Osano & another v Wanjala (Civil Appeal E099 of 2021)
[2024] KEHC 1955 (KLR) (Civ) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E099 OF 2021

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

JOHN NYARANDI OSANO ..... 1ST APPELLANT

DENNIS ORARO MOIGARE ..... 2ND APPELLANT

AND

ALEX KHAEMBA WANJALA ..... RESPONDENT

(Being an appeal from the judgment of A.N. Makau (Ms.) PM, delivered on 26**{{^**th**}}** February 2021 in Nairobi Milimani CMCC No. 3219 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on 26th February, 2021 in Nairobi Milimani CMCC No. 3219 of 2019. The suit was instituted via the plaint dated 24th April, 2019 and was filed by Alex Khaemba Wanjala, the plaintiff in the lower court (hereafter the Respondent) against John Nyarandi Osano and Dennis Oraro Moigare, the defendants in the lower court (hereafter the 1st and 2nd Appellants). The Respondent sought general and special damages in the sum of Kshs. 3,550/- pursuant to injuries he allegedly sustained following a road traffic accident which occurred on or about 12th October, 2017.

2. The Respondent pleaded that the 1st Appellant was at all material times the registered owner of the motor vehicle registration No. KAN 608W (hereafter the subject motor vehicle) while the 2nd Appellant was the driver thereof. It was further pleaded that on the material date, the subject motor vehicle was so negligently, carelessly driven and/or controlled and managed by the 2nd Appellant that it knocked down the Respondent who was lawfully walking along 75 Round, occasioning him serious bodily injuries. The particulars of negligence were set out under paragraph 4 of the plaint.

3. The 1st and 2nd Appellants entered appearance and filed their joint statement of defence dated 26th June, 2019 therein denying the key averments in the plaint and liability. Alternatively, the Appellants pleaded contributory negligence on the part of the Respondent.

4. The suit proceeded to full hearing. The Respondent and his witness, a police officer testified. On their part, the Appellants did not call any witnesses. In its judgment, the trial court found the Appellants jointly and severally liable, and consequently awarded the Respondent general and special damages in the respective sums of Kshs. 400,000/- and Kshs. 3,550/-, the costs of the suit and interest thereon.

5. The Appellants by the memorandum of appeal dated 2nd March, 2021 challenge the decision by the trial court on both liability and quantum, on the following grounds:

    1. The learned magistrate in law and misdirected herself when he failed to consider the applicants submissions on both points of law and facts.

    2. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    3. That the learned magistrate erred in law and misdirected himself when she failed to consider the provisions set out in The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.

    4. The learned magistrate erred in law and fact in finding the Defendants/Appellants 100% liable in view of the evidence produced before the trial Court and in particular the following:

        a. That the Plaintiff failed to prove his case on liability against the Defendants.

    5. The Learned magistrate erred in law and fact in awarding quantum of damages inconsistent with the injuries pleaded and proved to have been sustained by the Plaintiff.

    6. The Learned magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.

    7. The Learned magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by Plaintiff;

        a. General Damages Kshs. 400,000

        b. Special Damages Kshs. 3,550

        Net Award Kshs. 403,550

8. The Learned magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions made by Appellants' counsel on liability and quantum.

9. The learned Magistrate erred in awarding costs of the suit and interest to the Plaintiff. (sic)

6. The appeal was canvassed by way of written submissions. As at the time of writing this decision, the submissions by the Appellants had not been presented for the court's consideration, despite specific timelines being granted for them to comply. That being the position, the court will address the submissions filed on behalf of the Respondent.

7. The Respondent naturally defended the trial court's findings on both liability and quantum. However, before addressing the merits of the appeal, counsel for the Respondent argued that the appeal ought to

be rendered incompetent and struck out accordingly, for failure on the part of the Appellants to avail a certified copy of the decree as part of the record of appeal. In so arguing, counsel cited the decisions in Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR and Chege v Suleiman [1988] eKLR where the respective courts laid emphasis on the importance of a copy of decree/order being appealed against being included in the record of appeal.

8. Concerning liability, counsel anchored his submissions inter alia, on the decisions in Tabitha Songa (Suing as mother and on behalf of other dependants of the late Paul Mulondolo Songa) v Bernard Kiganda [2018] eKLR and David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR to submit that in the absence of contrary evidence by a defendant, the evidence tendered by a plaintiff is deemed uncontroverted. Counsel further submitted that while the Respondent had proved his case against the Appellants, the latter did not adduce any evidence to support their defence of contributory negligence. That consequently, the trial court acted correctly by finding the Appellants wholly liable.

9. On quantum, counsel cited the decision in Catholic Diocese of Kisumu v Tete [2004] eKLR concerning the discretionary power of the courts in assessing damages, as well as the circumstances under which an appellate court can interfere with the assessment of damages made by a lower court. Counsel maintained that the award made by the trial court under the head of general damages is reasonable and within the range of comparable awards made for similar or related injuries. In this respect, counsel relied on the decisions in Silper Okoko & Another v F. Radido & Another [2000] eKLR where the court awarded a sum of Kshs.700,000/- for injuries particularized as loss of teeth and Bildad Onditi & Another v Belinda Atieno Onyuka [2013] eKLR where an award of Kshs.750,000/- was made for loss of teeth in the upper jaw, fracture of the tooth and multiple soft tissue injuries. On those grounds, the court was urged to dismiss the appeal and to uphold the decision by the trial court.

10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions on record. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is 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 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 this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

12. Upon review of the memorandum of appeal and the rival submissions, it is the court's view that the appeal turns on two main issues, namely, whether the finding of the trial court on liability was well founded and whether the award on damages was justified.

13. However, it is noted that the Respondent also challenged the competence of the appeal on the basis that the Appellants failed to extract and include the impugned decree in the record of appeal. Order 42, Rule 2 of the Civil Procedure Rules, 2010 (CPR) provides as follows:

> "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 a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."

14. Order 42, Rule 13(4)(f) of the CPR further provides thus:

> "
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> "(4) 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—
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> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (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:
>
> Provided that—
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> (i) a translation into English shall be provided of any document not in that language;
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> (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."

15. Order 42 Rule 13(4)(f) (supra) is specific that what is required at the appeal stage is the judgment, order or decree appealed from. Moreover, a decree is defined under Section 2 of the *Civil Procedure Act*, Cap 21, Laws of Kenya (CPA) in the manner hereunder:

> "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:

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."

16. In this case, while the Appellants did not attach the decree resulting from impugned judgment to the record of appeal, they did attach a certified copy of the lower court judgment. In the court's reading of the foregoing provisions , it is not a mandatory requirement for an appellant to include both the judgment and the decree of the lower court in the record of appeal. It is therefore the court's view that the Appellants' omission of a certified copy of the decree in the record of appeal does not in itself invalidate the present appeal or impede their right to be heard as enshrined under Article 50 of *the Constitution*. Resultantly, the court declines to strike out the appeal on that ground.

17. The court will now consider the merits of the appeal, beginning with the question of liability.Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

18. As earlier mentioned, the Respondent pleaded in his plaint that the 1st Appellant was at all material times the registered owner of the subject motor vehicle whereas the 2nd Appellant was its driver on the material date. The following paragraph sets out the pertinent facts and particulars of negligence against the Appellants, jointly and severally:

> "
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> "4. On or about the 12th October 2017, the Plaintiff was lawfully walking at 75 Round about when the 2nd defendant managed, controlled and or drove motor vehicle registration number KAN 608W so carelessly and or negligently at a very high speed that he lost control causing the said motor vehicle to veer off the road and collide onto the plaintiff, thereby causing the plaintiff serious bodily injuries, endured and continues to endure pain and has suffered loss and damages.
>
> PARTICULARS OF NEGLIGENCE ON THE PART OF THE 2ND DEFENDANT AS THE 1ST DEFENDANT'S DRIVER, SERVANT AND/OR AGENT

a. Failing to keep any or proper outlook.

b. Drove motor vehicle registration KAN 608W at a speed that was too fast in the circumstances.

c. Failed to have any or proper control of the motor vehicle registration KAN 608W.

d. Drove without any due regard or attention.

e. Failed to have any or any sufficient regard for the safety of other road users and in particular the plaintiff herein.

f. Failed to brake, stop, swerve, slow down or in any other manner manage or control the said motor vehicle registration KAN 608W so as to avoid the accident subject matter.

g. Drove recklessly, carelessly and dangerously.

h. Failed to heed the presence of the plaintiff so as to avoid the accident the subject matter.

i. Caused motor vehicle registration KAN 608W to run down the plaintiff." (sic)

19. The Appellants filed their statement of defence denying the key averments in the plaint and liability. Alternatively, the Appellants pleaded contributory negligence against the Respondent by setting out the particulars thereof under paragraph 4 of the statement of defence, as follows:

"PARTICULARS OF THE PLAINTIFF'S NEGLIGENCE

a. Failing to keep to the pedestrian walk.

b. Failed to have regard to other road users and particular Motor Vehicle Registration KAN 608W.

c. Failed to stand with due care and attention.

d. Failed to move and avoid the accident.

e. Stood carelessly and dangerously on the road." (sic)

20. At the trial stage, the Respondent called PC Jackline Naeku as PW1. The police officer produced the Police Abstract relating to the accident as P. Exhibit 7 and stated that at the time of giving her testimony, the matter was still pending under investigations. During cross-examination, the police officer stated that she was not the investigating officer regarding the accident and could not therefore ascertain the circumstances under which the said accident took place.

21. The Respondent testifying as PW2 adopted his signed witness statement as his evidence-in-chief and produced his bundle of documents as P. Exhibits 1-6. He stated that on the material date while he was standing on the side of the road, when the subject motor vehicle while in the process of overtaking another vehicle, lost control, veered off the road and knocked him down, causing him severe bodily injuries. In cross-examination, the Respondent clarified that the subject motor vehicle was attempting to overtake a trailer at a high speed when it hit him, while he was standing on the left side of the road. It was his testimony that he had no way of avoiding the accident.

22. As earlier mentioned, the Appellants did not call any witnesses. In her judgment, the learned trial magistrate reasoned as follows:

> "I have given due consideration to the plaintiff's pleadings and the evidence adduced by the plaintiff and the documents he produced in evidence. I find it is evidently clear that an accident occurred involving the plaintiff and the defendants motor vehicle herein.
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> The plaintiff sustained injuries stated as a result of the said accident. The issue now is who is to blame for the occurrence of the said accident.
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> Upon a careful analysis of the parties' evidence, I find the accident occurred when the plaintiff was beside the road. The plaintiff accuses the driver of being careless and failing to control the vehicle such that it veered off the road and hit him. In their statement of defence the defendants denies having been negligent and attributed any accident that may have occurred to the plaintiff negligence. They failed to attend court and substantiate their denial. Having no doubt that the accident occurred, and that plaintiff sustained the pleaded and stated injuries, and there being no different version from the defendants on how the accident occurred, I am persuaded to find the 2nd defendant liable at 100% for the occurrence of the accident and subsequent injuries the plaintiff suffered. The 1st defendant being the registered owner of the vehicle herein, is found to be vicariously liable for the actions and/or omissions of his driver." sic.

23. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

24. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

25. Notwithstanding the fact that the Appellants did not call any witness to support their defence case, it is trite law that the duty of proving the averments contained in the plaint lay squarely with the Respondent.

26. In the present instance, it is not in dispute that an accident occurred on the material day involving the subject motor vehicle, at the time being driven by the 2nd Appellant, and the Respondent who was a pedestrian. As a result of which the latter sustained bodily injuries. Suffice it to say that the mere occurrence of an accident in itself is not proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

27. The Respondent did not call any eyewitness to the material accident to corroborate his testimony, and the police abstract (P. Exh7) indicated that the matter was pending under investigations and the investigating police officer was not called to shed light on the events surrounding the accident. The police officer who testified as PW1 was unable to give any significant details on the investigations. However, his evidence that the subject vehicle lost control, veered off the road and proceeded to knock him down while he walked or stood beside the road was uncontroverted.

28. In view of all the foregoing factors, the court finds that the Respondent proved on a balance of probabilities the negligent actions pleaded against the driver of the subject vehicle. The question of liability is therefore resolved in the Respondent's favour.

29. Regarding quantum, the injuries pleaded in the plaint included fracture to the upper incisor tooth and soft tissue injuries to the neck, cheek, and knee. These injuries were documented in the medical evidence tendered as P.Exh. 1-4 and 6. The evidence was similarly not controverted. The Respondent was treated and discharged on the same day but followed up for cleaning of wounds which had healed with some scarring by the time he was seen by Dr. Mwaura on 21.07.2017. The prognosis indicated by the doctor was 'fair'. The trial court having considered submissions awarded Kshs. 400,000/- in general damages. Although the court asserted to have compared the injuries with those of the plaintiffs in authorities cited before it, the judgment does not indicate such comparisons and conclusions.

30. In Tayib v Kinany (1983) KLR 14, the Court exhorted inter alia that:

> " By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional." (Emphasis added).

31. Having reviewed the case of Silper Okoko (supra) cited by the Respondent before the trial court, this court is of the view that it was of no assistance to the case at hand, involving as it did serious injuries in the form of fractures and soft tissue injuries. In the court's view, the Appellant's authorities, namely, Samuel Mburu and 3 Others v Wangiki Wangari and Anor (2014) eKLR represented more comparable injuries comprising soft tissue injuries, while the case of Fast Choice Company Ltd. &Anor v Joseph Wanyiri Mwangi (2011) eKLR involved a fracture of the incisor tooth. The plaintiffs therein receiving Kshs. 50,000/- and Kshs. 150,000/- respectively, as general damages. These cases compare well with the instant case. The trial court awarded Kshs. 400,000/-, correctly citing the inflationary factor.

32. As observed by the Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001 [2004] eKLR the award of general damages is discretionary and "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 in the first instance".

33. In Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30, it was held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages."

34. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 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".

See also Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.

35. On this appeal, the Appellant did not demonstrate any error on the part of the trial court by way of taking into account an irrelevant factor or ignoring a relevant matter, or that the award was so inordinately high as to an erroneous estimate, based on the wrong principles. In the estimation of this court, the trial court's award was modest but adequate and there is no justification for interfering with it. The Appellant's challenge regarding quantum is without merit, therefore.

36. In the result, the court finds no merit in the entire appeal which is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kabita

For the Respondent: N/A

C/A: Carol