



REPUBLIC OF KENYA



KENYA LAW
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**Musira v Makokha (Civil Appeal E004 of 2023)
[2025] KEHC 693 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E004 OF 2023
JN KAMAU, J
JANUARY 29, 2025**

BETWEEN

THOMAS ANZEZE MUSIRA APPELLANT

AND

KENNETH BISMARCK MAKOKHA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M.M. Gituma (RM) delivered at Vihiga in Principal Magistrate's Court Case No 193 of 2019 on 21st March 2023)

JUDGMENT

Introduction

1. In her decision of 5th May 2022, the Learned Trial Magistrate, Hon M.M. Gituma, Resident Magistrate, found the Respondent to have been wholly liable for the injuries that the Appellant herein sustained. She entered Judgment in favour of the Appellant herein against the Respondent herein as follows:-
General Damages Kshs 140,000/=
Special damages Kshs 10,550/=
Kshs 150,550/=
Plus costs and interest at court rates.
2. Being aggrieved by the said decision, on 31st March 2023, the Appellant filed a Memorandum of Appeal dated 30th March 2023. He relied on three (3) grounds of appeal. He also filed a Supplementary Record of Appeal dated 18th March 2024 on 30th March 2024.
3. His Written Submissions were dated and filed on 29th April 2024. Although the Respondent was given ample time to file Written Submissions, she did not do so. Indeed, the court checked the e-filing portal



and his Written Submissions had not been uploaded. The Judgment herein is based on the Appellant's said Written Submissions which he relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123, where the court held that the appellate court was not bound by the trial court's findings of fact but that in re-considering and re-evaluating the evidence to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus made due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination was as follows:-
 - a. Whether or not the quantum that was awarded was inordinately low in the circumstances warranting interference by this court.
 - b. Whether or not the Trial Court erred in not having awarded him special damages in the sum of Kshs 50,000/=.
7. The court deemed it prudent to address the grounds of appeal under the following distinct heads.

I. Quantum

8. Grounds of Appeal Nos (a) and (c) were dealt with under this head as they were related.
9. The Appellant pointed out that the Respondent did not call any witnesses whereupon judgment was entered against him on a hundred (100%) percent basis. He was, therefore, not appealing against the apportionment of liability.
10. He asserted that he suffered T-11 and T-12 vertebral displacement and soft tissue injuries. He pointed out that the Medical Report of Dr C.I. Lamba (hereinafter referred to as "PW 3") had indicated that he could use his right leg after he suffered loss of lumbar lordosis after trauma. He averred that he could not stand straight and constantly suffered from back pain.
11. He submitted that the award of Kshs 140,000/= general damages was too low and urged this court to enhance the same to Kshs 1,500,000/= due to the inflation rate. In this regard, he placed reliance on the case of *David Omutelema Opondo vs Dela Rue Currency and Security Print Limited* [2017] eKLR where the plaintiff therein had suffered loss of lumbar lordosis and was awarded Kshs 1,200,000/=.
12. PW 3 stated that the Appellant herein sustained soft tissue injuries on both shoulders and lower limb. He testified that the Appellant had a slightly bent back but the injury on his back did not worry him. He averred that although he had indicated that the Appellant had limitation to his right leg, he expected that he had made a full recovery.
13. When he was cross-examined, he stated that he recommended the Appellant to go for physiotherapy but not a follow-up with him. He averred that he examined him approximately one (1) month after the accident and reiterated that he expected the injuries to be fully healed. He did not have a plan of action for the Appellant.
14. It was the considered view of this court that the sum of Kshs 140,000/= that the Trial Court awarded was too low considering that PW 3 indicated that the Appellant sustained loss of lumbar lordosis and



T-11 and T-12 vertebrae body displacement. In its place, taking into account the inflationary trends, a sum of Kshs 300,000/= general damages appeared to have been more reasonable.

15. In arriving at the said conclusion, this court had due regard to the following cases:-

1. Ufrah *Motors Bazaar & Another vs Kibe (Civil Appeal 39 of 2021)* [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment)

The Respondent sustained soft tissue injuries to the right shoulder joint, chest, back, knee joints, and right hip joint and deep lacerations on the right hand arm, forearm, and hand. The appellate court upheld the award of Kshs 220,000/= in 2023.

2. Charles Kimunya & Another vs Rose Mueni Maina [2019] eKLR

The respondent sustained a back injury which caused the collapse of T11 and T12. Permanent disability was assessed at 20%. The court upheld the sum of Kshs 650,000/= in 2019.

3. Dickson Ndungu vs Theresia Otieno & 4 Others [2014] eKLR

The appellate court reviewed the award of Kshs 250,000/= downwards to Kshs 127,500/= for soft tissue injuries which produced no complaints.

4. Fred Barasa Matayo vs Channan Agricultural Contractors [2013] eKLR

The court reviewed an award of Kshs 250,000/= downwards to Kshs 150,000/= where the respondent therein had sustained moderate soft tissue injuries that were expected to heal in eight (8) months' time.

5. Boru *& Another vs Musyimi (Civil Appeal 67 of 2019)* [2022] KEHC 3255 (KLR) (4 May 2022) (Judgment)

The respondent therein sustained deep cuts on the right face, blunt injuries to the right eye, cheek, upper jaw, head injury, back, neck, and scalp, bruises on both lower limbs, chest, and back, cut wounds on both legs. He also got spondylosis due to multiple disc degeneration. Permanent incapacity was assessed at 20%. In 2022, the appellate court upheld the award of Kshs 900,000/= general damages.

6. Teita Estate Limited v Wellington Mwapwaka Mwakujja [2022] eKLR

The respondent therein suffered diffuse disc bulges on the lumbar spine, loss of lumbar lordosis due to muscle spasms, and facetar arthropathy on L4/5 and L5/S. He also suffered loss of libido/erectile dysfunction. He suffered fifty (50%) percent incapacity. In 2022, the appellate court upheld the sum of Kshs 800,000/= for pain and suffering and loss of amenities.

16. In the premises foregoing, Grounds of Appeal Nos (a) and (c) were merited and the same be and are hereby allowed.

II. Special Damages

17. Ground of Appeal No (b) was dealt with under this head.

18. The Appellant submitted that the Trial Court erred when it stated that the receipt for Kshs 50,000/= was only marked for identification and not produced yet the same was actually produced.

19. A perusal of the proceedings showed that the payment receipt was marked as MFI 6. It was correct as the Trial Court observed that the said receipt was not produced as evidence. Whether or not the Trial Court recorded it incorrectly was an issue that this court did not want to delve into as it would be



merely speculative as to what really transpired. This court was not therefore persuaded that it should interfere with the finding of the Trial Court on special damages in the sum of Kshs 10,550/=.

20. In the premises foregoing, this court found and held that Ground of Appeal No (b) was not merited and the same be and is hereby dismissed.

Disposition

21. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 16th May 2024 and lodged on even date was partly merited. The effect of this was that the decision of Hon M.M. Gituma (RM) that was delivered at Vihiga in Principal Magistrate's Court Case No 192 of 2019 on 21st March 2023 be and is hereby set aside and/or vacated and replaced with an order that judgment be and is hereby entered in favour of the Appellant against the Respondent in the following terms:-

General Damages Kshs 300,000/=

Special damages Kshs 10,550/=

Kshs 314,550/=

Plus costs and interest at court rates. Interest on special damages will accrue from the date of filing suit while interest on general damages will accrue from the date of judgment of the lower court.

22. As the Appellant was only partly successful in his Appeal herein, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of the Appeal herein.
23. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JANUARY 2025.

J. KAMAU

JUDGE

