

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
[MILIMANI LAW COURTS]
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E555 OF 2023

-between-

MASINDE SAMUEL BUSOLO.....
APPELLANT

-versus-

RICHARD MUNYUA GATHUA.....
.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. W. Murage (Principal Magistrate) delivered on 9th June, 2023 in Nairobi CMCC No. E751 of 2021)

JUDGMENT

1. On or about 21st October 2019, *Richard Munyua Gathua*, the Respondent herein, was a passenger aboard motor vehicle registration number KBW 388P when it veered off the road along *James Gichuru/Redhill Bypass* and landed into a ditch, thereby causing the Respondent bodily injuries. *Masinde Samuel Busolo*, the Appellant herein, was the registered/beneficial/insured and/or owner of the said motor vehicle. At the time of the accident, the motor vehicle was being driven by the Appellant's authorized driver, servant and/or agent.
2. As a result of that accident, the Respondent pleaded vicarious liability against the Appellant and sued him in *Nairobi [Milimani] Chief Magistrates Civil Suit No. E751 of 2021* [hereinafter referred as '**the suit**'] for judgment for general damages, special damages in the sum of Kshs. 3,550/=, future medical expenses in the sum of Kshs. 200,000/= together with costs and interests.
3. In his Statement of Defence dated 13th April 2021, the Appellant denied being the registered/beneficial owner of the said motor vehicle and further denied vicarious liability by further denying that the said motor vehicle was driven by his authorized driver,

servant and/or agent. In the end, he blamed the Respondent for the accident and urged the Court to dismiss the suit with costs.

4. The suit proceeded through oral evidence with the Respondent calling three witnesses. The Respondent testified as **PW2**, No. 98109 PC Hannah Muthoni Mwangi from Kilimani Police Station testified as **PW1** and Dr. Mwaura testified as **PW3**. The Appellant did not call any witnesses and at the close of the parties' cases, the trial Court rendered its judgment on 9th June 2023 in favour of the Respondent in the following terms: -

- i. Liability against the Appellant - 100%;*
- ii. General Damages - Kshs.1,200,00/=;*
- iii. Future medical damages - Kshs.200,00/=;*
- iv. Special damages - Kshs.3,550/=*
- v. Costs of the suit and interest.*

5. Aggrieved by that decision, the Appellant filed the instant appeal *vide* a Memorandum of Appeal dated 16th June 2023 and preferred the following grounds: -

- i. The Learned Magistrate erred in law and fact by holding the appellant 100% liable or at all to blame for the accident contrary to the evidence before her.*
- ii. The Learned Magistrate erred in law and fact as the evidence adduced did not support any negligence on part of the Appellant.*
- iii. That the Learned Magistrate's award of damages in particular considering the injuries sustained by the Respondent was inordinately high, in that it was an erroneous estimate of damages without due regard being made to the injuries sustained and the comparable cases.*
- iv. The Learned Magistrate erred in law and fact in holding that the Respondent's injuries were of a serious nature contrary.*

6. The Appellant now seeks this Court to allow the appeal and dismiss the suit, or in the alternative, vary the issue of liability

between himself and the Respondent as well as the award of general damages and that he be awarded costs of the instant appeal. For clarity, the appeal was against both liability and quantum of damages. Pursuant to the directions of this Court, the appeal was canvassed by way of written submissions. The Appellant's written submissions were dated 11th March, 2025 while the Respondent's written submissions were dated 5th February 2025. The gist of these submissions will be ingrained in the latter part of this decision.

7. This being a first appeal, this Court's role is well settled. In ***Selle and Another vs Associated Motor Boat Company Ltd & Others*** [1968] 1 EA 123, the Court stated as follows: -

... 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 into account of particular circumstances or probabilities materially to estimate the evidence.

8. In ***Mwanasokoni vs Kenya Bus Service Ltd*** (1982-88) 1 KAR 78 and ***Kiruga vs Kiruga and Another***, the principle that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings was discussed. [See also ***Gitobu Imanyara & 2 Others vs Attorney General*** [2016] eKLR and ***Sugut v Jemutai & 3 Others*** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment)].
9. This Court will now venture into the main appeal and consider whether the trial Court erred on the issue of liability and quantum. On the issue of liability, the Appellant submitted that the Respondent did not adduce any evidence or call any witnesses to prove that he was negligent and that the testimony

on how the accident happened did not establish negligence on his part. Further, it was his submission that the Police Abstract produced by PW1 did not indicate who was to blame for the accident, and as such, her evidence was merely circumstantial as there was no eye witness and also the fact that she was not the investigating officer but was called only to produce the police abstract.

10. This Court has had the liberty to peruse the record and it is not in dispute that an accident involving the Respondent in the Appellant's motor vehicle occurred. This was confirmed by the testimony of the Respondent who was PW2 in the suit and who further went ahead and narrated how the accident occurred. There was also PW1 who again confirmed that the accident was self-involving and for this reason, she blamed the Appellant's driver for causing it. Further, the Police Abstract dated 8th October 2020 which was produced in evidence confirmed that the accident was self-involving.
11. Although the Appellant did not tender any evidence in the suit to support his case, nevertheless the law placed the duty on the Respondent to prove his case. To that end, and on the aspect of liability, the Respondent testified and called PW1. Although the witnesses were cross-examined, nothing arose that impugned their evidence. As such, the evidence was credible, reliable and largely unchallenged. It is on that score that the trial Court allowed it and found the Appellant wholly liable.
12. The failure of a party to tender evidence in a suit has been severally dealt with by Courts. In ***Autar Singh Bahra And Another Vs Raju Govindji*** HCCC No. 548 of 1998 (UR) *Mbaluto, J.* [as he then was] had the following to say: -

..... Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are

unsubstantiated. In the circumstances, the Counterclaim must fail.

13. This was restated in ***Interchemie E.A Limited vs Nakuru Veterinary Centre Limited*** [2001] KEHC 618 (KLR) and further affirmed in ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*** [2009] KEHC4030 (KLR), where the Courts held that where no witness is called on behalf of a Defendant, the evidence tendered by the Plaintiff stands uncontroverted.
14. In the suit, the Appellant did not adduce any evidence or call any witnesses to rebut the evidence by PW1 and PW2. Further, nothing much arose in cross-examination. The evidence largely remained uncontroverted. In other words, the Appellant's Statement of Defence remained mere unsubstantiated statements thereby rendering the Respondent's evidence unchallenged. Therefore, the Appellant's argument that he bore no liability or that liability be varied between himself and the Respondent finds no basis in fact and law and is for rejection. This Court affirms the liability as rendered in the suit.
15. The next issue for consideration is the assessment of damages. The Appellant submitted that the award of Kshs.1,200,000/= in general damages was manifestly excessive and inordinately high as no X-ray reports were adduced to confirm that the Respondent sustained a fracture. Additionally, he submitted that PW3's prognosis opined that the injuries sustained by the Respondent would heal within 6 months with a permanent incapacitation of 10%. For these reasons, he submitted that an award of Kshs. 100,000/= would be a sufficient for general damages. On the issue of future medical expenses, he submitted that the award of Kshs. 200,000/= was not supported, and further that PW3 examined the Respondent two years after the accident. To this end, he submitted that this award be dismissed as It was not proved to the required standard. The award in special damages was not challenged.

16. Through a Medical Report dated 5th January 2021, PW3 examined and confirmed that the Respondent sustained a fracture of the left femur, bruises on the forehead, swollen tender left thigh and swollen tender lower back. He also noted that the healing was incomplete at the time of the examination and opined that the Respondent suffered a 10% permanent incapacitation. He also pointed out the metal implants would require the sum of Kshs.200,000/= for removal.
17. Starting with the claim for Kshs. 200,000/= for future medical expenses, this Court finds that the same was specifically pleaded and supported by PW3. As such, the submission by the Appellant that there was no basis for the amount to the required standard was incorrect and fails.
18. Coming to the issue of general damages, this Court is alive to the duty imposed on a first appellate Court where it is called upon to interfere with the award on general damages made in exercise of discretion by a trial Court. Such a task is generally difficult. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler** (1982) KLR 277.)
19. The Court of Appeal in **Kemfro Africa Ltd v A. M. Lubia & Another** (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

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.... The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to 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.

[Also see ***Arrow Car Limited -vs- Bimomo & 2 others*** (2004) 2 KLR 101 and ***Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd*** (2013) eKLR].

20. With the foregoing guidance, this Court will look at some comparable decisions. In ***Kelvin vs. Runyambo*** (Civil Appeal E091 of 2021) [2023] KEHC 25388 (KLR) (Civ) (17 November 2023) (Judgment), the Court sitting on appeal reduced an award of Kshs.1,000,000/= to Kshs.600,000/= on claimant who sustained a mid-shaft fracture of the left tibia and fibula with 10% permanent incapacity. The Court in ***Pestony Ltd & Another vs. Samuel Itonye Kagoko*** [2022] KEHC 1146(KLR) reduced the award of Kshs.1,400,00/= to Kshs.800,000/= to a claimant who suffered a fracture of the midshaft femur with 5% permanent incapacity. This Court is cognizant of the fact that no two cases can be similar, but may be comparable. The above cases show a trend of awards between Kshs. 600,000/= and 800,000/= for injuries similar to those sustained by the Respondent. The cases were decided in 2022 and 2023. Therefore, the award by the trial Court of Kshs. 1,200,000/= seems to inordinately high. Alternatively, an award of Kshs. 800,000/= would be sufficient compensation.
21. As there was no challenge on the other limbs of damages, this discussion comes to an end with the following final orders: -

[a] The appeal partially succeeds on the aspect of general damages for pain, suffering and loss of amenities.

[b] The award of General Damages of Kshs. 1,200,000/= awarded for pain, suffering and loss

of amenities is hereby reviewed to Kshs. 800,000/=.

[c] The rest of the awards and orders in the judgment are hereby affirmed.

[d] As the appeal has partially succeeded, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 19th day of November, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Olung'a, Learned Counsel for the Appellant.

Miss Maina, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.