

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HCCA NO. E033 OF 2023

JEFFERSON NDOTO MUNGUTI 1ST

APPELLANT

VINCENT NGALA WAMBUA 2ND

APPELLANT

-VERSUS-

CATHERINE MBULWA KIVUVI 1ST

RESPONDENT

MBUKONI SERVICES LTD 2ND

RESPONDENT

***(An appeal of the entire Judgment and Decree of the
Senior Resident Magistrates Court at Makindu by
Honorable D Karani (SRM) dated 29th March 2023 in the
Chief Magistrate's Court at Makindu Civil Case No. 130
of 2018)***

CATHERINE MBULWA KIVUVI

PLAINTIFF

BETWEEN

JEFFERSON NDOTO MUNGUTI 1ST

DEFENDANT

VINCENT NGALA WAMBUA 2ND

DEFENDANT

MBUKONI SERVICES LTD. THIRD

PARTY

JUDGMENT

Introduction:

1. This This is an appeal arising from the judgment of the Senior Resident Magistrate’s Court at Makindu delivered on 29th March, 2023 in **Makindu CMCC No. 130 of 2018.**
2. The suit before the trial Court arose from a road traffic accident which occurred on 17th August, 2016 along the Nairobi-Mombasa Road. At the time of the accident, the Plaintiff, who is the Respondent in this appeal, was a lawful passenger in motor vehicle registration number

KBV 990G. The said motor vehicle was involved in a collision with motor vehicle registration number KBV 819N, which was being driven by the 1st Defendant and was owned by the 2nd Defendant. The Third Party was subsequently enjoined in the proceedings.

3. The Respondent instituted the suit by way of a Plaint dated 16th May, 2018, seeking general and special damages for injuries allegedly sustained as a result of the accident. She pleaded that the accident was caused by the negligence of the Defendants' driver. The Defendants denied liability and, in the alternative, attributed blame to the driver of the vehicle in which the Respondent was travelling. The Third Party likewise denied liability.

4. Upon hearing the matter, the trial Court found the Defendants wholly liable for the accident and entered judgment in favour of the Plaintiff at 100% liability. The Court awarded general damages in the sum of Kshs.300,000/= for pain, suffering and loss of amenities, and special damages in the sum of Kshs.4,050/=, together with costs and interest.

5. Aggrieved by the said decision, the Defendants, now the Appellants, lodged the present appeal. The appeal is confined to the question of quantum of damages, as the Appellants contend that the award of general damages was excessive and not supported by the evidence on record.

Submissions:

6. On behalf of the Appellants, it was submitted that the learned trial Magistrate erred in the assessment of general damages and arrived at an award that was excessive and unsupported by the evidence. The Appellants contended that the Respondent sustained soft tissue injuries to the lower back and left hip, from which recovery was expected, and that the assessment of permanent disability at 10% was not sufficiently justified by the medical evidence.

7. The Appellants argued that the trial Court misapprehended the nature and extent of the injuries and relied on authorities involving more severe injuries, thereby arriving at an inordinately high award.

8. In urging this Court to interfere with the award, the Appellants relied on, *inter alia*, **HB (Minor suing through mother and next friend DKM) v Jasper Nchonga Magari & another eKLR**, where an award of **Kshs.60,000/=** was upheld for blunt injuries, **Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others eKLR**, where an award of **Kshs.100,000/=** was substituted for soft tissue injuries, and **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others eKLR**, where an award of **Kshs.90,000/=** was upheld. The Appellants submitted that an award of **Kshs.90,000/=** would have been reasonable compensation in the circumstances.
9. The Appellants further relied on the principles governing appellate interference with awards of damages as set out in **Jackline Syombua v Board of Governors, Ekalakala Secondary School, Embu HCCC No. 118 of 2006**, and **Kigaraari v Aya (1982-88) 1 KAR 768**. On costs, the Appellants invoked **Section 27** of the **Civil Procedure Act** and urged that costs follow the event should the appeal succeed.

10. The Respondent opposed the appeal and submitted that the trial Court properly exercised its discretion in assessing damages. It was submitted that the Respondent sustained injuries to the left hip joint and lower back, resulting in permanent disability assessed at 10%, as confirmed in the medical report prepared by Dr Kavuli. The Respondent argued that the injuries amounted to maim and were not mere soft tissue injuries, and that the medical evidence tendered was not controverted by the Appellants.
11. The Respondent relied on the principles governing interference with awards of damages as stated in ***Paul Kipsang Koech & another v Titus Osule Osore (2013) eKLR*** and ***Alfarus Muli v Lucy M. Lavuta & another, Civil Appeal No. 47 of 1997***, and submitted that no basis had been laid for this court to interfere with the discretion of the trial Court.
12. On comparable awards, the Respondent relied on ***James Gichuki Gathura v Entonox Enterprises Limited, Machakos HCCA No. 157 of 2017***, where an award of Kshs.304,100/= was upheld for injuries resulting in 10%

permanent incapacity, ***Samuel Muthama v Kenneth Maundu Muindi, Machakos HCCA No. 102 of 2005***, where an award of Kshs.380,000/= was upheld.

13. Further reliance was placed on ***Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge, Kiambu HCCA No. 60 of 2018***, where an award of Kshs.500,000/= was upheld. The Respondent submitted that the award of Kshs.300,000/= was reasonable, proportionate, and consistent with comparable decisions.
14. The Respondent therefore urged the court to dismiss the appeal and uphold the judgment of the trial court, including the award on quantum, and to award the costs of the appeal to the Respondent.

Determination:

15. This is a first appeal. It is settled law that the duty of the first appellate Court is to re-evaluate the evidence which was adduced in the subordinate Court both on points of law and fact and come up with its own findings and conclusions.

16. In **Selle and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123** it was stated as follows:-

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] 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 that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

17. Having reviewed the record of appeal, the grounds of appeal, and the submissions made by the parties, I believe that the appeal involves a single issue for determination: whether the learned trial Magistrate erred in assessing general damages, resulting in an award that was excessively high and thus justifying intervention by this Court.

18. I have considered the medical report dated 21th March, 2018 together with the testimony of **PW2**, Dr Dorcas Kavuli Musyoka. In her examination-in-chief, the doctor testified that at the time of examination, the Respondent complained of on-and-off low back pain and was wearing a thoracolumbar corset.
19. She classified the injuries as amounting to maim and expressed the opinion that the Respondent was likely to develop osteoarthritis. On that basis, she assessed permanent disability at 10%.
20. On cross-examination and re-examination, the doctor clarified that her categorization of the Respondent's injuries arose from muscle spasms affecting the lower back.
21. The record further shows that a medical report by Dr Wambugu dated 7th March, 2019 was filed on behalf of the Defence. On 8th December, 2021, the learned trial Magistrate granted the Defence a final adjournment to enable them to call the said doctor to testify, the report having been filed late.

22. However, there is no indication on the record that Dr Wambugu ever testified. Indeed, when the matter came up for hearing on 29th June, 2022, counsel appearing for the Third Party proceeded with only one witness, and the Defence medical evidence was never formally produced through oral testimony.

23. It must be noted that a medical report constitutes expert opinion evidence within the meaning of the law. Where such evidence is tendered by a qualified medical practitioner, and any other evidence does not controvert the same, a trial Court is entitled to rely on it.

24. The medical opinion offered by **PW2**, Dr Dorcas Kavuli Musyoka, stood unchallenged. Although the medical report by Dr Wambugu was filed on behalf of the Defence, the said doctor was never called to testify, and the report was therefore not formally produced through oral evidence.

25. The learned doctor explained that the Respondent continued to experience persistent lower back and left hip pain long after the accident and that, in her professional opinion, the injuries exposed the Respondent

to a risk of developing osteoarthritis. It was on the basis of these clinical findings and the anticipated long-term complications that **PW2** assessed permanent incapacity at 10%. The expert opinion was therefore supported by reasons and a discernible analytical process.

26. In those circumstances, it was not necessary for the trial Court to embark on its own inquiry into the medical soundness of the conclusions reached by **PW2**. The Court could not be expected to go on a speculative exercise to interrogate the propriety of the medical characterization of the injuries.

27. The Court in **Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR** while assessing the modalities of being led by expert testimony such as this had this to say:

“A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another Jacob J.*

observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning."

28. The Court was consequently entitled, and indeed correct, to accept and rely on the uncontroverted expert evidence of Dr Kavuli placed before it.

29. The record indicates that the Trial Magistrate carefully reviewed the medical report by Dr. Dorcas Kavuli Musyoka, examined the type of injuries sustained, and evaluated the permanent incapacity at 10%. The

Court also took into account the parties' submissions and the relevant legal authorities before determining the quantum.

30. The learned Magistrate was therefore alive to the medical evidence placed before the Court and demonstrably took it into account in assessing damages. It cannot be said that the court ignored, misunderstood, or failed to evaluate the expert evidence tendered.

31. The Appellants urged this Court to interfere with the award and relied on authorities where awards ranging between Kshs.60,000/= and Kshs.140,000/= were made. These included ***HB (Minor suing through mother and next friend DKM) v Jasper Nchonga Magari & another eKLR, Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others eKLR, and Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others eKLR.*** A common feature in those decisions is that the injuries sustained were largely soft tissue injuries, with no or minimal permanent incapacity.

32. On the other hand, the Respondent relied on authorities where Courts upheld higher awards in cases involving permanent incapacity. In ***James Gichuki***

Gathura v Entonox Enterprises Limited, Machakos HCCA No. 157 of 2017, the Court upheld an award of Kshs.304,100/= where permanent incapacity was assessed at 10%.

33. In ***Samuel Muthama v Kenneth Maundu Muindi, Machakos HCCA No. 102 of 2005***, an award of Kshs.380,000/= was upheld where permanent incapacity was assessed at 4%. In ***Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge, Kiambu HCCA No. 60 of 2018***, the court upheld an award of Kshs.500,000/= for soft tissue injuries.

34. Granted, it is not every time that one will find a case that matches the exact sequela as another. However, looking at the award of Kshs.300,000/= made by the trial Court as against the foregoing authorities, it becomes apparent that it was relatively modest.

35. I have therefore no reason to interfere with the award of the learned Magistrate.

Disposition:

36. In the end, the appeal herein lacks merit and is hereby dismissed.

37. Accordingly, the judgment of the Senior Resident Magistrate's Court at Makindu delivered on 29th March, 2023 in **Makindu CMCC No. 130 of 2018** is hereby upheld in its entirety.

38. The Respondent shall have the costs of this appeal.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this **17TH** day of **DECEMBER, 2025.**

.....
C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl Anindo

Ms. Karanja, Advocate for the Respondent

No attendance for the Appellant

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