REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E291** OF 2024

JOHN MATU MURIMI…….....……..…….....…APPELLANT

-VERSUS-

AUBREY VUNDI NZAU……...…...

…….....RESPONDENT

(Being an appeal from judgment and decree of the Chief Magistrate's Court at Thika civil case number E563 of 2023 dated 24th October 2024)

JUDGMENT

The respondent had sued the appellant in the lower court claiming general and special damages arising from an accident that occurred on 5-08-2023 involving motor vehicles registration numbers KBQ 058N driven by the respondent and KCW 925T owned by the appellant.

On 7-08-2024, the parties entered into a consent on liability at 85:15 against the appellant. Further, the parties consented that the respondent's list of documents dated 8-11-2023 be admitted as evidence without calling the makers and that the appellant's list of documents be admitted without calling the makers. Parties also agreed to file submissions on quantum. After parties filed their submissions, the trial court awarded Kshs 800,000.00 in general damages and Kshs 7,500.00 for special damages subject to contribution as consented by the parties plus costs of the suit.

The appellant was dissatisfied with the awards and preferred this appeal raising the following grounds;

1. ***THAT*** *the learned trial Magistrate stepped into the ligation arena by ordering parties to file evidentiary material at the point of judgment.*

2. ***THAT*** *the learned trial Magistrate erred in law and in principle by disregarding the appellant's second medical report dated 1/10/2024 by Dr. Ashwin Madhiwala as annexed to the appellant's submissions pursuant to the trial court's leave granted on 7.8.2024.*

3. ***THAT*** *the learned trial Magistrate awarded an extremely high amount of general damages Ksh. 800,000/= without giving reasons for his departure from his cited case of* ***Wafula vs Sitco Dev Ltd (2004) eKLR.***

4. ***THAT*** *the learned trial Magistrate erred in law and fact by failing to exercise his discretion judiciously in failing to consider totality of submissions and authorities by the appellant.*

5. ***THAT*** *the manner in which the learned trial Magistrate conducted this matter and arrived at a decision was erroneous in law and in principle and against constitutional, statutory and case law in Kenya.*

The appellant has argued that the trial court ordered or accepted evidence of the parties after the trial. I have gone through the proceedings and I am unable to see where the appellant is coming from with this argument. According to the typed proceedings, after the consent was recorded, the parties appeared before the court three times as follows;

- On 18-09-2024 when the parties had not filed submissions and requested for more time;

- On 23-10-2024 when the appellant appeared in absence of the respondent and his advocate confirmed filing of submissions. The court gave a judgment date for 24-10-2024; and

- On 24-10-2024 when the court delivered its judgment.

In the judgment of the trial court, I have seen nothing that suggests that the court adopted any evidence which had not been produced in the court. In his submissions, the appellant framed two issues for determination which border on failure by the court to analyse evidence of Dr. Ashwin Madhiwala and failure by the trial court to take into account the nature of injuries. The submissions do not allude to any extraneous evidence or the complaint that the court ordered parties to adduce more evidence after the trial.

Having read the submissions of the appellant dated 28th April 2025 and those of the respondent dated 28th July 2025, I have formed the opinion that the issues in the appeal are the nature of injuries and the quantum of general damages for pain and suffering awarded to the respondent. The disagreement between the parties on quantum is born out of argument that the medical report by Dr. Madhiwala was to be considered. As per the consent dated 7-08-2024 referred to above, the following documents were produced as evidence;

By the plaintiff;

a. *Medical report by Dr. J.W. Siboko and receipt for the same dated 3-10-2023.*
b. *Chest X-ray report from Avenue Hospital Thika dated 6-08-2023.*
c. *CT Scan chest request dated 29-08-2023.*
d. *Receipts in support of special damages.*

e. Police abstract dated 29-08-2023.

f. P3 form dated 29-08-2023.

g. Copy of records and receipt dated 17-11-2023.

h. Demand letter dated 15-09-2023.

By the defendant;

a. A copy of defendant's identity card.

b. A copy of the defendant's driving licence.

At page 80 of the record of appeal is a medical report by Dr. Ashwin Madhiwala dated 1-10-2024 which is not listed in the appellant's list of documents dated 1st March 2024. Instead, the report is shown to be part of the appellant's authorities in support of his submissions. Obviously, this report was not ready at the time the parties recorded the consent aforesaid because it is not listed in the defendant's list of documents and the same was prepared after the consent.

A medical report is part of evidence of parties and cannot be introduced in court record as an authority as the appellant did. The trial court had not made an order allowing the appellant to produce any evidence after the consent. By the time the report was prepared, the consent had already been recorded and for the appellant to come to this court on appeal arguing that the trial court admitted evidence at the time of judgment yet he is the one who sneaked evidence in his submissions, is with due respect the highest degree of dishonesty and disrespect to the court. It actually in my view, borders on contempt of court. In the circumstances, I find that the appellant's argument that the trial court failed to consider that report is baseless and lacking in merits and the same is dismissed.

The last issue I need to deal with in this matter is whether the trial court erred in awarding Kshs 800,000.00 in general damages for pain and suffering. Award of damages is in the discretion of the trial court and it is trite that an appellate court should not interfere with a trial court's discretion unless it is demonstrated that the trial court applied wrong principles or that the court considered an irrelevant factor or failed to consider a relevant factor. Further an appellate court should not interfere with an award of damages unless it is shown that the court's award was too high or too low so as to amount to an erroneous estimate considering recent awards by other courts in similar cases.

In ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (2022) KEHC 282 (KLR,*** Honourable Justice JM Mativo held as follows;

> *'Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment.'*

Similarly, the Court of Appeal held in ***National Bank of Kenya v Samuel Nguru Mutonya (2019) KECA 404 (KLR)*** that;

> *'Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in numerous case law from this Court. In the case of* ***Coffee Board of Kenya V. Thika Coffee Mills Limited & 2 Others [2014] eKLR,*** *it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be*

manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.'

The court in this matter was provided with medical report and records from the respondent's side only. The appellant's documents which were admitted by consent did not have any indication on the nature and extent of injuries sustained by the respondent. According to the respondent, he sustained fracture of the 6th and 7th ribs and soft tissue injuries to the chest. The injuries were managed at Avenue Health Care and Sport View Center. There was no history of admission to hospital or post-accident complications. The fact that a medical report talks of injuries does not mean that a court of law cannot find otherwise. If the evidence produced by the victim of the accident does not support the findings contained in the medical report, the court has the discretion and actually a duty to disallow the injuries.

I have looked at the medial report of Dr J.W. Siboko dated 31-10-2023 and the treatment records. The first diagnosis by Dr. David Wanyonyi from Avenue Health Care where the respondent was treated shows that there was subtle contour irregularity of the left 6th and 7th ribs suggestive of fractures. That in my view means that there was no conclusion that there were fractures as suspected and it needed more investigations.

At Sports View Medical Centre, Dr. Waweru did investigations including taking X-rays which revealed that the chest was normal. If indeed there were fractures, the doctor would not have stated that the chest was normal. The P3 form does not show that the respondent suffered any fractures. More to this, I do believe treatment of the fractures would have been indicated by further treatment and management towards healing of the fractures. The nature of treatment given to the

respondent does not match the nature of injuries claimed by the respondent. All this was the responsibility of the respondent as the burden fell squarely on him because he was the one who desired the court to make a finding to that effect.

The court has the discretion to disregard a medical report which does not match with other reliable medical documents. When faced with similar situation in ***Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki (2018) KEHC 8799 (KLR),*** Honourable Justice Joel Ngugi, as he then was, stated as follows as he declined to adopt some injuries indicated in the medical report produced before him;

> *'It might be fair to say that the Learned Trial Magistrate based his finding on quantum on this Report by Dr. Mwaura. I, however, find the Report less reliable than the Treatment notes, the Discharge card and the P3 form which are all consistent. The Treatment notes were filled immediately after the accident by the treating medical practitioner without any interest in the case. It is fairly categorical that the Respondent was conscious when brought to the health facility and that she suffered soft tissue injuries. Soft tissue injuries do not lead to long-term pain upon exertion as the Medical Report by Dr. Mwaura suggests. Similarly, the Treatment notes do not speak of any blunt trauma to the chest or hands. I would therefore discount the Medical Report by Dr. Mwaura and rely on the other three documents which are consistent that the Respondent suffered soft tissue injuries to the lower right leg and soft tissue injuries to the back (trunk).'*

In view of the above, it is my finding that there was no proof that the respondent sustained fractures of the ribs. The only injuries as far as I can see were the soft tissue injuries to the chest.

Having found as above, it is inevitable to conclude that the trial court applied wrong principles and considered a factor he should not have considered. The appealed judgement shows that the trial court considered fracture of the 6th and 7th ribs in reaching the decision to award Kshs 800,000.00. This means that the submissions by the respondent on the quantum which are based on the said fractures are not relevant to this case.

I have considered the submissions and authorities of the appellant which propose an award of Kshs 250,000.00 in addition to the following authorities which I consider fairly comparable to this case;

a. ***Kimatu Mbuvi v Benson Nguli (2010) KEHC 3405 (KLR)*** in which the court awarded a sum of Kshs 150,000.00 for blunt injury to the chest, blunt injury to the right elbow and blunt injury to the shoulder on 11-02-2010.

b. ***Apex Security Services Limited v Joel Atuti Nyaruri (2018) KEHC 7559 (KLR)*** in which Honourable Lady Justice L. Njuguna awarded Kshs 150,000.00 for soft tissue injuries to the chest, back and leg on 19-03-2018.

In view of the above, it is my finding that the award of Kshs 800,000.00 was too high and amounted to erroneous estimate once compared with other decided comparable cases. I will proceed to reduce the same to Kshs 250,000.00 after factoring the incidence of inflation and the age of the cited authorities. This leads me to make the following orders;

1. The award of Kshs 800,000.00 in general damages made in Thika Chief Magistrate's civil case number E563 of 2023 vide judgment dated 24th

October 2024 is hereby set aside and substituted for an award of Kshs 250,000.00 subject to the agreed contribution.

2. The appellants shall have the costs of this appeal.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Kisiangani holding brief for Waiganjo for the appellant and Mr. Njenga for the respondent.