



**Thuku v Musembi & another (Civil Appeal E143 of 2023)  
[2024] KEHC 8211 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E143 OF 2023  
JK NG'ARNG'AR, J  
JUNE 26, 2024**

**BETWEEN**

**RUEL MUNGAI THUKU ..... APPELLANT**

**AND**

**DAMARIS WAIRIMU MUSEMBI ..... 1<sup>ST</sup> RESPONDENT**

**GITHIGA TRAVELLERS SACOO ..... 2<sup>ND</sup> RESPONDENT**

*((An appeal from the judgment and decree of the Chief Magistrate's Court at Githunguri (V. Asiyu, SRM.) delivered on 8th May 2023 in CMCC No. 13 of 2021))*

**JUDGMENT**

1. The appellant was the 1<sup>st</sup> defendant in CMCC No. 13 of 2021. Vide an amended plaint dated 29<sup>th</sup> September 2022, the appellant and 2<sup>nd</sup> respondent were sued by the 1<sup>st</sup> respondent as the driver and registered owner on the one part and the beneficial owner in possession, on the other part respectively of motor vehicle registration number KAZ 098C. On 6<sup>th</sup> December 2020, the 1<sup>st</sup> respondent was a pedestrian along the Githiga-Githunguri road. On reaching Equity Bank area, the suit vehicle knocked the 1<sup>st</sup> respondent occasioning bodily injuries. Resulting from the accident, the 1<sup>st</sup> respondent suffered a fracture of the left humerus and oral dental injuries. As a result, the 1<sup>st</sup> respondent sought general damages for pain, suffering and loss of amenities, special damages of Kshs. 166,460.00, costs and interest.
2. In its judgment dated 8<sup>th</sup> May 2023, the trial magistrate found the appellant and 2<sup>nd</sup> respondent jointly 100% liable for the accident. The court awarded the 1<sup>st</sup> respondent general damages in the sum of Kshs. 600,000.00, special damages of Kshs. 163,760, costs and interest on both general and special damages. It is these findings that implored the appellant to file an appeal before this court.



3. By memorandum of appeal dated 25<sup>th</sup> May 2023, the appellant raised eight grounds challenging the findings of the trial court. In summary, the appellant complained that the trial court misapprehended and inadequately assessed the evidence thereby misdirecting himself to apportion 100% liability and award damages as it so did. That the trial court proceeded on wrong principles, was misguided, failed to consider conventional awards in cases of a similar nature and thereby arrived at an erroneous conclusion that occasioned a miscarriage of justice. For those reasons, the appellant urged this court to allow the appeal by setting aside the award on quantum. He urged this court to re-assess the same afresh. He further prayed for costs of the suit.
4. Although the appeal was directed to be disposed of by way of written submissions, the parties herein did not furnish their submissions as at the time I was writing this judgment. It is also instructive to note that the record of appeal had not been placed before me. However, this court shall rely on the trial court file that was furnished before this court.
5. I have considered the trial court file, examined the evidence and analyzed the law. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. [See Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR].
6. Although the appeal is on quantum, we shall analyze the entire trial court file afresh to justify my final findings. Interlocutory judgment was entered against the 2<sup>nd</sup> respondent on 2<sup>nd</sup> March 2022 after the 1<sup>st</sup> respondent established that in spite of the party being duly served with summons to enter appearance, the 2<sup>nd</sup> respondent had failed to do so. PW1 Joseph Ndungu, a clinician, produced the P3 form signed by his colleague one Regina Njuguna. They were informed that the 1<sup>st</sup> respondent was treated at Kiambu Hospital. She suffered a scar on the forehead and a fracture on the upper left limb. The P3 form was produced and marked PExh.1.
7. PW2 CPL Susan Inanga, police officer attached to Githunguri Traffic Department testified that on 6<sup>th</sup> December 2020, a road traffic accident occurred at Equity Bank area along the Githunguri-Githiga road. She stated that motor vehicle registration number KAZ 098C was heading to Githiga when it knocked the 1<sup>st</sup> respondent who was crossing from the left side of the road to the right side. As a result of the accident, the 1<sup>st</sup> respondent was injured. She produced the police abstract that was marked PExh.2.
8. PW3 the 1<sup>st</sup> respondent adopted her witness statement dated 29<sup>th</sup> March 2021 as her evidence in chief. She testified that on the fateful day, she was a lawful pedestrian walking along the Githiga-Githunguri road near Equity Bank area at around 6:00 p.m. She was head to Githunguri police station when motor vehicle registration number KAZ 098C veered off the road and knocked her down. The said motor vehicle was inbound Githiga. She was hit on her right hand side. She maintained that she was not crossing the road when the accident occurred. As a result of the accident, PW3's evidence was that she suffered a fracture on the left humerus and oral dental injuries. She bled instantaneously and was rushed to Kiambu Level 5 Hospital by the driver of the suit vehicle. In the course of the journey, the driver told her that the brakes had failed hence the accident. She was later admitted at Makkah Hospital where she was discharged five days later.
9. In support of her evidence, PW3 produced treatment notes (PExh.3), a discharge summary from Makkah Hospital (PExh.4), search certificate of motor vehicle registration number KAZ 098C (PExh.5a), receipt of the suit motor vehicle search in the sum of Kshs. 550.00 (PExh.5b), statutory notice dated 3<sup>rd</sup> February 2021 (PExh.6), demand letter dated 3<sup>rd</sup> February 2021 (PExh.7), x-ray (PExh.8), a prescription (PExh.9), discharge sheet (PExh.10) and a bundle of receipts totaling Kshs.



- 116,460.00 marked PExh.11. She added that her treatment included installing implants that cost Kshs. 150,000.00 paid on 28<sup>th</sup> January 2021. As at the time of her testimony, the implants had not been removed.
10. PW4 Dr. Washington Wokabi produced the medical report dated 7<sup>th</sup> March 2021 (PExh.12) as its author. According to his findings, PW3 suffered a fracture of the left humerus bone and lost three teeth on the left upper jaw. He assessed her degree of permanent incapacity at 12% and estimated future medical expenses at Kshs. 80,000.00. He charged Kshs. 3,000.00 for the report which receipt was marked PExh.13.
  11. The appellant called one witness one Dr. Jeniifer Kahuthu DW1. She confirmed that indeed that 1<sup>st</sup> respondent was injured in a road traffic accident and suffered a fracture on the left humerus bone, a cut wound on the forehead and blunt injury to the chest. That the fracture was treated by way of installation of an implant. She confirmed that the implant would require to be removed in future at a cost of Kshs. 80,000.00. She observed that the 1<sup>st</sup> respondent had stiffness on the left shoulder and assessed her permanent incapacity at 12%.
  12. DW1's point of departure however appertained to PW3's claim that she lost three teeth as a result of the accident. According to DW1, the loss of the teeth was not recorded by any of the Hospitals that PW3 had previously received treatment. That information was similarly not captured in the P3 form. She thus casted doubt on the authenticity of that claim by Dr. Wokabi as to have been occasioned by the accident that occurred on 6<sup>th</sup> December 2020. She produced her medical report dated 17<sup>th</sup> August 2022 that was marked DW1.
  13. On 6<sup>th</sup> December 2020, the evidence from both parties contend to the fact that the appellant and 2<sup>nd</sup> respondent's motor vehicle registration number KAZ 098C knocked the 1<sup>st</sup> respondent at Equity Bank area along the Githiga-Githunguri road near Equity Bank area at around 6:00 p.m. She was a pedestrian heading to Githunguri police station when the suit motor vehicle veered off the road and knocked her down. She was hit on her right hand side. As she was being rushed to hospital by the driver of the said vehicle, it was revealed that the vehicle's brakes failed and as a result, the accident occurred. I therefore find that the trial court's findings on liability at 100% jointly against the appellant and 2<sup>nd</sup> respondent is without error.
  14. Following the accident, PW3's evidence was that she suffered a fracture on the left humerus and oral dental injuries. She was rushed to Kiambu Level 5 and later treated at Makkah Hospital where she was discharged five days later. The appellant did not oppose the injuries save for the dental injuries which his witness stated was an afterthought. It is however agreed by both parties that PW3 suffered a fracture on the left humerus and a scar on the forehead. They assessed her permanent disability at 12%. It was further the assessment of both parties that the 1<sup>st</sup> respondent had a metal implants that would be removed at a futuristic cost of Kshs. 80,000.00.
  15. This court agrees with the findings of the trial court and the evidence of DW1 that the dental injuries only emerged when the 1<sup>st</sup> respondent visited Dr. Wokabi. Since they were not captured in the P3 form and in other treatment notes, they cannot formulate a basis for compensation in respect to this accident.
  16. On general damages for pain and suffering, the court considered the submissions of both parties and the authorities cited. After making due consideration, the trial court awarded general damages in the sum of Kshs. 600,000.00. I find that award conventional with current market rates and alive to the principles in award for general damages. I will therefore not interfere with that finding. I also find that the trial court was correct in determining that since future medical expenses was not pleaded, the same



could not be awarded irrespective of the fact that both parties agreed that it was necessary. On special damages, it is my finding that the 1<sup>st</sup> respondent pleaded and proved the sum of Kshs. 163,760.00. The trial court again properly assessed damages under this head. I will therefore not interfere with those findings since they are proper.

17. In light of the above, it is my finding that the appellant's appeal is devoid of merit. It is hereby dismissed with costs to the 1<sup>st</sup> respondent.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of:-

Oneche for the Appellant

Mwiismi for the Respondent

Court Assistant- Peter Ong'idi

Further Order;

30 days stay granted.

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

