

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. E037 OF 2024

SIMON KHACHINDA..... APPELLANT

VERSUS

SYLVESTER ODUOR WABWIRE

(suing as personal representative of the estate of

ALBERT WABWIRE WAMALWA).....RESPONDENT

**(An appeal arising from the ruling and order of Hon. Kassim Akida,
delivered on 16th August 2024, in Busia SCCC No. E027 of 2023)**

RULING

1. The suit, at the primary court, was initiated by the respondent, against the appellant, for Kshs. 655,700.00, compensation and costs, with respect to damage allegedly caused in an accident involving the deceased and a motor vehicle belonging to the appellant. The amount claimed was in respect of funeral expenses. The appellant did not file a defence.
2. A formal hearing was conducted, on 16th January 2024. The respondent testified, and called a witness. A judgement was delivered, on 1st February 2024, for Kshs. 1,000,000.00.
3. Thereafter, the appellant filed an application, dated 13th May 2024, seeking, principally, the setting aside of the judgement of 1st February 2024, and consequential orders. That application was canvassed by way of written submissions, and a ruling was delivered on 16th July 2024, dismissing it, on grounds that the judgement, sought to be set aside was regular, and no probable defence, with triable issues, had been demonstrated.
4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 19th July 2024, revolve around the trial court basing its decision on the reply by the respondent; the trial court erring in finding that the assertions by the respondent were unchallenged; the trial court quoting from the submissions of the respondent, suggesting that it was biased; failing to consider existence of exceptional circumstances to challenge jurisdiction and quantum; there being no jurisdiction to determine personal injury

claims not founded on negligence; and failing to appreciate the essence of sections 12 and 32 of the Small Claims Court Act, Cap. 10A, Laws of Kenya.

5. Directions, on the disposal of the appeal, were given, on 9th June 2025, for canvassing by way of written submissions.
6. The submissions by the appellant turn exclusively on jurisdiction. He relies on *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), to argue that there would be no jurisdiction, in respect of unquantified claims for compensation for personal injury. He links that with *Dharmagma Patel & another vs. T A (a minor suing through the mother and next friend HH)* [2014] KEHC 110 (KLR) [2014] eKLR (Wendoh, J), with respect to there being no liability without fault.
7. The respondent submits on several points, but on jurisdiction he cites *Gichovi vs. Kilem* [2024] KEHC10859 (KLR) (Njuguna, J) and *Ochieng vs. Mshila* [2025] KEHC 2660 (KLR)(Ado, J), where the Judges took positions different from *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), that there was jurisdiction, as the Small Claims Court Act vested jurisdiction with respect to personal injury claims, and the claims excluded did not include that which was before the trial court.
8. The High Court is conflicted on whether the Small Claims Court can exercise jurisdiction over personal injury claims. The Judges have taken conflicting positions on the issue, in such decisions as *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), *Irungu vs. Karanja* [2024] KEHC 3162 (KLR) (Muchemi, J), *Elrons Limited vs. Basil* [2024] KEHC 6614 (KLR) (Musyoka, J) and *Jepkigei vs. Koech* [2024] KEHC 15364 (KLR) (Ominde, J); and those cited by the respondent.
9. A section of the Judges holds the view that there is jurisdiction, flowing from section 12(1)(d) of the Small Claims Court Act; the others take the view that that legislation is inconsistent with the position that, for personal injury claims, arising from road traffic accidents, negligence has to be alleged and proved. The position is not settled.
10. I have come across *Gichohi alias Gichohi Moses Gichuki vs. Githinji* [2025] KEHC 7631 (KLR) (Muchemi, J), where I have learnt that the Chief Justice has appointed a bench of 3 High Court Judges,

led by Ogola J, Principal Judge of the High Court, to address the issue of the jurisdiction of the Small Claims Court, to handle claims on personal injury.

11. I will follow the position taken in *Gichohi alias Gichohi Moses Gichuki vs. Githinji* [2025] KEHC 7631 (KLR) (Muchemi, J), and hold determination of the instant appeal in abeyance, to await determination of the jurisdiction question, by the bench of 3 in Eldoret HCCA No. E008 of 2024. I am alive to the fact that the decision of that panel of 3 would not be binding on a single Judge of the High Court, but a decision from that bench could provide some guidance, by way of a majority position, in an effort to build consensus on the direction the High Court should take on the matter.
12. Let the Deputy Registrar keep track of the goings on in Eldoret HCCA No. E008 of 2024. This matter shall be placed before me, for further directions, once a decision is made in Eldoret HCCA No. E008 of 2024. It is so ordered.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,
THIS 3RD DAY OF OCTOBER 2025.**

**W MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Andati, instructed by Wambo Muyala & Company, the Advocates for the appellant.

Mr. Were, instructed by Mr. Gabriel Fwaya, the Advocate for the respondent.