



REPUBLIC OF KENYA



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**Simiyu v Okello (Civil Appeal E102 of 2024)  
[2024] KEHC 15593 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E102 OF 2024  
RE ABURILI, J  
DECEMBER 5, 2024**

**BETWEEN**

**MICHAEL WASILWA SIMIYU ..... APPELLANT**

**AND**

**SHARON AKINYI OKELLO ..... RESPONDENT**

*(Appeal arising from the judgment and decree in Winam SPM CC No. E102 of 2022 rendered on 21/12/2023 by Hon Dennis Ogal, Principal Magistrate)*

**JUDGMENT**

**Introduction**

1. The appellant was sued by the respondent vide a plaint dated 10<sup>th</sup> May 2022 for general damages for injuries sustained following a road traffic accident that occurred on the 13<sup>th</sup> April 2022 off the main Kisumu – Kakamega road.
2. The respondent averred that she was a pedestrian lawfully walking on the pedestrian lane at Kibuye Area when the appellant, his agent, employee and/or servant so carelessly, negligently and or recklessly managed his motor vehicle registration number KCX 922S Subaru Forester so as to cause it to suddenly lose control, swerve off the road and into the pedestrian lane and violently knock her down.
3. In response the appellant filed his statement of defence dated 14<sup>th</sup> June 2022 denying the respondent’s claim in toto and putting her to strict proof thereof. The appellant further averred that the respondent contributed to the accident.
4. On the 7<sup>th</sup> September 2023, the parties recorded consent in the ratio 75:25 in favour of the respondent. In his judgement, the trial court proceeded to award the respondent general damages of Kshs. 400,000.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 25<sup>th</sup> May 2024 raising the following grounds of appeal;
- a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before hi superficially and consequently coming to a wrong conclusion on the same.
  - b. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
  - c. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
  - d. The learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent, if any, and failed to apply precedents and tenets of law applicable.
  - e. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent’s claim.
  - f. The learned trial magistrate failed to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
6. The parties agreed to dispose the file off by way of written submissions. As this file was part of a series, the orders herein were similarly to apply to *Civil Appeal E159 of 2023*.

### **The Appellant’s Submissions**

7. The appellant submitted that award of Kshs. 400,000 in general damages was excessive and unjustifiable as the respondent sustained soft tissue injuries. The appellant submitted that Kshs. 200,000 in general damages would be justifiable.
8. The appellant relied on the cases of *Robert Cheserek v Jackline Jepkoech Jimmy* [2019] eKLR where the high court awarded Kshs. 200,000 as general damages for injuries similar to those sustained by the respondent in the instant case as well as the case of *James Nganga Kimani & Another v Gichagi Njoroge & 2 Others* [2019] eKLR where Kshs. 200,000 was awarded in general damages for injuries similar to those sustained by the respondent herein.

### **The Respondent’s Submissions**

9. It was submitted that there was nothing provided before the trial court both in terms of document and testimony of the Appellant that it could consider as the only documents available for consideration by the court on the Appellant’s side were his pleadings and submission that were duly considered by Court, and that the trial court erred in failing to consider her submissions and made awards which were inordinately low.
10. The respondent submitted that on the contrary the trial court erred by failing to consider her evidence, submissions and authorities thus resulting in an award that was low considering the injuries she had suffered.



11. The Respondent submitted that an award of Kshs 500,000 would have been reasonable under the circumstances. This position was supported by the following authorities:
  - a. *Joseph Mutua Nthia v Fredrick Moses M. Katuva* [2019] KEHC 4154 (KLR), the court awarded Kshs 400,000/= for loss of 2 teeth.
  - b. *Coast Motorcycles Watu Credit v SIM (Minor Suing Through Father & Next Friend DMC)* (Civil Appeal 053 of 2022) [2023] KEHC 24917 (KLR) (24 October 2023) (Judgment), the Respondent in this case lost her 2 lower teeth and the court awarded General Damages, Special damages less 10% totaling to Kshs 452,295.00
  - c. *Beatrice Wangui Waititu v DGK (suing as father and next friend of GMG (Minor))* [2021] KEHC 2776 (KLR), where court awarded Kshs 400,000/= for loss of 2 upper teeth.
12. The Respondent submitted and pleaded for the future medication expenses and related damages contained in paragraph 11 of its Complaint and particularized as (a) to (g) of the Complaint dated 10th May 2022. The respondent then went on pray that she be awarded Kshs. 250,000 for future medical expenses and Kshs 500,000 general damages.

### **Analysis and Determination**

13. This being a first appeal the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
14. I have carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the parties’ rival written submissions. I have also read the Judgment of the trial court. I find that the only issue for determination is that of quantum of damages.
15. It is trite that the assessment of damages is a matter of discretion by the trial court and an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome.
16. In *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited)* [2015] eKLR, the Court of Appeal held that:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt vs. Khan* [1981] KLR 349)”



17. Additionally, in *Stanley Maore v Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:
- “...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
18. It is noteworthy that in this case the appellant never called any evidence in support of his pleadings. In the case of *Motex Knitwear limited v Gopitex Knitwear Mills limited* Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:
- “Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
19. In the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. That notwithstanding, the respondent still had to formally prove her case.
20. With the foregoing principles in mind, I have examined the evidence of the respondent as to the exact injuries sustained in the material accident which were also pleaded as follows:
- a) Head injury which involves Open wound and swollen right frontal area Stitched cut wound on the right parietal region and scalp Cut wound on the back of the right ear Right ear otorrhoea (ear discharge) Cut wound on both lower and upper lips Lose of two (2) upper teeth Weakened four (4) lower teeth Right upper orbital lacerations Right conjunctiva lacerations
  - b) Sprain on the right shoulder
  - c) Chest pain
  - d) Lower back pain
  - e) Bruises on both knees
  - f) Right hip pain and tender
21. The treatment notes from JOOTRH produced by PW3 lists the injuries as cut wounds on both lips, right conjunctival lacerations, cut wounds of the right parietal scalp & right bank of the ear, lost 2 upper teeth and weakness of 4 lower teeth, bruises on the knees and face and chest pain & tenderness. PW3 further testified that the injuries suffered by the respondent were loss of teeth and other soft tissue injuries.
22. I have considered the authorities cited by both parties and find that they all are comparable to the instant case.
23. In addition, in the case of *James Nganga Kimani & another v Giachagi Njoroge & 2 others* [2019] eKLR where the High Court sitting on appeal awarded the sum of Kshs.200,000/= in view of injuries



categorized as a scar on the nasal bridge and lower limb, broken upper incisor tooth and missing lower incisor of teeth and multiple dental carries; and the case of *Washington Mukunya Karanja & another v Margaret Wambui Maina* [2020] eKLR in which the High Court sitting on appeal upheld the sum of Kshs.300,000/= awarded on general damages to a plaintiff with swelling of upper part of mouth, alveolar fracture of both incisor teeth, soft tissue injuries on right leg and a superficial wound.

24. Taking into account all the factors of inflation and comparable awards, I am not persuaded that I should interfere with the award of Kshs. 400,000 in general damages made by the trial court.
25. As regards the award of future medical expenses, it is my opinion that the submissions have been made based on no pleadings on record. If at all the respondent was dissatisfied with the trial court's award, she ought to have filed a cross-appeal to the instant appeal pleading the issues raised in her submissions. Even though, there was no pleading in the plaint for the cost of future medical care for the trial court to consider in its judgment.
26. This so for the reason that parties cannot rely on submissions to do that which should have been done by pleadings and evidence as was held in the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR. Submissions, it has been held, is not evidence.
27. As a consequence of the above, I find that this appeal lacks merit. It is dismissed with an order that each party bear their own costs of the appeal. Decree to issue and the lower court file to be returned.
28. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

