



**Kimwele v Board of Governors, Shanzu Teachers Training College & another (Civil Appeal E147 of 2022) [2025] KEHC 1772 (KLR) (20 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E147 OF 2022  
JK NG'ARNG'AR, J  
JANUARY 20, 2025**

**BETWEEN**

**CHRISTOPHER MWINZI KIMWELE ..... APPELLANT**

**AND**

**THE BOARD OF GOVERNORS, SHANZU TEACHERS TRAINING  
COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**KAHINDI KITSAO NGAO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against part of the Judgment of Hon. M. Nabibya (PM) delivered on 25th August 2022 in Mombasa Chief Magistrate's Court Civil Suit No. 2256 of 2016, Christopher Mwinzi Kimwele v The Board of Governors Shanzu Teachers Training College & Kahindi Kitsao Ngao)*

**JUDGMENT**

1. The background of the appeal is that the Appellant filed a suit in the trial court vide a plaint dated 14<sup>th</sup> November 2016 whereby he claimed that at all material times to the suit, the 1<sup>st</sup> Defendant was the beneficial and/or insured owner of the motor vehicle known as Isuzu Bus registration number KBR 219U while the 2<sup>nd</sup> Defendant was the driver of the said motor vehicle. That at all material times to the suit, the Plaintiff was the beneficial owner and driver of motor cycle registration number KMDR 828N.
2. The Plaintiff averred that on 23<sup>rd</sup> September 2016, the 2<sup>nd</sup> Defendant was driving motor vehicle Isuzu Bus registration number KBR 219U at Nyali Center along Mombasa-Malindi Road when the 2<sup>nd</sup> Defendant controlled and/or managed the motor vehicle in such a manner that as to cause the same to lose control and hit the Plaintiff who was lawfully aboard his motor cycle registration number KMDR 828N by the side of the road causing the Plaintiff to be thrown off his motorcycle. Particulars of injuries sustained by the Plaintiff were bruises on the chin, upper incisors tooth loss, blunt object injury to



- the right shoulder, and fracture of right scapula shoulder wing bone. That the Plaintiff also suffered material loss as a result of the accident which led to his motorcycle being badly damaged beyond repair and was actually written off.
3. The Plaintiff prayed for damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for general damages for pain and suffering, future medical expenses for dental crowning of tooth at Kshs. 7,500, Kshs. 95,000 being the value of the motor cycle registration number KMDR 828N, special damages of Kshs. 18,220, costs of this suit and interest on all above at court rates.
  4. This suit was heard in the trial court and judgment delivered on 25<sup>th</sup> August 2022 where the court found that the Plaintiff's evidence was not controverted by any from the defence side and therefore in liability the 1<sup>st</sup> Defendant was held vicariously liable for the acts/omissions of its driver while the 2<sup>nd</sup> Defendant was held 100% liable. On quantum, the trial court held that the Plaintiff suffered a fracture of the scapular shoulder wing bone, loosening of the upper incisor tooth, blunt object injury to the right shoulder, and a bruise to the chin. Having considered the nature and extent of injuries, time, inflationary trends and the authorities cited, the court gave an award of Kshs. 350,000 in general damages.
  5. The trial court in the award for future medical expenses held that it was more than 6 years since the accident occurred yet the court had not been supplied with medical reports to confirm that the corrective procedure on the tooth was carried out or that healing took place. That it would therefore not be prudent to give an unnecessary award at that point. On compensation for the loss of motorcycle, the trial court held that the report of the assessor (p-exhibit 4) stated that the cost of repair of the same could have been uneconomical and therefore it was declared constructive total loss. That there was no contrary report and the court therefore allowed the claim for Kshs. 95,000 being the value of the destroyed vessel. On special damages, the trial court held that receipts for a larger amount (in excess of Kshs. 100,000) than claimed was present but the Plaintiff pleaded Kshs. 18,220 which was awarded. The court also awarded costs and interests to the Plaintiff at court rates.
  6. Being dissatisfied, the Appellant appealed against part of the judgment through the Memorandum of Appeal dated 9<sup>th</sup> September 2022 on grounds that the learned trial principal magistrate erred in law and in fact in awarding a sum of Kshs. 350,000 on general damages which amount is too low in the circumstances, without considering submissions of both the Appellant and the Respondent and the authorities cited therein, and without considering the current trends on similar injuries as suffered by the Appellant. That the learned trial principal magistrate erred in failing to consider the severity of the injuries suffered by the Appellant and award a commensurate amount, and by failing to award an amount for future medical cost for dental crown as recommended by the doctor.
  7. The Appellant prayed for orders that judgment of the trial principal magistrate be varied in so far as the general damages and future medical expenses are concerned and this court do give an appropriate award on the two items. That costs of this appeal be awarded to the Appellant.
  8. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 11<sup>th</sup> December 2023 argued that the amounts awarded by the trial court was inordinately low as the Respondents in their submissions in the trial court had indicated a willingness to pay damages of Kshs. 700,000. That the degree of disability was assessed at 7% by Dr. Ajoni Adede, an expert witness and that the same was never controverted by the Defendants in the trial court.
  9. The Appellant submitted that in *Joseph Musee Mua v Julius Mbogo Mugi*, High Court Civil Case No. 86 of 2008, the court awarded a sum of Kshs. 1.3 million where the estimated permanent partial disability was at 5%. The Appellant relied on the holding in the case of *Badar Hardwares Limited v*



- James Amwoma Oiko (2017) eKLR which cited with authority the case of Kigaraari v Ava (1982-88) 1 KAR 768 on the limits in the award of damages. The Appellant also cited the case of Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others (1986) eKLR on the circumstances under which an appellate court can vary a sum awarded by the trial court.
10. The Appellant placed reliance on the cases of Teresiah Ngugi & Another v Michael Masia Kimende (2018) eKLR where the court reviewed damages from 2 million to 1.5 million, the case of James Gatbirwa Ngugi v Multiple Hauliers (EA) Limited & Another (2015) eKLR where the court awarded Kshs. 1,500,000 and the case of Mwaura Muiruri v Suera Flowers Limited & Another (2014) eKLR where the court awarded Kshs. 1,450,000. The Appellant argued that he suffered almost similar injuries to the cited cases and that an award of Kshs. 1,500,000 would be sufficient considering passage of time and inflation rate. The Appellant relied on the medical report to seek for future medical expenses of Kshs. 7,500 for dental crowning. The Appellant also prayed that the cost for the appeal and trial in the lower court be borne by the Respondents.
  11. The Respondents in their submissions dated 14<sup>th</sup> December 2023 contended that the Appellant's appeal is limited to general damages awarded by the subordinate court and that the court awarded Kshs. 350,000 when the Appellant believes that the award should have been higher. The Respondents cited the case of Kemfro Africa Ltd t/a Meru Express Service & Another v A.M. Lubia & Another (1982-88) 1 KAR 777 on the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages. That the Appellant in his submissions does not allege that the trial court took into account an irrelevant factor or left out of account a relevant one. That matters of quantum are matters of discretion as was held in Gerald Mubuthia Mwangi v John Mburugu & Another (2022) eKLR. That as a first appellate court, the Respondents cited the case of Selle and Another v Associated Motor Boat Co. Ltd and Others (1968) EA 123 that it is the duty of this court to subject the whole evidence to fresh and exhaustive scrutiny and make its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
  12. The Respondents submitted that the injury suffered by the Plaintiff included bruises on the chin, upper incisors tooth loss, blunt injury to the right shoulder, and fracture of the right scapula shoulder wing bone. That the injuries were taken verbatim from the medical report of Dr. Ajoni Adede who concluded that there was a 7% permanent partial disability, and that the P3 Form points to a fracture of the right scapula. The Respondents cited the case of Gerald Muhuthia Mwangi v John Mburugu & Another (supra) where an award of Kshs. 280,000 was upheld, and the case of George Kiptoo Williams v William Sang & Another (2004) eKLR with much more serious injuries and where the court awarded Kshs. 560,000. The Respondents argued that the decisions cited by the Appellant were not relevant. They therefore prayed that the appeal be dismissed with costs.
  13. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in Selle v. Associated Motor Boat Co. (1968) EA 123 as follows: -

“... 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 ...”
  14. I have considered the Record of Appeal dated 29<sup>th</sup> September 2023 and submissions by the parties. The appeal herein lies on the award on quantum and more specifically under general damages and future medical expenses which will be considered as hereunder.
  15. The trial magistrate awarded Kshs. 350,000 in general damages. On future medical expenses, the trial court held that it was more than 6 years since the accident occurred yet the court had not



been supplied with medical reports to confirm that the corrective procedure on the tooth was carried out or that healing took place. That it would therefore not be prudent to give an unnecessary award at that point.

16. According to the Appellant, the award of Kshs. 350,000 was inordinately low and proposed that an award of Kshs. 1,500,00 would be sufficient according to the cited authorities. The Appellant also indicated that the Respondents in their submissions in the trial court were willing to pay Kshs. 700,000.
17. The award of general damages is discretionary. However, circumstances under which an appellate court can interfere with quantum of damages was clearly set out by the Court of Appeal in the case of *Kenya Bus Services Limited v Jane Karambu Gituma*, Civil Appeal Case No. 241 of 2000 as follows: -

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

18. The Court of Appeal in *Southern Engineering Company Ltd. v Musingi Mutia* (1985) KLR 730 set out the guiding principles in awarding damages as follows: -

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary



terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

19. According to the Plaintiff, the injuries suffered by the Appellant included bruises on the chin, upper incisors tooth loss, blunt object injury to the right shoulder, and fracture of right scapula shoulder wing bone.
20. This court has reevaluated the evidence on record and established that the medical report dated 18<sup>th</sup> October 2016 prepared by Dr. Ajoni Adede confirm the injuries in the Plaintiff. According to the report, there was 7% permanent partial disability due to fracture of the right scapula shoulder wing bone, stiffness of the right shoulder, fracture sites that remained a weak point for life even if the bones unite and can re-fracture and post fracture accelerate bone and joint wear and tear. The report further stated that there was hope the loose tooth could regain firmness, that refashioning the fractured tooth No. 21 with composite build up and dental crowning costs Kshs. 7,500, and that accompanying soft tissue injury left no residual disability.
21. I have perused the authorities cited by the Appellant and noted that in *Teresiah Ngugi & Another v Michael Masia Kimende* (2018) eKLR the injuries suffered were mild head injury with facial bruises, a blunt chest injury with fractured ribs, a cut wound right leg below, the knee had a compound fracture of the right tibia fibula, permanent incapacity was assessed at 70%, and partial permanent disability of 7%. The court awarded Kshs. 1,500,000. In *James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & Another* (2015) eKLR the injuries suffered were fracture of left radius, fracture of the left ulna, fracture of right tibia and fracture of the right fibula, and disability ranging between 60% to permanent disability. The court awarded Kshs. 1,500,000. In *Mwaura Muiruri v Suera Flowers Limited & Another* (2014) eKLR the injuries suffered were multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia, compound double fractures of the right leg upper and lower 1/3 tibia fibula, permanent injuries as paralysis of the right hand, deformation of the right leg which is angulated medially and reduced ankle joints, and total permanent disability at 70% computed as 50% for the loss of the right arm and 20% on the left leg. The court awarded Kshs. 1,450,000.
22. Upon perusal of cases with similar injuries, I note that in *Kosgei v Mutisya* (Civil Appeal 4 of 2023) [2024] KEHC 156 (KLR) (19 January 2024) (Judgment) the court awarded Kshs. 450,000 while in *UAP Assurance Limited & 2 others v Rachael Warigia Ndungu* (2022) eKLR an award of Kshs. 650,000 in general damages was upheld.
23. In light of comparable awards, passage of time and inflation, this court finds that the award of Kshs. 350,000 by the trial court for general damages was low and the same justifies interference by this court. Accordingly, I set aside the award of Kshs. 350,000 and substitute it with an award of Kshs. 600,000.
24. On future medical expenses, the court in *Sheikh Omar Dahman T/A Malindi Bus v Denis Jones Kisomo*, Civil Appeal No. 154 of 1993 held that the cost of future medical operation is special damages, which must be pleaded. Special damages are ascertained and quantified.
25. This court notes that the Appellant pleaded future medical expenses for dental crowning of tooth at Kshs. 7,500. This amount was confirmed by the medical report dated 18<sup>th</sup> October 2016 prepared by Dr. Ajoni Adede that refashioning the fractured tooth No. 21 with composite build up and dental crowning would cost Kshs. 7,500.
26. In the upshot, I find merit in the appeal as follows: -



- a. I set aside the award of Kshs. 350,000 as general damages and substitute thereof with an award of Kshs. 600,000.
- b. The Appellant is awarded future medical expenses in the sum of Kshs. 7,500.
- c. The award for general damages will attract interest at court rates from the date of the judgment in the trial court while the award for future medical expenses will attract interest from the date of filing suit till payment in full.
- d. The Respondents to bear costs.

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2025.**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

..... Advocate for the Appellant

..... Advocate for the Respondent

Court Assistant – Shitemi

