



REPUBLIC OF KENYA



**KENYA LAW**  
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**Coast Motorcycles Watu Credit v SJM (Minor Suing Through Father & Next Friend DMC)  
(Civil Appeal 053 of 2022) [2023] KEHC 24917 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 053 OF 2022  
JM CHIGITI, J  
OCTOBER 24, 2023**

**BETWEEN**

**COAST MOTORCYCLES WATU CREDIT ..... APPELLANT**

**AND**

**SJM (MINOR SUING THROUGH FATHER & NEXT FRIEND)  
DMC ..... RESPONDENT**

*(Being an Appeal from the judgment/decree of Hon. Julie Oseko Chief Magistrate delivered on 21st April, 2022 in Malindi PMCC No. 103 of 2021)*

**JUDGMENT**

**Brief Background**

1. The instant Appeal stems from a fatal road traffic accident involving motor cycle registration number KMFB 398D and the (Minor)that occurred on the 215 April 2021 Following the accident, the Respondent lodged a suit viz Malindi PMCC No. 103 of 2021 seeking recompense for injuries arising from the said accident.
2. Upon hearing parties, Honourable Julie Oseko Chief Magistrate delivered a judgment on the 21<sup>st</sup> April, 2022 in Malindi PMCC No. 103 of 2021 as follows: -

“General Damages, Special damages less 10% totaling to 452,295.00 plus costs of the suit and interest on the above sums.”



3. Aggrieved by the decision of the trial Court, the Appellant preferred the instant appeal on the following grounds.
  1. That the learned trial magistrate erred in law and in fact in failing to properly analyse the evidence before her in the assessment of damages thereby awarding damages that are manifest, excessive under the circumstances of the case.
  2. That the learned Trial Magistrate erred and misdirected herself in law by assessing damage that was manifestly excessive and incomparable with the current judicial awards for analogous injuries.
  3. That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages for loss of dependency.
  4. That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.
  5. That the Learned Magistrate failed to exercise his discretion judiciously in awarding damages.
  6. That the amount of general damages awarded was inordinately high as to represent an entirely erroneous estimate and in reaching such high figure, the learned Trial magistrate must have acted on wrong principles of law.
4. The Appellant prays that: -
  1. That the judgment/decreed of the Honourable Court dated 21<sup>st</sup> April, 2022 be reviewed and/or set aside to the extent of the Court's finding on quantum,
  2. That costs of the appeal be borne by the Respondents.
5. The Appellant addressed all the grounds collectively and advanced the argument that the Respondent's injuries as pleaded before the trial court were:
  - a. Missing two lower incisor teeth
  - b. Bleeding from the mouth

#### **Evidence Adduced during trial**

6. At the hearing before the trial court, parties had entered into a consent on apportionment of liability at 90:10 in favour of the Respondent and against the Appellant. Parties had also agreed to prude their respective documents by consent (see Page 114 of the Record of Appeal on the proceedings before the trial court).
7. Two medical reports were produced by the parties in support of their respective cases. The Medical report by Dr. Ajoni Adede confirms that the minor was 6 years of age at the time of the accident and confirmed the injuries as pleaded in the Plaint. (see Page 12, 45 & 114 of the Record of Appeal). Of importance to the injuries suffered by the Respondent (Minor) Dr. Adede notes in his report that: -

“the lost teeth will regrow due to the young age of the patient and that the accompanying soft tissue injuries will leave no permanent disability”



8. The medical report produced by the Appellant before the Trial court also confirmed that the injuries suffered by the minor had healed with no permanent incapacity expected.
9. The Respondent in his closing submissions had suggested an award of Kshs. 1,000,000.00 as requal and fair recompense to the Respondent for his injuries and relied on the authority *Sipler Okoko & another vs F. Radio & Another* [2000] eKLR, where an award of Kshs. 700,000/- as general damages was awarded to the 2<sup>nd</sup> Plaintiff.
10. The Appellant in its closing submissions had submitted that the authority quoted by the Respondent was not comparable to the case at hand for the following reasons:
  - a. That the 2<sup>nd</sup> Plaintiff in that authority suffered far more severe injuries than the case at hand. The plaintiff therein suffered from Loss of teeth with bleeding tooth sockets, Injury to the mouth leading to distortion of the mouth & Injury to the face resulting to facial disfigurement resulting in psychological trauma hence those injuries were more severe compared to the case at hand in which the plaintiff suffered from soft tissue injuries with no residual permanent disability as the teeth were expected to re-grow given the age of the minor.
  - b. That the authority cited by the Respondent was quite dated with the decision having been made 22 years ago on 8<sup>th</sup> December, 2000 and relates to an adult as opposed to the case at hand in which the Respondent is a minor.
11. The Appellant in its closing submissions had suggested an award of Kshs. 60,000/- as requal and fair recompense to the Respondent for his injuries and relied on the authority *T.M. (Minor) & 2 Others v Moses Kinyua Muriuki* [2016] eKLR where an award of Kshs.60,000.00 was made by the High Court in 2016. T M G a minor aged 9 years had suffered from the following injuries:
  - a. Deep cut wound on the upper lip.
  - b. Bruises on the face
  - c. Laceration on the tongue
  - d. Loss of 3 upper milk incisors
12. The doctor found that the patient had "inverted L scar at nasalis base extending to left upper lip". The doctor also found that the patient was resuscitated and admitted for eight days after sustaining grievous harm of maxillo facial leaving ugly scars.
13. The Appellant had pointed out to the court the authority *Isaac Muriungi Mbataru v Silas Kalumani* [2017] eKLR where an award of Kshs. 350,000/- as general damages awarded by the trial court was reduced on appeal to Kshs 200,000/- where the plaintiff, an adult had suffered loss of two incisor teeth and required dental filling.
14. According to the appellant, the award on general damages made by the Learned Trial Magistrate was manifestly excessive given that she had relied on an authority involving an adult who had suffered from loss of two pre-molar teeth while in the instant Appeal the Respondent (Minor) who was 6 years old had suffered from loss of two upper incisor milk teeth.
15. Furthermore, it was the respective parties Doctors consensus that due to the age of the minor the teeth were expected to regrow.
16. Secondly, even if the Court was to find that the authority relied on by the Learned Trial Magistrate was relevant and applicable, the increment of Kshs. 100,000.00 can't be justified even taking into account



inflation and the passage of time since it represents more than a 25% increment in the award in less than 1 year.

17. The Appellant relies on the authorities of i) JK (A Minor Suing Through Father & Next Friend NKM V Jasper Nchonga Magari & Another (2021) eKLR where the High Court at Malindi awarded Kshs. 30,000.00 for soft tissue injuries. ii) HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [2021] eKLR where the High court upheld the trial's court award of Kshs.60, 000.00

### **Respondent's Submissions**

18. The Respondent opposes the Appeal. According to the Respondent, the medical report by Dr. Adede admitted by consent as evidence confirmed the following;
  - a) Missing two lower incisor teeth
  - b) Bleeding from mouth
19. The trial court awarded Kshs. 500, 000 as general damages taking into account the plaintiff's injuries. The injuries sustained by the Respondent are far more serious than the injuries in the cases quoted by the Appellant.
20. The Plaintiff's evidence on the injuries suffered was unchallenged in the trial court. The P3 form produced as evidence confirmed that the degree of injury is grievous harm. Grievous harm is defined under section 4 of the Penal Code as follows;

“grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”
21. Injury to the teeth are far much worse than what the Appellant wants the court to believe. Problems with the teeth will cause difficulty when eating affecting the overall health of the Respondent.
22. The Appellant's main contention is that the Plaintiff at the time was 6 years old and thus there is a possibility that the missing teeth will grow back and thus the minor should not be awarded damages awarded to an adult. The Appellant's reasoning is misconstrued as the difference is that the minor will not be awarded future medical expenses for example to replace the missing teeth.
23. The award for an adult or a child should be similar as they experienced the same amount of pain save for the future medical expenses.
24. The trial court in its judgment relied on the case of Retco East Africa Limited vs. Wycliff Kennedy Makori [2021] eKLR where the Respondent had suffered loss of two teeth and other soft tissue injuries. The injuries therein are comparable to the injuries sustained by the minor and thus the award is proper and it ought not to be disturbed.
25. The Respondent had pleaded for Kshs. 1,000,000/- while relying on the case of Silper Okoko & Another -vs- F. Radido & Another [2000] eKLR where the 2<sup>nd</sup> plaintiff suffered loss of teeth with bleeding tooth socket, injury to the mouth and face and was awarded Kshs. 700,000/= as general damages for pain and suffering.



26. Reliance is placed in the case of Joseph Mutua Nthia vs. Fredrick Moses M. Katuva [2019] eKLR where the Respondent had sustained injury to the left face, loose teeth, loss of 2 teeth, blunt chest injury and blunt back.

### **Analysis and Determination**

27. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
28. In the case of *Selle & another vs Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: -
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
29. The principles guiding an appellate court in determining whether to interfere with an award of general damages have also been enunciated in the case of *Butt vs Khan* [1981] KLR 349, wherein Law, J.A. observed that:
- “An appellate court will not disturb and award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
30. The Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No.284 of 2001 (2004) 2KLR 55* as quoted in *Mumbi Ngumbi Kasamu (Suing as the legal representative of the Estate of Boniface Mulinge Mbithe (deceased v Mutua Mulaa & Another (2019) eKLR* stated as follows:
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”
31. The Court in *Lim Poh Choo v Camdem & Islington Area Health Authority (1979) 1 Aller 332* cited in the case of *Nancy Oseko v Board of Governors Masai Girls High School (2011) eKLR* held that:
- “In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.”
32. The case of *Anthony Maina Mwaniki v Munyara Estate, Civil Appeal No.493 of 1999, D. KS Aganyanya J (as he then)* was stated that the principle on which an appellant court will interfere with the lower court’s assessment of damages are now well settled in Kenya.



33. Kneller J.A (as he was then) said in *Robert Msioki Kitavi v Coastal Bottlers Ltd* (1985) 1KAR 981 AT 895 (1982-88) 1 KAR 891 at page 895) that;

“The court of Appeal in Kenya, then should as its fore runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so low or so high that it amounts to an erroneous estimate.”

34. This is a first appeal and this Court has the power to review, re-evaluate and analyse the evidence on record and arrive at its independent conclusions.

35. I have also considered the age of the authorities that parties relied on as well as the inflationary trend of the Kenya Shillings and I am of the view that the trial court award was not inordinately high as compensation for general damages in the circumstances.

36. Looking at the injuries in the cases cited by both sides I am of the view that the sum awarded is a reasonable compensation for the Respondent and I do not see any justification to interfere with the judgment.

**Orders;**

The Appeal lacks merits and the same is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

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**JOHN CHIGITI (SC)**

**JUDGE**

