



**Kariuki & another v Musyoka (Civil Appeal E143 of 2023)  
[2024] KEHC 2569 (KLR) (Civ) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E143 OF 2023**

**DAS MAJANJA, J**

**MARCH 15, 2024**

**BETWEEN**

**BEN KARIUKI ..... 1<sup>ST</sup> APPELLANT**

**PAUL MATHERI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENSON WAMBUA MUSYOKA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. P. K. Rotich, SPM dated 15th February 2023 at the Nairobi Magistrates Court at Milimani in Civil Case No. E4509 of 2020)*

**JUDGMENT**

**Introduction and Background**

1. Before the court for determination is an appeal by the Appellants against the subordinate court's findings of both liability and quantum in a judgment dated 15.02.2023 stemming from a suit in respect of an accident that occurred on 17.03.2020 along ring road Kileleshwa involving the Respondent's motorcycle registration number KMCH \*V ("the motorcycle") and the motor vehicle registration number KBG \*E ("the motor vehicle") driven by the 1<sup>st</sup> Appellant and owned by the 2<sup>nd</sup> Appellant.
2. In his plaint, the Respondent claimed that 1<sup>st</sup> Appellant drove the motor vehicle so negligently causing it to lose control and collide onto the motorcycle. As a result, the Respondent sustained severe bodily injuries; a swollen, painful, tender - left shoulder, a swollen, painful, tender - left fore - arm, a swollen, painful, tender - left thumb, blunt injuries on the chest and back, blunt injuries on scalp and a head concussion. The Respondent averred that after accident he could no longer engage in any gainful occupation. He prayed for general and special damages, costs of the suit and interest.



3. The Appellants filed a defence where they generally denied the claim and if anything blamed the Respondent for the accident.
4. The matter was set down for hearing and the Respondent testified on his own behalf (PW 2) and also called Dr George Mwaura, a medical practitioner (PW 1) and 77168 PC Bobby Okeri, a police officer attached at Kilimani Police Station (PW 3). The Appellants did not call any witnesses nor produce any evidence.
5. In the judgment rendered on 15.02.2023, the Subordinate Court held that the Appellants were 100% liable as the Respondent's evidence was unrebutted. On quantum of damages, the Subordinate Court held that based on the injuries suffered by the Respondent, which were soft tissue and authorities cited by the parties, it awarded the Respondent Kshs. 350,000.00 The learned magistrate also awarded special damages of Kshs. 9,700.00 which the court held was specifically pleaded and strictly proved. The Appellants appeal against the total award of Kshs. 359,700.00, costs and interest.
6. As stated, this decision is the subject of the present appeal which I now turn to determine below.

### **Analysis and Determination**

7. In determining this appeal, the court is guided by the principle that it is its duty to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
8. Even though the Appellants raise 8 grounds in their memorandum of appeal, the main issue for the court's determination is whether the Subordinate Court came to the correct conclusion on liability and quantum.
9. On liability I agree with the position taken by the Subordinate Court. The effect of a defendant not calling evidence to challenge a plaintiff's testimony renders not only the defence unsubstantiated but also leaves the plaintiff's case unchallenged (see *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009]eKLR). However, even though the Appellants failed to support their defence by evidence, the Respondent still had a duty to prove his case on a balance of probabilities as is required by law. In the case of *Kirugi and Another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held that, "The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that, "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."
10. The question then is whether the Respondent proved his case on a balance of probabilities. In his evidence, the Respondent blamed the motor vehicle for the accident by stating that the 1<sup>st</sup> Appellant turned the motor vehicle in the middle of the road and hit him. PW 3 gave corroborative evidence and blamed the motor vehicle as he failed to give way and he also produced the police abstract which as per the results of investigations therein, the motor vehicle was blamed. I find that this was sufficient evidence on a balance of probabilities to find the Appellants liable for the accident and since the same was not challenged, the subordinate court did not err in finding the Appellants 100% liable for the accident. This ground of appeal by the Appellants therefore fails.
11. Turning to the issue of quantum of damages, this court can only disturb the awarded sum by the trial court if it is shown that the court took into account an irrelevant factor, or left out of account a relevant



one, or the amount is inordinately low or inordinately high that it was a wholly erroneous estimate of the damages (see *Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another* [1982-88] 1 KAR 777). The court should also make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see *Maore v Geoffrey Mwenda* [2004]eKLR).

12. As per the evidence of PW 2 and the treatment notes on record, the injuries sustained by the Respondent were classified as soft tissue injuries. The court awarded the Respondent a sum of Kshs. 350,000.00. Considering inflation, I find that this falls within the range of awards issued by courts in the past for soft tissue injuries and the same is not manifestly high as contended by the Appellants (see *Francis Ochieng & another v Alice Kajimba* [2015]eKLR and *Michael Okello v Priscilla Atieno* [2021] eKLR). I therefore hold that the Subordinate Court's award was guided by the injuries suffered by the Respondent, the parties' authorities and submissions and it was consistent with awards made in the past for similar injuries.

### **Disposition**

13. The appeal fails. It is dismissed with costs to the Respondent assessed at Kshs. 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Kabita instructed by Kimondo Gachoka and Company Advocates for the Appellant.

Mr Mwangi instructed by B. W.Kamunge and Company Advocates for the Respondent.

