of Appeal decision in *J.M Mwakio -vs- Kenya Commercial*



Bank Ltd Appeal No. 28/1982 E.R. In the case of Hirani -vs- Kasam (1952) 19 E.A,C.A at page 134 it was stated that:

“The mode of paying the debt, then, is part of the consent Judgment. That being so the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescanning a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th Edn) Vol 1, page 24 as follows:

“Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court... or of the consent was given without sufficient material facts, or in general for which would enable court to set aside an agreement.”

12. See also Brook Bond Liebig Ltd -vs- Mallya (1975) E.A 226 at 269 what it was stated that:

“A court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

Thus, for this court to set aside a consent, the appellant is bound to prove that circumstances that would justify the setting aside of a contract exist. These include fraud, collusion, misrepresentation or that the agreement is contrary to the policy of the court. The applicant contention is that on 22/2/2023 parties at the trial court agreed on a consent that was recorded that liability be apportioned in the ratio of 85% to 15% in favour of the dependants as against the plaintiff.

13. This is a court of record and therefore the record of the court is of paramount importance when this court has to ascertain what transpired in court when the order was issued. The appellant has filed the record of the lower court in the Chief Magistrates' court at Kitui Civil Suit No. E077/2021 proceeding of 22/2/2023 where Ms. Gathenya was holding brief for Mr. Mwaniki and Ms. Mutege for 1st defendant. The learned Magistrate stated that:

“Judgment be entered against the defendant in favor of the plaintiff at 80% - 20%.”

14. This forms the record of the court and there can be no doubt that the parties recorded that consent. The contention by the appellant that the consent was 85:15 is not borne out by the record. I find that the appellant has not laid any ground to warrant this court to interfere with the consent recorded on liability.

15. I find that the appellant has not disclosed any ground to warrant this court to rule that the consent is not what was agreed by the parties. Ground for setting aside consent were stated by the court of Appeal in Flora N. Wasike -vs- Destimo Wamboko (1988) eKLR where it was stated:

“It is well settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract.”

I find that this ground has no merits.

16.

(2) Whether the learned Magistrate erred in awarding damages which were inordinately too low.



The principles upon an appellate court will interfere with an award of damages have been laid down by this court and the court of Appeal. In this case of *Kemfo Africa t/a Meru Exporters Services & Another -vs- A.M Lubia & Another* (1982-88) 1 KAR 727. The court stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by trial Judge was held by the former court of appeal of Eastern t be that, it 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 that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

17. These are the principles which this court must apply in determining this appeal which is challenging the award of the quantum of damages. The courts have also held that the assessment of the quantum of damages is an exercise of courts’ discretion. In *Loice Wanjiku Kagunda -vs Julius Gachau Mwangi C.A 142/2003 (UR)* the court stated that;

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence appellate court should not interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of law, or has misapprehended the facts or for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on wrong principles (see *Manga -vs- Musila* (1984) KLR 25.)”

18. The Court of Appeal in *Bashir Ahmed Butt -vs-Uwais Ahmed Khan* (1982 – 88) KAR had stated as follows with regard to the issue of appeal on quantum of damages:

“An appellate court will not disturb an award of general damages unless it is so inordinately high or low to represent an entirely erroneous estimate. It must be shown that eh Judge proceed 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...”

19. The principles for compensation of personal injury are principally three-fold. That is;

- I. Compensation for the personal injury suffered – See *Lord Dunedin in Admiralty Commissioners -vs- Valeria (Owners)* (1922) 2A. C 242, 248.
- II. Comparative awards for comparative injuries – See *Kagaragani -vs- Aya* (1985) KLR 273 where the court of Appeal (*Hancox, Nyarangi JJA and plat Ag. JA*) it was held;

“In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”

20. This is an appeal on quantum of damages the court will only interfere with the discretion of the learned Magistrate if the award is so in-ordinately low so as to represent an entirely erroneous estimate or a party asking for an increase must show that in reaching that in-ordinately low figure the magistrate proceeded on a wrong principle or misapprehended the evidence in some material respect.

21. In this case a medical report by Dr. Calvin M. Achieng, the plaintiff suffered severe internal abdominal injury and small bowel perforation. Chest tenderness, right foot wound, tender swollen. The doctor’s



prognosis was that the injuries healed with no major complication. The degree of injury was grievous harm.

22. In her Judgment, the learned Magistrate stated that, the appellant had submitted that the appellant be awarded Kshs. 400,000/= while relying on decided cases. She decided on *Poa Link & Another -vs- Sindani Boaz Benzemol 20 21 eKL* where the plaintiff had sustained the following injuries: Blunt injury to chest, Bruises Lower abdomen, Bruises of right hip joint, Bruises of the thigh and Bruises on the knee. General damages awarded Kshs. 350,000/=.
23. I note that the appellant had urged the court to award Kshs. 400,000/=. The appellant has suffered grievous harm owing to the internal injuries. The award of Kshs. 400,000/= pleaded by the appellant was reasonable. Though the learned magistrate followed the principles that comparable injuries should attract comparable awards, she erred in her award as the appellant had internal injuries which were assessed as grievous harm.
24. I should therefore interfere with the award of quantum of damages. I set aside the award of Kshs. 300,000/= and substitute with Kshs. 400,000/=

Conclusion

25. The appeal partly succeeds as follows:
1. Liability 80:20 in favour of the appellant against the respondent.
 2. General Damages Kshs. 400,000/=
 3. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF MARCH 2025

HON. LADY JUSTICE L. GITARI

JUDGE

