



**Mwanza & another v Makokha (Civil Case E076 of 2023)
[2024] KEHC 16435 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E076 OF 2023
S MBUNGI, J
DECEMBER 23, 2024**

BETWEEN

HASSAN OMUSEBE MWANZA 1ST APPELLANT

RAMADHAN WAMUKOYA 2ND APPELLANT

AND

PAUL WECHULI MAKOKHA RESPONDENT

*(Being an Appeal from the judgment of Honorable Sylvia A. Wayodi
Adjudicator/Resident Magistrate at Small Claims Court at Kakamega in
Small Claims Civil Case No. E033 of 2023 delivered on 14th April, 2023)*

JUDGMENT

1. What is before this court is an appeal against a decision by the trial court in Kakamega SCCC No. E033 of 2023 delivered on the 14th April 2023.
2. The respondent herein filed a statement of claim in the trial court against the appellants whom he alleged had jointly set ablaze his canes. The case proceeded to full hearing and the trial magistrate awarded Kshs. 119,098.40/- to the claimant together with costs and interests of the suit.
3. The appellants having been aggrieved by the judgment, filed this appeal on the following grounds:
 - a. That the learned trial Magistrate erred in law and in fact in finding the Appellants liable in setting ablaze the Respondent's cane when the damage was not proved.
 - b. That the learned trial Magistrate erred in law and in fact in holding that the Claimant/ Respondent had proved his case on a balance of probability.
 - c. That the trial learned trial Magistrate erred in law and in fact in allowing a valuation report that was not authenticated as evidence of the damage caused on the cane farm.



- d. That the trial learned Magistrate erred in law and in fact in disregarding the Appellants' defense.
 - e. That the trial learned Magistrate erred in law and in fact by alleging that the withdrawal slip was dated 3rd March, 2022 instead of 8th March, 2022 and that the 1st Appellant had not signed the bank slip yet the same was signed and appended with his left-hand index finger print.
 - f. That the learned trial Magistrate erred in law and in fact in finding that the Appellants set the cane ablaze when it was clearly shown that at the time of the act the 1st Appellant was actually in Nairobi and the 2nd Appellant was in Kakamega.
 - g. That the trial learned Magistrate did not specify in the judgment between the 1st and 2nd Appellants who were to be held liable for the damage on the cane.
4. The appellants prayed that the appeal be allowed and the judgment by the trial court be set aside with costs.
 5. The appeal was canvassed by way of written submissions.

Appellants' Case.

6. The appellants filed submissions dated 04.12.2023 and isolated two key issues for determination.
7. On whether the respondent proved his case on a balance of probability, they submitted negatively. It was not contested that the respondent produced an assessment report carried out by an agricultural officer which showed that the burnt cane was worth Kshs. 119,098.40/-. However, they submitted that the assessment neither stated the cause nor the source of the fire. The appellants argue that the honorable court had the discretion to summon the said agricultural officer for cross examination after the appellant's advocate objected to the production of the said report but it failed to exercise its judicial discretion to verify the authenticity and originality of the report. To add on this, the report did not directly or indirectly implicate the appellants for having caused the fire.
8. Further, the appellants submit that no O.B was produced to show that the respondent even reported the incident to the police and hence the respondent did not prove his case against the appellants on a balance of probability.
9. On whether the appellants were liable for the damage caused, they submitted negatively. The appellants submit that the respondent stated that he saw the appellants jointly setting his canes ablaze between 12:00pm heading towards 1:00 pm. This is contested by the 1st appellant who brought a bank slip as evidence in court to show that on 08.03.2022 at 1:30 pm, he was in Nairobi at Gateway Mall in Family Bank where he withdrew Kshs. 400,000/- and thus it was humanly impossible for him to have been in Kakamega as alleged by the respondent. The same evidence was entirely disregarded by the trial court.
10. The 2nd appellant confirmed that indeed the 1st appellant was in Nairobi at the time the offence is said to have occurred. he also submits that he was in Kakamega and nowhere near the farm.
11. The appellants submit that despite the respondent admitting to having seen the appellants setting his cane ablaze, he did not state any action he took to stop the fire or even raise alarm from the neighbors for help, but rather decided to watch the appellants set his cane on fire and let the cane burn down completely.

Respondent's Case.

12. The respondent submitted that the appellants had refused and or ignored to pay him the awarded compensation of Kshs. 119,098.40/- despite being served with a demand letter by his advocate.



13. He submitted that the 1st appellant had denied the claim stating that he was in Nairobi on 08.03.2022 but the withdrawal slip produced by the 1st appellant as evidence shows the slip is dated 03.03.2022 and not 08.03.2022.
14. He averred that the 2nd Appellant denied the claim by the respondent but failed to produce any evidence in support of his averment that he was in Kakamega at the time of the offence.
15. The respondent submitted that it was not disputed that the parties have been having squabbles and the respondent had proved his claim on a balance of probability.

Analysis and Determination.

16. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“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.”

17. I have looked at the memorandum of appeal, the proceedings and judgment by the trial court and submissions by both parties.
18. A slight glance at the judgment by the trial magistrate shows that the trial magistrate did not make a conclusive finding as to who was to benefit from the order for Kshs. 119,098.40/-. Unlike on the issue of costs, it was very clear that the claimant was to have the costs and interests of the suit.
19. I find this to be a grave error. It can only be remedied by having a retrial of the suit.
20. Since no party can be faulted for this, each party shall bear its own costs of this appeal. This matter to be mentioned before the small claims court on 23.01.2025 for further directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant - absent

Aburili holding brief for Okeyo for respondent present online

Court Assistant – Elizabeth Angong’a

