

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E188 OF 2024**

**BETWEEN**

**BONFACE NDAMBUKI MWEU**

.....**APPELLANT**

**AND**

**JOSHUA MUTUKU MBITHI.....**

**RESPONDENT**

*(Being an appeal from the judgment of Hon. P. Wechuli  
(Principal Magistrate) delivered in PMCC No. E89 of 2022 at  
Kithimani Law Courts)*

**JUDGMENT**

**Background**

1. This appeal arises from the judgement delivered in Kithimani PMCC No. E89 of 2022 in which the learned trial magistrate awarded the respondent Ksh 1,000,000 as general damages arising from a road accident that occurred on 8<sup>th</sup> April 2021.
2. In the plaint dated 4<sup>th</sup> April 2022, the respondent, claimed he was lawfully riding on a motor cycle registration number KMEP 927X along Matuu- Thika road when the appellant negligently and/or carelessly drove, managed and/or controlled motor vehicle registration number KCK 176S Toyota Station Wagon. As a result, the vehicle lost control

and rammed into the rear of motor cycle causing the respondent to sustain serious bodily injuries. The respondent therefore sought special damages of Ksh.20,105/- general damages for pain, suffering and loss of amenities, costs of the suit, interests on special damages, general damages and costs of the suit and any other relief the court deemed fit.

3. In a defence dated 30<sup>th</sup> June 2022, the appellant denied the respondent's claim in its entirety and put him to strict proof. Without prejudice, the appellant further pleaded that the accident was wholly caused by, and/or was substantially contributed to, by the negligence of the respondent.
4. The trial court subsequently rendered a judgment in which it found that the respondent had proved, on a balance of probabilities that the appellant was liable for the accident. However, liability was apportioned at the ratio 90:10 as the court determined that the respondent was riding without being a qualified driver.
5. The court awarded Ksh.1,000,000 as general damages and Kshs.17,105 as special damages.
6. This decision has triggered this appeal. Through the Memorandum of Appeal dated 15<sup>th</sup> July 2024 the appellant raises three (3) grounds reproduced verbatim as follows.  
That:-

***(1) The learned trial magistrate erred in law and in fact in finding that the plaintiff was entitled***

***to general damages of Kshs.1,000,000.00/= which is manifestly excessive in the circumstance in view of the injuries suffered by the plaintiff that it presented a miscarriage of justice.***

***(2) The learned trial magistrate erred in law and in fact by failing to consider the defendant's/ appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.***

***(3) The learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is manifestly excessive in the circumstance.***

7. Consequently, the appellant prays for the appeal to be allowed with costs, that the judgment of the lower court on general damages be set aside, and that this court be pleased to re-assess the general damages payable to the respondent.
8. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 7<sup>th</sup> April 2025 in support of the appeal while the respondent filed written submissions dated 24<sup>th</sup> March 2025 in rebuttal. I have summarised these submissions below.

### **Appellants' Submissions**

9. The appellant faults the trial court for failing to consider the authorities he cited namely, **GA (Minor suing through her father and next friend BZO v. Paul Muthuku [2020] eKLR and Specialized Aluminum Renovators Limited & Another v. Stephen Mutuku Musyoka [2021]**. He contends that the injuries in those cases were analogous to the injuries in the present case.
10. He further faults the trial court for relying on the decision in **George Otieno vs Attorney General & Anor (2006) eKLR**. In that case, the plaintiff suffered quadriplegic injuries and was unable to walk without walking aids following gunshot wounds that fractured the spinous process of his vertebrae at C3. The appellant argues that the respondent's injuries were comparatively less severe, and therefore the trial court erred in adopting that precedent.
11. The appellant relies on the case of **Jabane vs Olenja (1986) KLR** where the court held "*in assessment of general damages, it must be borne in mind that each case depends on its own facts; awards should not be excessive, comparable injuries should attract comparable awards.*"
12. The appellant submits that he has met the threshold set out in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and OliveLubia**

**(1982 -88) 1 KAR 727** justifying this court's interference. He argues that the trial court either considered irrelevant factors or failed consider relevant ones, resulting in an inordinately high award.

13. The appellant also contends that the trial court erred in awarding Kshs.17,105 as special damages, while the respondent only proved special damages of Kshs.7,840. These comprised Kshs.5,000 for a medical report, Kshs.550 for a motor vehicle search, Kshs.140 for postage and Kshs.2,150 for medical expenses.

14. In conclusion, the appellant urges this court to set aside the trial court's judgment on quantum and to re-assess the general damages payable to the respondent.

### **Respondent's Submissions**

15. The respondent submits that the award of Kshs.1,000,000 was not excessive given the severity of the injuries sustained. He relies on the decisions in **Elizabeth Akinyi Ounda -Vs- Abubakar Wilberforce HCCA No. E016 & E118 of 2023-Bomet, R. Lagat - Korir, J. 19.6.2024** and **Mumias Sugar & Company Limited -Vs- Mohammed Kweyu Shaban HCCA No. 14 of 2016 - Kakamega, J. Njagi, J. 14.6.2018**, where the courts awarded Ksh.2,800,000 and Ksh.800,000 respectively.

16. He submits that the learned magistrate carefully considered the evidence, exhibits and the defendant's

written submissions, as well as the relevant law before awarding general damages.

17. The respondent emphasizes that the trial court took into account the severity of his injuries and conventional awards for general damages for pain and suffering in arriving at a figure that was reasonable and not excessive in the circumstances.

18. The respondent concludes by urging this court to dismiss the appeal with costs, as it lacks merit.

### **Analysis and Determination**

19. I have considered the grounds of appeal, examined the record of appeal and reviewed the submissions of the parties. It is clear that this appeal challenges only the quantum of damages awarded by the trial court.

20. Accordingly, the issues for determination by this court are whether the awards for general damages of Ksh.1,000,0000 and special damages of Ksh.17,105 granted by the trial court were erroneous, unjustified and/or excessive in the circumstances of this case.

21. This being a first appeal the principles in **Selle v. Associated Motor Boat Co. Ltd [1968] EA** apply. The appellate court has a duty to re-valuate both law and facts subjecting the evidence to fresh and exhaustive scrutiny, while bearing in mind the fact that it did not have the advantage of seeing and hearing the witnesses first hand.

22. Turning to the award of general damages, the trial court granted Ksh.1,000,000 as general damages. The appellants argue that this amount is excessive while the respondent maintain that the award was proper.

23. The Court of Appeal in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR** is categorical that:

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”*

24. Similarly in **Butt v. Khan Civil Appeal No. 40 of 1997** it was held:

*“An appellate court will not disturb an 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 arrive at a figure which was either inordinately high or low.”***

25. The principles are therefore settled: interference is warranted only where the award is manifestly excessive or inadequate, or where irrelevant considerations were applied. The question, then, is whether the award of Kshs. 1,000,000 was excessive and unjustified.

26. In **Denshire Muteti Wambua - v- Kenya Power & Lighting Co, Ltd. Civil Appeal No. 60 of 2004**, where the court of appeal emphasized that: “***...awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness***” and as was stated by Lord Denning in **Kim Pho Choo - v - Camden & Islington Area Health Authority, (1979) 1 All ER 332**, 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.

27. In **Simon Taveta v Mercy Mutitu Njeru [2014] KECA 755 (KLR)**, the court of appeal observed at paragraph 18 that “***the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.***”

28. Thus, I note that in **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J**

***N [2018] eKLR** the court observed that “Having considered the decisions cited, I find that the trial magistrate erred in not considering the nature and extent of the injuries in light of the decision relied on to reach the award of Kshs. 950,00/-. The child sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future. The child did not suffer any permanent disability. Consequently, I set aside the judgment of the trial court and substitute it with an award of Kshs. 500,000/- as general damages.”*

29. Further, in **Silas Muthuri Muraga & another v Margaret Mwengwa Munene [2015] KEHC 769 (KLR)**, the plaintiff suffered fracture of the sixth cervical (neck), cut on the forehead and laceration on the lower limb. General damages for pain suffering and loss of amenities assessed at Kshs. 650,000.

30. Also, in **Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR** where the respondent had been awarded general damages of Ksh.700,000 in the lower court and was revised by the High Court to Ksh.500,000 for multiple facial lacerations; depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruise on both knees.

31. Further, in **Specialized Aluminum Renovators Limited & Another v. Stephen Mutuku Musyoka [2021]** where for similar head injuries as in the instant case, the learned Judge set aside an award of Ksh.800,000 and is substituted with an award of Ksh.500,000.
32. In the instant case, the trial court relied on the decision in **George Otieno V Attorney General & Another [2006] KEHC 2744 (KLR)** where the claimant suffered re quadriplegia injuries due to gun shots to his neck with a 45per cent degree of disability. That case involved far more severe injuries than those sustained here. The Medical Report of Dr. Kioko dated 28<sup>th</sup> January 2022 indicates that the respondent suffered head and neck injuries that were managed conservatively using neck corset, physiotherapy and analgesics.
33. In addition, the Medical Report of Dr. Ruga dated 25<sup>th</sup> August 2023 states that the respondent suffered neck injury with fracture of odontoid treated with neck support, medication and physiotherapy. At the time of examination, the respondent was in good condition, with normal neck movement and no pain or deformity. Dr. Ruga opined that the respondent suffered severe harm and that the injuries had healed well.
34. it follows that the authority relied upon by the trial court was not comparable to the instant case. The respondent's injuries, though serious, were not of the same

magnitude as those cited. Further, I note that the decisions relied on by the respondents to urge their case, **Elizabeth Akinyi Ounda -Vs- Abubakar Wilberforce HCCA No. E016 & E118 of 2023-Bomet, R. Lagat - Korir, J. 19.6.2024** and **Mumias Sugar & Company Limited -Vs- Mohammed Kweyu Shaban HCCA No. 14 of 2016 - Kakamega, J. Njagi, J. 14.6.2018**, where the courts awarded Ksh 2,800,000 and Ksh 800,000 respectively were made for more serious injuries than in the present case.

35. As such, I am unpersuaded by the authorities relied on by the appellants because they do not constitute comparable awards in the circumstances of this case.

36. Subsequently, I am of the opinion that the trial court's award of Ksh.1,000,000 was excessive and unjustified. The trial court did not take into account comparable awards made in the past and did not base the award on them. Accordingly, I find that the award of Kshs.1,000,000 was on the higher side and therefore substitute to an award of Kshs.700,000 as general damages for pain and suffering and loss of amenities which I consider to fall within the bracket and requirement that comparable awards need to meet comparable injuries. I also consider that sum to be the fair and reasonable compensation in the circumstances of the case.

### **Award on special damages.**

37. On the award of special damages, the trial court awarded Kshs.17,105. It is the appellant's case that this award was not proved.

38. It is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. The Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985]** KLR 716, at P. 717, and 721 held: ***“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”***

39. I note that the respondents claim for special damages was of Kshs.20,105 being medical report, Ksh.5,000, copy of records Ksh.550, P3 form Ksh.3,000, treatment expenses Ksh.11,415 and postage Ksh.140.

40. Having gone through the record, I have determined that the special damages pleaded and proved were medical expenses of Kshs.2,150, medical report of Kshs.5,000, motor vehicle search of Kshs.550 and, postage of Kshs.140 all totaling to Ksh.7,840. Thus, the trial court's finding on special damages was erroneous.

41. Accordingly, having appraised the evidence afresh, I find that the appellant has established his case. The appeal is therefore allowed and the subordinate court judgment in respect of general damages is substituted as follows

a. General damages Kshs.700,000/-

b. Special damages Ksh.7,840

**Less 10% liability**

**Total 637,056/-**

c. Each party to bear its own costs of the appeal.

It is so ordered.

Dated, signed and delivered at Machakos this 14<sup>th</sup> day of January, 2026.

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant