

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E044 OF 2025**

**EASY COACH LIMITED ..... 1<sup>ST</sup> APPELLANT**  
**JACK OMONDI ..... 2<sup>ND</sup> APPELLANT**  
**- VERSUS -**  
**EDWARD ODWARO ONDHORO ..... RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. J.M. Wekesa SPM delivered on the 20/01/2025 in Nyando SPMCC No. E096 of 2021, Edward Odwaro Ondhoro v Jack Omondi & Easy Coach Limited)**

**J U D G M E N T**

1. The respondents filed the primary suit before the trial court vide a plaint dated **31/05/2021** for general damages, future medical treatments, loss and suffering and special damages of **Kshs. 71,607/-** for injuries sustained following a road traffic accident that occurred on or about the **1/02/2020**.
2. The appellants entered appearance and filed a statement of defence dated **1/09/2021** in which they denied the respondent's claim and claimed that the accident was caused by a third party whom they intimated they would initiate proceedings against.
3. The matter proceeded to trial and by a judgment delivered on **20/01/2025**, the trial court decreed: -
  - a) ***Liability 100% in favour of the plaintiff against the defendants.***
  - b) ***General damages Kshs. 1,200,000/-.***  
***Special damages pleaded and proven Kshs. 46,057/-***

- c) Net award Kshs. 1,246,057/-.*
  - d) Costs of the suit plus interest at court rate from time of delivery of the judgement until payment in full.*
4. Being dissatisfied with the said Judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated 20/02/2025 and raised six (6) grounds of appeal as follows: -
- a) That the trial court erred and misdirected itself in finding that the respondent had proved his injuries and therefore erred in awarding general damages to the respondent.*
  - b) That the trial court erred and misdirected itself in finding that the respondent had proved the pleaded injuries without sufficient, reliable and credible evidence to prove the same.*
  - c) That the trial court erred in making an award under the head of general damages despite the respondent not having produced any initial treatment notes proving the pleaded injuries.*
  - d) That the trial court misdirected itself as to the nature of the respondent's injuries and therefore erred the assessment of damages awardable which was manifestly excessive.*
  - e) That the trial court erred in failing to appreciate and apply the jurisprudence regarding the award of general damages when entering judgment against the appellant and therefore arrived at an erroneous determination on merit.*

- f) That the trial court erred by failing to consider the case law cited in the appellant's submissions and thereby arrived at an erroneous determination on merit.*
5. The appeal was disposed of by written submissions. The appellants submitted that for all the injuries allegedly sustained by the respondent, he did not produce any initial treatment notes to prove his injuries.
  6. That failure to produce proper initial treatment notes in evidence was fatal to the respondent's claim as he alleged to have sustained injuries as was held in the cases of **Peter Migiro v Valley Bakery Limited [2015] eKLR, Amalgamated Saw Mills Ltd v Stephen Muturi Nguru Nakuru HCCA No. 75 of 2005, Timsales Ltd v Wilson Libuywa [2008] eKLR & Fadna Issa Omar v Malne Sirengo Chipu & 3 Others [2016] eKLR.**
  7. That the respondent only sustained injuries to his jaw and teeth and thus an award of **Kshs. 300,000/-** would be reasonable. Reliance was placed in the cases of **Francis Ochieng & Another v Alice Kajimba [2015] eKLR & Alfred Chivatsi Chai & Another v Cecilia Tabu Kitsao [2019] eKLR.**
  8. On his part, the respondent submitted that the P3 form and dental treatment report adduced as evidence outlined the injuries sustained by him and that the initial treatment notes were neither mandatory or the only way of proving injuries as was held in **Henry Binya Oyala v Sabera O. Itira [2011] eKLR.**
  9. That the appellants never disputed the fact that the respondent was injured as a result of the accident as the injuries were in tandem and corroborated by the respondent's oral evidence and police abstract produced in court.

10. That the appellants did not call any evidence to challenge the respondent's injuries in the P3 form hence the evidence remained undisputed. That the respondent was subjected to a second medical examination on 27/03/2023 by the appellants however they failed to file the subsequent report.
11. That the trial court was well guided in the assessment of damages before arriving at the award of **Kshs. 1,246,057/-**. In support of those submissions, reliance was placed on **Silper Okoko & Another v F. Radido & Another [2000] eKLR**, **Bildad Onditi & Another v Belinda Atieno Onyuka [2013] eKLR**, **Ng'ang'a John & Another v David Ogot Agola [2021] eKLR** and **Ahmed Mzee Famau T/A Najaa Coach Limited & Another v Veronica Ngii Muia [2017] eKLR** cases in which the court awarded general damages varying from **Kshs. 500,000/- to Kshs. 750,000/-** for comparable injuries.
12. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123**.
13. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

*“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High 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 allowances in this respect.”*

14. Before the trial court, the respondent testified as **PW1**. It was his testimony that on the **1/2/2020** he was a passenger aboard a bus owned by the 1<sup>st</sup> appellant being driven by the 2<sup>nd</sup> appellant. That at around 4pm when the bus was around Awasi area, it collided with a lorry as a result of the driver's negligent driving.
15. That as a result thereof, he sustained injuries to his upper lip which was hanging down and lost four upper teeth. That he sustained soft tissue injuries to his tongue that was torn. That he underwent first aid at Awasi Mission Hospital before proceeding to Avenue Hospital Kisumu.
16. **PW2 No. 80184 PC Ali Opile** produced the abstract on behalf of the respondent. At the end of his testimony the respondent closed his case. The appellants similarly closed their case without calling any witnesses.
17. From the foregoing, the grounds of appeal may be summarized into one, viz, *‘That the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on quantum and consequently came to a wrong conclusion on the same’*.
18. The appellants' appeal is basically on quantum, which they deem to be inordinately high. The general rule is that assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with an award of damages where it is inordinately high or low as to represent an erroneous estimate.
19. In **Butt v Khan (1977) I KAR**, the Court of Appeal held that: -

***“An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely 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.”***

20. The injuries pleaded and supported by the medical evidence on record are as follows:

- a) **Fractured jaw**
- b) **Lost upper incisors**
- c) **Lacerations of the forehead & lower limbs**

21. The said injuries were provided in the P3 and Dental Treatment Report that were produced by consent of both parties as **Exhibit 5 & 6**.

22. The appellant impugned the judgment on the grounds that initial treatment notes showing the aforementioned injuries was not produced by the respondent thus the injuries were not proved. The law is clear that he who alleges must prove. **Section 107 of Evidence Act** defines the burden of proof.

23. **Section 109 of the Evidence Act** exemplifies the rule in **section 107** on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

24. The question therefore is, whether the respondent discharged the burden of proof that he sustained the injuries alleged in his plaint. He testified on those injuries and produced the P3 form and Dental Treatment Report which supported his contention as to the injuries sustained. To this Court's mind, the failure to produce the initial treatment notes was not fatal. It did not water down the effectiveness of the P3 form and the Dental Treatment Report that were produced in evidence. The latter two were sufficient to prove the injuries pleaded.

25. It must be noted that the appellants did not produce any evidence to challenge the respondent's case. In **Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002**, Lessit, J (as she was then) 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.”*

26. From the record, it is thus clear that the appellants never disputed the fact that the appellant was injured as a result of the accident as the injuries were in tandem and corroborated by the respondent's oral evidence and police abstract produced in court.

27. In any case, this Court is of the considered view that the respondent had discharged the burden of proof and proved his case on a balance of probabilities, that the appellants' driver was negligent, causing the aforesaid accident and that as a result thereof he sustained injuries.

28. The Court of Appeal in **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** stated: -

*“Since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them.”*

29. Consequently, a look at the medical record presented by the respondent revealed that in addition to the soft tissue injuries sustained to the forehead and lower limbs he also sustained fractured jaw as well as losing his upper incisors.

30. In considering comparable awards, I have examined the decisions cited by both parties and find that those relied on by the appellants to be more comparable.

31. In the case of **Silper Okoko & Another v F. Radido & Another [2000] eKLR** the court awarded a sum of **Kshs. 700,000/-** for loss of teeth, and the case of **Bildad Onditi & Another v Belinda Atieno Onyuka [2013] eKLR** in which an award of **Kshs. 750,000/-** was made for loss of teeth in the upper jaw, fracture of the tooth and multiple soft tissue injuries.

32. The trial court awarded the respondent general damages of **Kshs. 1,200,000/-**. Upon review of the decisions mentioned above, it is clear that

the damages was inordinately high, as to suggest application of a wrong principle. The authorities relied on by the appellants on the other hand, were made more than a decade ago.

33. Accordingly, this Court reduces the award of **Kshs. 1,200,000/-** to **Kshs.1,000,000/-** considering the nature of the injuries sustained. The award of costs and interest remain undisturbed.

34. The appeal is successful. I set aside the award by the trial court on general damages and substitute therefor with an award of **Kshs. 1,000,000/-**. The award of special damages remains undisturbed. Each party shall bear its own costs.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this **31<sup>st</sup>** day of **October, 2025**.

**A. MABEYA, FCI Arb**  
**JUDGE**