

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E041 OF 2024

YUSUF WESONGA AMAUDA APPELLANT
- VERSUS -
JOHN WAITHAKA THUO RESPONDENT

**(Being an appeal from the judgment and decree of Hon. G.N. Barasah (SRM)
delivered on the 5/2/2024 in Kisumu CMCC No. E083 of 2023, Yusuf Wesonga
Amauda v John Waithaka Thuo)**

J U D G M E N T

1. The appellant moved the trial court vide a plaint dated 7/3/2023. He sought general and special damages for injuries sustained following a road traffic accident that occurred on the 29/1/2023 involving motor vehicle registration number **KCT 080A SCANIA BUS** in which he alleged to have been a passenger and which vehicle was owned by the respondent.
2. The respondent entered appearance and filed a statement of defence dated 12/4/2023 in which he denied the appellant's claim and further alleged negligence on the part of the appellant.
3. The matter proceeded to trial and by a judgment delivered on 5/2/2024, the trial court decreed: -

a) Liability 100% in favour of the plaintiff against the defendant.

b) General damages Kshs. 200,000/-.

Special damages Kshs. 20,940/-

c) Net award Kshs. 220,940/-.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **4/3/2024** and raised seven (7) grounds of appeal summarized as follows: -

- a) *That the trial court erred in law and fact in failing to consider the submissions by the appellant on the issue of quantum.*
 - b) *That the trial court erred in law and in fact in failing to appreciate the fact that the appellant suffered disability due to the injuries sustained.*
 - c) *That the trial court erred in law and fact in using the wrong principles in the assessment of damages thereby arriving at an erroneous decision.*
 - d) *That the trial court erred in law and fact by failing to take into account the evidence on record hence arriving at a wrong decision.*
 - e) *That the trial court erred in awarding the plaintiff Kshs. 200,000/- in general damaged which was very low thereby arriving at a wrong decision.*
5. The appeal was to be disposed of by written submissions however at the time of writing this judgement, only the respondent's submissions were on record.
6. The respondent submitted that he fully concurred with the decision of the trial court. That the trial court was guided by the exhibits produced in court as evidence and thus did not err in making the award of **Kshs. 200,000/-** in damages.

7. The respondent relied on a number of cases where awards ranging from **Kshs. 100,000/- – 300,000/-** were awarded for comparable injuries. The said cases included **Shengli Engineering Construction Limited v Kitheka Mutua (2019) eKLR**, **Maseno University College v Elizabeth Kerubo Mokaya (2021) eKLR**, **Martin Mutuku & Another v SN (Suing through his mother & next friend DC) [2021] eKLR**, **H Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** and the case of **Annet Noti Jefwaa Kayaa v David Njau Kungu & Another [2019] eKLR**.
8. 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** and **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**.
9. Before the trial court, the appellant testified as **Pw1** and adopted his witness statement dated **3/3/2023** as his evidence in chief. It was his testimony that following the road traffic accident while travelling in the respondent's vehicle, he sustained injuries on his right hand, left ear and forehead. That the vehicle was being driven at a high speed. That he was treated at JOOTRH then Bungoma District Hospital.
10. In support of his case, the appellant with consent of the respondent, produced a Discharge Summary from JOOTRH as **PEXh1a**, Invoice amounts as **PEXh1b**, Discharge Summary from Bungoma District Hospital as **PEXh2**, P3 Form as **PEXh3**, Medical report dated **1/3/2023** as **PEX5a** and Supplementary medical report dated **22/6/2023** as **PEXh5b**.

11. At the end of this testimony the appellant closed his case as did the respondent.

12. 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’.***

13. The appellants’ appeal is basically on quantum, which they deem to be inordinately low. 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 shown to be inordinately high or low as to represent an erroneous estimate.

14. 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.”

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

- a) **Cut wound to the left ear**
- b) **Friction burns to the left shoulder**
- c) **Degloving laceration wound to the right hand**

16. The said injuries were provided in the Discharge Summary from Bungoma District Hospital produced as **PEXH2**, P3 Form produced as **PEXH3**, Medical report dated **1/3/2023** produced as **PEXH5a** and Supplementary medical report dated **22/6/2023** produced as **PEXH5b**. Dr. Charles Andai who last examined the appellant noted that the appellant had sustained serious soft tissue injuries and that the partial stiffness of the right index and middle fingers was permanent. The Doctor further stated that the scar on the left shoulder was in the process of forming a keloid that would require excision and radiotherapy in future.

17. It must be noted that the respondent did not produce any evidence to challenge the appellant'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 1st 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.”

18. From the record, it is clear that the respondent never disputed that the appellant was injured as a result of the accident. The injuries were in tandem with and were corroborated by the appellant's oral testimony and the various supporting exhibits produced.

19. This Court is of the considered view that the appellant had discharged the burden of proof and proved his case on a balance of probabilities, that he sustained the injuries pleaded.

20. In considering comparable awards, I am alive to the fact that no two cases can be completely similar. I have examined the decisions cited by the respondent.

21. In **Easy Coach Ltd v Emily Nyangasi [2017] eKLR**, an award of **Kshs. 700,000/=** was upheld by the appellate court and the injuries suffered were; Facial injuries, Injury to chest, injury to back, injury to right hand with cut wound, injury to right leg with cut wounds. The learned Judge observed that;

“The most serious injuries were on the right hand which healed with a 10cm scar with keloid formation on the elbow and on the right leg which was treated through grafting and healed with 18cm scar right thigh, 26cm scar right leg, 28 cm scar right leg below the knee and 12 cm scar right foot with keloid formation.”

22. The trial court awarded the respondent general damages of **Kshs. 200,000/-**. Upon review of the decision above, it is clear that the damages were inordinately low, as to suggest application of a wrong principle.

23. Accordingly, this Court set aside the award of **Kshs. 200,000/-** and replaces it with one of **Kshs. 350,000/-** considering the nature of the injuries sustained. The award of costs and interest remain undisturbed.

24. The appeal is successful. I set aside the award by the trial court on general damages and substitute therefor with an award of **Kshs. 350,000/-**. The

award of special damages remains undisturbed. Each party shall bear own costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **14th** day of **November, 2025**.

A. MABEYA, FCI Arb
JUDGE