



REPUBLIC OF KENYA



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**Ayieko v Obat (Civil Appeal E042 of 2021)
[2023] KEHC 22846 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E042 OF 2021
RE ABURILI, J
SEPTEMBER 29, 2023**

BETWEEN

ELI OMONDI AYIEKO APPELLANT

AND

PHELGONAH RABACH OBAT RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. F. Rashid
(PM) delivered on the 9th April 2021 in Winam PMCC No. 15 of 2019)*

JUDGMENT

1. This appeal was lodged on 7th May 2021 and it was not until 24th May 2023 two years later that the trial court record was availed for admission of the appeal following many requests and reminders.
2. The appeal was admitted on 24th May 2023 and directions given for the disposal of the appeal by way of written submissions.
3. The record of appeal was filed on 3rd May 2023 after the Respondent filed an application dated 2nd May 2023 seeking to have the appeal dismissed for want of prosecution. Following the admission of the appeal to hearing and availability of the lower court file, the application for dismissal of appeal for inaction was compromised and withdrawn with no orders as to costs.
4. Both parties' counsel complied with directions given on 24th May 2023 and filed written submissions to canvass the appeal.
5. The appeal is essentially against quantum of damages awarded to the Respondent Phelgonah Rabach Obat against the Appellant Elly Omondi Ayieko as Judgment on liability was agreed between the parties in the ratios of 90% : 10% in favour of the Respondent/Plaintiff against the Appellant hence liability is not under any challenge.



6. The judgment which is impugned, challenging the quantum of damages was delivered on 9th April 2021. The Appellant raises the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact in the assessment of quantum by awarding Kshs.250,000 for general damages an award which was excessive and an erroneous estimate of damages awardable.
 2. That the learned trial magistrate erred in fact and in law in failing to consider the defendant's submissions and authorities supplied on the issue of quantum.
 3. That the learned trial magistrate erred in fact and in law in failing to consider the evidence that was tendered on quantum during the hearing of the suit.
 4. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.
 5. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
7. The Appellant therefore prayed that the judgment on quantum be set aside and be substituted with this court's own assessment and that costs of this appeal be provided for.
8. As earlier stated, the appeal was canvassed by way of written submissions. In the Appellant's submissions dated 6th June 2023 and filed in court on 9th June 2023, the Appellant's counsel reiterated the grounds of appeal and the pleadings in the plaint on the injuries sustained by the Respondent as well as what was stated in the P3 form and treatment notes as well as the Medical Report produced by the Appellant and cited the case of *KPLC Limited & Another vs Zakayo Saitoti & Another* (2008) eKLR cited in *Jennifer Mathenge vs Patrick Muriuki Maina* (2020) eKLR where the court reiterated the 4 principles that the appellate court ought to bear in mind in determining whether to interfere with the quantum of damages and which principles this court takes judicial notice of.
9. Citing the cases of *Ndungu Dennis vs Ann Wangari Ndirangu & Another* (2018) eKLR; *Eldoret Grains Ltd vs Anderson Mukolwe Ndakala* (2019) eKLR; *Eva Karemi & 5 Others vs Koskei Kieng & Another* (2020) eKLR, the Appellant counsel submitted that an award of Kshs.80,000 would be adequate compensation for the injuries suffered in this case. Counsel urged this court to set aside the award of Kshs.250,000 and substitute it with an award of Kshs.80,000 general damages together with costs of this appeal plus interest on costs pursuant to Section 27(1) of the *Civil Procedure Act*.
10. Opposing the appeal, the Appellant's counsel filed a supplementary record of appeal dated 9th June 2023 on 14th June 2023 containing sick off form from Aga Khan Hospital dated 30th August 2018 and Medical Report dated 15th February 2019 by Kr. Okombo. Counsel also filed written submissions dated 9th June 2023 on 14th June 2023. He cited decisions on the principles applicable on a first appeal as espoused in *Butt vs Khan* (1977) KARI and *Selle vs Associated Motor Boat Co.* (1968) EA 123.
11. On the grounds of appeal, counsel submitted that the 5 grounds of appeal are wholly on quantum of damages as liability was determined by consent of the parties at 90% to 10%.
12. On quantum, counsel for the Respondent reproduced the testimony of PW 1, the Respondent on the injuries that she sustained following the material admitted accident and the documentary evidence adduced in support of her case in the lower court. Counsel further set out the parameters under which an appellate court will interfere with an award in general damages as was held in *Bashir Ahmed Butt vs Uwan Ahmed Khan* (1982-88) KAR and reiterated in *Gitobu Imanyara & 2 Others vs Attorney General*



(2016) eKLR counsel further cited the case of *Shabani vs City Council of Nairobi* (1985) KLR 616 on the issue of whether the quantum of damages awarded to the plaintiff was inordinately high. Further reliance was placed on the cases of *Kigaragari vs Aya* (1989) KLR 273 and *Tayab vs Kihau* (1983) 114 at 115 on consistency in making appropriate awards in personal injury claims and what an appellate court is expected to do, and what indeed I am about to do in this case.

13. Reliance was further placed on the Respondent's written submissions and authorities relied on the subordinate court, which I shall consider in this judgment, just as I shall consider what the appellant's counsel has cited both here on appeal and before the lower court.
14. On the whole, and relying on a number of authorities, the Respondent's counsel urged this court to uphold the award of Kshs.250,000 general damage awarded to the Respondent and dismiss this appeal with costs to the Respondent.

Analysis And Determination

15. I have considered the grounds of appeal, submissions for and against the appeal. This being a first appeal, this court is expected to re-evaluate and reassess the evidence adduced before the lower court bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified hence give an allowance for that as it cannot comment on the demeanor of the witnesses. This is the principle enunciated in the locus classicus case of *Sielle vs Associated Motor Boat Company* (1968) EA 123.
16. The Court of Appeal in the above case further made it clear that a first appeal is a retrial of the case and the court is therefore expected to re-evaluate the evidence and arrive at its own independent conclusion.
17. Further, that the 1st appellate court is not necessarily bound to accept the trial court's findings of fact if it appears either that he clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence in the case generally.
18. Revisiting the evidence adduced in the lower court, the Respondent herein Phelgona Rabach Obati testified as PW 1 and adopted her witness statement filed on 13th February 2018 wherein she had narrated how the accident happened and the type of injuries that she sustained following the said accident. She also produced exhibits as her documentary evidence among them; Treatment notes from Aga Khan Kisumu Hospital, Medical Report by Dr. Okombo, P3 form, police abstract, receipts and invoice and copy of records for the accident motor vehicle KAQ 664J.
19. These documents were initially marked for identification but later on 4th August 2020, by consent of both parties' counsel, the documents were all produced as exhibits for the plaintiff without calling their makers.
20. The Plaintiff's counsel also later consented to the production of the defendant's exhibit being the medical report as D.Exhibit 1 and the defendant now appellant closed his case without calling any witness.
21. The parties' counsel then filed written submissions on quantum, upon which the trial court rendered judgment which is impugned herein.
22. In her testimony, the respondent narrated, reiterating what was pleaded in her plaint and medical report by Dr. Okombo, the injuries that she sustained following the material accident and stating that she had not fully healed.
23. The injuries that she had pleaded are as follows:-



- a. Swollen forehead with cut wound and bruises.
 - b. Laceration on the nose.
 - c. Cut wound on the nose
 - d. Couple of sub centimetre size calculi in the gall bladder.
 - e. Tenderness on the neck
 - f. Loss of 2 lower teeth.
 - g. Bruises on the forehead
 - h. Tenderness on the right hip joint.
 - i. Bruises on the knee joints
 - j. Bruises, swelling and tenderness on the right ankle joint.
 - k. Injury on the left side of the upper jaw with 2 loose teeth.
24. As stated above, the pleaded injuries were replicated in her witness statement filed on 19th February 2019 from the Radiology/X-ray reports dated 27th August 2018 Aga Khan Hospital, Kisumu, the Respondent had no evidence of bony injury or joint dislocation. Internally, she had 'couple of sub centimeter size calculi in the gall bladder.
 25. In addition, the Discharge summary dated 30th August 2018 by Dr. Osama shows that the Respondent was being treated for cut wound in the face with lacerated nose. She was admitted in hospital on 27th August 2018 and discharged on 30th August 2018 at Aga Khan Hospital, Kisumu.
 26. The P3 form filled on 10th September 2018 at Kisumu County Referral Hospital also mention injuries on the forehead and lacerated cut wound on the nose and bruises on the forehead.
 27. All the radiology reports of different parts of the plaintiff's body including the chest, CT Scan of the head, cervical spine, pelvis, left leg, abdomen and pelvis showed no evidence of bony injury or fracture. There is no mention of loose or lost teeth in all the treatment notes, not even the P3 form.
 28. However, in the Medical Report by Dr. Okombo dated 13th February 2019 which was prepared about six months after the said accident, the doctor recorded mouth injuries with loss of 2 lower teeth and injury on the upper jaw with 2 loose upper teeth.
 29. The trial court, during the hearing of the Plaintiff's case also observed that the plaintiff had lost 2 teeth in the lower jaw.
 30. In the Medical Report prepared by Dr. Jenipher Kahuthu on 6th May 2019, ten months later, she observed that the plaintiff had a healed scar on the nose and face and dental 2 lower incisor dentures. The doctor also observed that there was no record of loss of teeth in the treatment notes availed from Aga Khan Hospital where the plaintiff was admitted after the accident, therefore concluding that the lost teeth were unlikely to be the material accident related.
 31. In the submissions filed before the lower court, the appellant herein who was the defendant maintained that there was no evidence of loss of 2 teeth as alleged by Dr. Okombo and as pleaded since all the treatment notes never mentioned those injuries yet the respondent was admitted for 3 days in hospital and that there is no mention of any dental review hence there was no treatment administered for loose



- teeth or lost teeth. Further, that if the plaintiff was indeed injured on her teeth or lost her teeth, the same could have been noticed and treated during the 3 days of admission in hospital.
32. It was further submitted that there was no dental report following the accident for the trial court to consider hence the alleged dental injuries were not related to the material accident of 27th August 2018.
 33. The Defendant's counsel further submitted that as there were no such injuries in the treatment notes which the 2 doctors relied on, no doubt the alleged injuries were not proved. The defendant quantified Kshs.50,000 general damages for pain and suffering.
 34. The Plaintiff's counsel on the other hand quantified damages of Kshs.500,000 based on the pleaded injuries which included loss of 2 teeth and loose upper teeth.
 35. The Appellant in this appeal relied on the case of *Timsales Limited vs Wilson Libuywa* (2008) eKLR where the court held that injuries that were not observed and noted during treatment could not have been part of the injuries sustained in the material accident but could have been related to another accident all together.
 36. In cross examination of the Respondent, she stated that the upper teeth were shaking and that the lower teeth are not there. She stated that she told the doctor at Aga Khan that she had lost her teeth and that she did not know if they were included in the treatment notes. In reexamination she showed the court the 2 missing teeth and stated that before the accident, her teeth were okay.
 37. In her judgment which is impugned, the trial magistrate considered the medical documents and evidence adduced and stated as follows:-

“Both doctors relied on treatment notes from Aga Khan and the Plaintiff's history in compiling their respective reports. I have looked at the treatment documents from Aga Khan Hospital where the Plaintiff was treated immediately after the accident and one indicate that the Plaintiff suffered loss of teeth. I therefore hold that the plaintiff suffered multiple soft tissue injuries.”
 38. From the above observations, it is clear to this court that the trial magistrate considered the submissions and medical evidence in support of the Plaintiff and Defendant's cases and that she was alive to the fact that the most serious bone of contention as far as quantum of damages were concerned was whether the Plaintiff/Respondent herein suffered any loss of 2 teeth and 2 loose teeth, since the other injuries which are soft tissue in nature are not in contention.
 39. However, the trial magistrate did not state or specify which of the many treatment notes and Radiology reports from Aga Khan Hospital where the Plaintiff was treated immediately after the accident indicate that the Plaintiff suffered loss of teeth.
 40. I must therefore go back to meticulously reexamine those medical documents to establish which one of them said so, so that this issue of injuries involving loss of 2 teeth or 2 loose teeth can be resolved once and for all.
 41. I have toothcombed the treatment notes as well as the bills/invoice and receipts from Aga Khan Hospital. P. Exhibit 3 is a discharge summary by Dr. Osama Salem and the only aspect of that note that comes close to the injury on or in the mouth area is the administration of Remidin Mouthwash gargle. The invoice/interim bill produced as P. exhibit 8 dated 30th August 2018 provides for the said mouthwash. There is absolutely no evidence of loss of 2 teeth or 2 loose teeth.



42. I reiterate that I have perused and considered all the treatment notes, the discharge summary, the P3 form and the bills incurred by the Respondent and for what type of treatment. I am unable to locate any injury on loss of 2 teeth. The P3 form mentions tenderness on the jaw. The loss of 2 teeth and loose teeth is such a serious visible and overt injury which in my view could not have escaped the attention of the doctors who attended to the Respondent immediately after the accident, at Agha Khan and admitted her there for the three days.
43. I am unable to find that mouthwash gargle was the treatment administered for lost teeth or loose teeth, in the absence of any mention in the initial treatment notes or even the P3 form that the Respondent suffered such loss or injury on her teeth.
44. Whereas I am in agreement with the observation in the casebook on measures of damages for bodily injuries by Richard Kuloba at Pages 3-5 that there are many ways of proving injuries sustained in an accident, that the medical report by the doctor who examined the victim is not mandatory and primary source of information about injuries sustained in an accident if at all is by the victim himself, and whereas Dr. Kahuthu and Dr. Okombo both relied on the treatment notes supplied by the Plaintiff in making the medical reports, I am unable to agree with the plaintiff that she suffered loss of 2 teeth in the material accident or immediately thereafter which injury was only seen by Dr. Okombo 6 months after the accident and not seen by the Doctors who treated her at Agha Khan or by the doctor who filled her P3 form.
45. In my view, had the alleged injuries been sustained, the Respondent herein would have been treated for the same as they are not the kind of injuries that can be hidden from the doctor who attends to an accident victim.
46. There is no record of evidence of treatment for loose teeth or lost teeth and hence the complaint by the Appellant that the trial magistrate failed to consider the nature and extend of injuries sustained by the Respondent in awarding damages which were inordinately high is in my view, justified.
47. I reiterate that loss of teeth following an accident would have been self-evident and even if the Agha Khan Hospital could have inadvertently failed to indicate in the initial treatment notes, it could have been stated in the P3 form.
48. My conclusion on this matter is that there was no evidence to demonstrate that the Respondent lost 2 teeth or had 2 loose teeth following the accident in question. It is for that reason that I find and hold that the trial magistrate erred in fact in stating in her judgment that she saw in one of the treatment notes from Agha Khan Hospital indicating loss of 2 teeth without specifying which treatment note that was, yet there is no such treatment notes wherein it was stated that the Respondent lost 2 teeth as a result of the material pleaded accident or that she had loose teeth or tooth.
49. My conclusion is that the injuries sustained by the Respondent were multiple soft tissue injuries without any fractures as shown by the treatment notes, P3 form and the radiology reports produced as exhibits and that the medical report by Dr. Okombo showing loss of 2 teeth which loss of two teeth was allegedly seen by the trial court during the hearing of the case was an injury that could have been sustained after the Respondent left hospital in a different accident and even after the P3 form was filled.
50. I would therefore doubt the medical report by Dr. Okombo on that injury which is in contention in this appeal and believe what Dr Kahuthu established in her second opinion on the injuries sustained by the respondent
51. The reason I doubt Dr. Okombo is this:- Curiously, why did the Respondent not plead for the cost of dentures to replace the lost teeth? In addition, loss of teeth would require attention of a dentist to



manage the loss or even the loose teeth for specialized treatment. There is no such evidence of treatment or referral for treatment by a dentist.

52. Having reassessed and reevaluated the evidence as adduced in the lower court, the question that I must answer, therefore, is whether the trial magistrate awarded damages that were commensurate with the loss or injuries sustained by the Respondent.

53. It is trite and this principle has been stated and reiterated in nearly all civil appeals where damages are involved that:

“The assessment of damages is within the discretion of the trial judge. The appellate court will only interfere where the trial judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence.” see (*Taita Taveta Matatu Cooperative Savings vs Zaina Rukus* (2016) eKLR and *Loice Wanjiku Kagunda vs Julius Gachau Mwangi* Civil Appeal No. 142 of 2003.

54. In assessing general damages, for personal injuries, the court also considers several factors as was stated by the Court of Appeal in *Ugenya Bus Service vs James Gachoki* CA 66 of 1981 that:-

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.

I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for the loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them.

We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.”

55. In awarding the plaintiff general damages of Kshs.250,000 the trial court considered submissions by both parties counsel and the fact that the plaintiff suffered multiple soft tissue injuries. Like cases attract like awards although no two cases can be exactly the same.

56. The trial magistrate, regrettably, did not indicate in her judgment as to which of the authorities cited in each of the respective parties’ submissions, resonated with the case before her. In other words, there is no material on record to show that she considered which authorities to be more relevant and excluded those authorities that she considered irrelevant. Thus, in as much as the assessment of damages is in the discretion of the trial court, that discretion must be exercised judiciously and predicated or premised on the established legal principles.

57. All said and done, the Court of Appeal has repeatedly stated in several cases among them see *Gitobu Imanyara & 2 Others vs Attorney General* (2016) eKLR that:-

“It is firmly established that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court



should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”

58. This principle was well captured in the earlier case of *Kemfro Africa Ltd t/a Meru Express Services & Gathogo Kanini vs A. M. Lubia & Olive Lubia* (1982-88) 1 KAR 727 where Kneller J.A at page 730 stated:

“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 that the judge in assessing the damages, took into account an irrelevant factors or left out of account a relevant one, or that; short of this, this amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

59. In my humble view, these principles attempt to secure the best for both parties in the assessment of damages in personal injury claims.

60. In the present case, the Respondent was aged 52 years old when she was involved in the accident. Her profession is stated to be a lab technologist. She sustained, from the treatment notes and P3 form, as well as the medical reports, (save for the misplaced injury involving loss of 2 teeth and loose upper teeth which injuries were not proved at all), multiple soft tissue injuries involving cuts and bruises on the forehead, cuts and lacerations on the nose, bruises on the hip and knee joints, bruises and swelling and tenderness on the right ankle, tenderness on the neck, secondary to whip lash injury, couple of the subcentimeter size calculi in the gall bladder, tenderness on the upper jaw, tenderness on the chest.

61. She was admitted in hospital for three days and discharged home for dressing daily with betadine and to apply Mebo ointment and massage; remedially mouthwash and other medication.

62. From the discharge summary, the major injury involved cut wound in the face with lacerated nose. She was given off duty of 14 days from 30th August 2018 and was scheduled for review on 3rd September 2018. There was no physical disability resulting from those injuries and the Respondent did not adduce any evidence to demonstrate that as at the time of giving evidence in court, she had been visiting any hospital or taken medication related to the accident in issue.

63. In her counsel’s submissions in the lower court, 3 decisions were relied on in support of quantum of soft tissue injuries:

1. *Leah Nyaguthii Kamungy vs KBC Nairobi HCC 1128 of 1993 – Sitati J on 19th June 2009.*
2. *Eldoret Express Ltd & 2 Others vs Ann Khisa & Another* (2018) eKLR Bugoma HCCA No. 13 of 2015 and
3. *Josephat Kaliche Ambani vs Fam Industries Ltd* (2016) eKLR Kisumu ELC CCA No. 11 of 2015

64. In all the 3 cases, the respective courts awarded Kshs.200,000 General damages for pain and suffering in what the Respondent submitted were comparable injuries and so Kshs.500,000 were sought in respect of the Respondent herein.

65. On the part of the Appellant, it was submitted that there was no evidence of loss of 2 teeth or loose teeth as stated above and relying on the decisions cited namely, *Samuel Mburu N. Ngaari & Others vs Wangike Wangare & Another* (2014) eKLR; *Ndungu Dennis vs Ann Wangari Ndirangu & Another*



(2018) eKLR; *Pamela Ombiyo Okinda vs KBS Ltd* Nairobi HCC No. 1309 of 2002, the appellants' counsel prayed for an award of Kshs.50,000 general damages.

66. I have considered the above submissions and assessment of the injuries sustained by the Respondent which from the evidence on record, excludes the loss of two teeth and two loose teeth and applying the principles set out in *Kimatu Mburu t/a Kimatu Mburu & Brothers vs Augustine Munyao Kioko* (2006)eKLR on the generally acceptable principles for assessment of damages in personal injury claims and considering that no two injuries can be exactly the same in comparable cases especially where the injures are multiple, upon my examination of the authorities relied on by the Respondent and appellant both in the lower court and in this appeal, I find that the decisions relied on by the Respondent disclosed more serious injuries than the ones sustained by the Respondent whereas the decisions cited by the appellant bear less serious injuries than those sustained by the Respondent.
67. In addition, some decisions are too old even if inflation was to be taken into account, noting that inflation has not aided businesses to do better nor livelihoods to improve, and it remains a factor yet the state of the Kenyan economy and cost of doing business and living are unbearable.
68. In a more recent High Court decision in *Francis Omari Ogaro vs Jao (minor suing through next friend and father G.O.D)* (2021) eKLR, the High Court at Nyamira on appeal set aside an award of Kshs.230,000 general damages and substituted it with an award of Kshs.180,000 in a case where the Plaintiff injured sustained injuries in a road traffic accident involving multiple soft tissue injuries of:-
- a. Multiple cut wounds on the right lower limb;
 - b. Bruises on the right lower limb;
 - c. Bruises on both elbows;
 - d. Bruises on the right iliac region;
 - e. Bruises on the frontal region;
 - f. Bruises on the temporal region;
 - g. Laceration on the frontal region, cut wounds on the left iliac region;
 - h. Cut wounds on the frontal region;
 - i. Cut wounds on the temporal region;
 - j. Blunt trauma to the abdomen
- The injuries healed with permanent ugly scars.
69. The learned Judge relied on the case of *Ephraim Wagura Muthui & 2 Others vs Toyota Kenya Ltd & 2 Others* (2019) where the Plaintiff sustained injuries which were nonetheless, less serious than the ones sustained by the Respondent in this appeal.
70. Similarly, in *F.M (Minor suing through mother and next friend M.W.M) vs J.N.N & J.D.K* (2020) eKLR where the Plaintiff sustained injuries involving: -
- a. Blunt object injury to the head;
 - b. Blunt object injury to the neck;
 - c. Blunt object injury to the chest;
 - d. Blunt object injury to the abdomen;



- e. Blunt object injury to the limbs.
71. The court on appeal set aside an award of Kshs.60,000 and substituted it with an award of Kshs.100,000 general damages for pain, suffering and loss of amenities.
 72. In the instant case, considering the injuries sustained, there being no permanent incapacity or serious resultant effects, I find that the award of Kshs.250,000 awarded for pain and suffering was inordinately high as it took into account injuries involving loss of 2 teeth and loose tooth which were not proved on a balance of probabilities.
 73. Accordingly, I am inclined to interfere with that award. I set it aside and substitute it with an award of Kshs.180,000 general damages, less 10% contribution as agreed between the parties in the lower court. Total General damage Kshs.162,000.
 74. The special damages was not part of the contestation. I shall not interfere with orders in respect thereof.
 75. On costs, albeit cost follow the event, had the trial court examined the evidence available on the injuries sustained by the Respondent, she could not have found that there was loss of 2 teeth or loose teeth which influenced her decision on the quantum of damages which are impugned.
 76. For that reason, in as much as the appeal is successful, as the court has not reduced the award to the level asked by the appellant, I find that in the circumstances of this case, each party shall bear their own costs of the appeal.
 77. The Respondent retains costs of the suit in the lower court.
 78. The general damages as reduced will earn interest at court rates from date of judgment on 9th April 2021 until payment in full.
 79. This file is now closed and the lower court record to be returned to the Magistrate's court forthwith.
 80. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2023.

R.E. ABURILI

JUDGE

