



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. E066 OF 2024**

**MAXWELL INGOSI SHIABULO .....**

**APPELLANT**

**VERSUS**

**JAMES SHIKWATI .....**

**RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. T. Obutu (CM) in Mumias CMCC. No. E123 of 2022 delivered on 18/03/2024)***

**JUDGEMENT**

1. The Respondent herein had filed a plaint dated 20<sup>th</sup> October 2022, where he averred that he was a lawful rider of motorcycle registration Number KMFX 207W along the Mumias-Kakamega road when the Appellant/defendant, who was driving motor vehicle registration Number KCJ 684Z, Toyota Hiace, lost control and hit him, causing him severe injuries, loss and damages. The respondent sought relief, seeking General damages

for pain and suffering, together with special damages of Kshs. 10,750/=.

2. The Appellant entered appearance and denied liability. The matter proceeded to a full hearing, and in its judgment dated 28th March 2024, the trial court held that the Appellant was 100% Liable for the accident because he failed to apply the brakes and avoid it.
3. On the issue of quantum, the trial court, upon considering both parties' submissions, stated that as the plaintiff had lost 6 teeth among other injuries, the Kshs. 80,000/ = suggested by the appellant was too low, and the court awarded general damages of Kshs. 300,000/= and special damages of Kshs. 7,850/=.
4. The Appellant, being dissatisfied with the judgment by the trial magistrate, appealed against both the liability and the quantum based on the following grounds;
  - a) *THAT the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions on the issue of quantum.*
  - b) *THAT the learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages, thereby arriving at an*

*erroneous decision and/or excessive award in general damages.*

*c) THAT the learned trial magistrate erred in law and fact in awarding the respondent Kshs. 300,000/= as general damages, which were excessive in the circumstances.*

5. They pray that the appeal be allowed and that the damages awarded be set aside and re-assessed downwards.

6. The appeal was canvassed by way of written submissions.

### **Respondent's Submissions**

7. The Respondent submitted that the record of appeal and the memorandum of appeal were defective as there was no judgment delivered on 18<sup>th</sup> March 2024. Since the Appellant did not seek leave to remedy the mistake, it cannot be ignored.

8. He stated that the record of appeal did not bear a certified decree of the lower court and quoted the Supreme Court case of **Bwana Mohammed Bwana vs. Silvano Buko Bonaya & 2 others [2015] eKLR** and the High Court case of **Kilonzo David t/a Silver**

**Bus Company vs. Kyalo Kiliku & another [2018]**

**eKLR**, holding that the omission to include the decree or an order was not a procedural technicality as stipulated under Order 42 Rule 2 of the Civil Procedure Act and as such, it cannot be ignored.

9. He held that although the appeal was unmeritorious, the Respondent testified that he was hit from behind. His evidence was uncontroverted, and the Appellant did not offer any evidence; the allegations in the statement of defence remained mere statements.
10. He further submitted that the defendant had failed to file any evidence against the plaintiff's claim, quoting the case of **North End Company Limited (carrying on the Business under the registered name of Kenya Refuse Handlers Limited vs. City council of Nairobi [2019] eKLR**, quoting section 107 of the Evidence Act. They hold that the appeal on liability hence fails. He further relied on the case of **Bhupinder Singh Bhangaravs. Joel Tumei Koech Eldoret HCCA No. 12B of 2002**.
11. On the issue of quantum, which the Appellant holds was excessive, he quoted several cases, including

**Jeremiah & Brothers Contractor & another vs. Francis Egusangu Kaguli [2020] eKLR, Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR.**

12. He pleaded that they sustained injuries, including a Head injury with mild loss of consciousness, blunt injury to the head, blunt injury to the chest, Blunt injury to the left knee, Lacerations on the left leg, which were corroborated by Dr Joseph Sokobe, who examined him after the accident.
13. He submitted that the general damages of Kshs. 300,000/= which the trial magistrate awarded, was not excessive in the circumstances, praying that the trial court uphold the same amount.
14. He held that the appeal was unmeritorious and should be dismissed with costs.
15. At the time of writing this judgment, the Appellant had not yet filed their submissions.

### **Analysis and Determination**

16. The duty of the court in a first appeal, such as this one, was stated in **Selle & another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123** as follows: “/

***accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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."***

17. This court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it did not see nor hear the witnesses first-hand and should make due allowance in this respect. In particular, this court is not necessarily bound to follow the trial court's findings of fact if it appears either that it clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.
18. The Appellant in his memorandum of appeal states that the quantum awarded by the trial court, specifically the general damages of Kshs. 300,000/= was excessive given the nature of the injuries sustained.

19. In its judgment dated 28<sup>th</sup> March 2024, the trial court found that the Appellant was 100% liable for the accident, while on the issue of quantum, it stated that the Respondent had inter alia, lost 6 teeth as a result of the accident and awarded Kshs. 300,000/= as general damages.
20. 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 was quoted in the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another, (1982-88) 1 KAR 777***, which stated 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 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. (See Ilango - v- Mayoka (1961) EA 705,709-713)."***

21. The context in which general damages for the injuries sustained by the Respondent must be evaluated is guided by the nature and extent of the injuries proven to have been a direct result of the accident, and comparable awards made in previous claims with similar injuries.
22. The Respondent highlighted his injuries in his pleadings as follows; head injury with mild loss of consciousness, blunt injury to the head, blunt injury to the chest, blunt injury to the left knee and lacerations on the left leg.
23. The Respondent further produced a medical report by Dr Joseph Sokobe dated 22/08/2022, which indicated that he had sustained head injury with mild loss of consciousness; blunt injury to the head; blunt injury to the chest; blunt injury to the left knee; and lacerations on the left leg. In his prognosis, the doctor held that the Respondent had healed scars on the left leg and mild tenderness on deep chest palpitation. In his opinion,

the Respondent had sustained soft injuries from which he recovered well.

24. In the report by Dr Steve Ochieng dated 23/05/2023, the doctor stated that there was a healed hypertrophic scar on the left knee and that the patient had been missing 6 lower teeth, which were replaced with temporary dentures. In his recommendation, the doctor held that the victim had blunt injury to the chest, left knee, ankle and bruises.
25. Upon analyzing the judgment dated 28<sup>th</sup> March 2024, I note that the trial magistrate, in awarding the general damages of Kshs. 300,000/=, expressly relied on the second finding that the Respondent had six missing teeth, among other injuries, as a result of the accident. This factor materially influenced the court's decision to grant the award.
26. However, upon re-evaluation of the pleadings and the medical evidence, it becomes apparent that the alleged loss of teeth stated in the judgment was not a result of the accident. It was a routine finding made by the Appellant's doctor upon a physical examination of the Respondent.

27. The injuries pleaded and proven were: head injury with mild loss of consciousness, blunt injury to the head, blunt injury to the chest, blunt injury to the left knee, and lacerations on the left leg. The medical report by Dr Joseph Sokobe, dated 22/08/2022, classified these as soft tissue injuries from which the Respondent recovered well, with healed scars on the left leg and mild tenderness on the chest. Dr Steve Ochieng's report dated 23/05/2023 confirmed blunt injuries to the chest, left knee, ankle, and bruises, with a healed hypertrophic scar on the left knee.
28. In **Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa [2020] eKLR**, the Respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest, and blunt object injury to the left wrist and was awarded Kshs. 300,000/=. On appeal, the court set aside that amount and awarded Kshs. 150,000/=.
29. In **Hantex Garments (Epz) Ltd Vs Haron Mwasala Mwakawa [2017] eKLR**, Njoki Mwangi J upheld an award of Kshs. 100,000/= in a case where the

Respondent had sustained bruises, blunt trauma, swelling and tenderness on the right leg.

30. In **Pascal v Ouko [2023] KEHC 24463 (KLR)**, the Respondent suffered a chest contusion, blunt trauma to the back, blunt trauma to the scalp, blunt trauma to the neck, blunt trauma to the upper limbs, blunt trauma to the lower limbs, Lacerations on the right knee and was awarded Kshs. 200,000/=. On appeal, Korir J set aside that amount and awarded Kshs. 150,000/=.
31. Upon evaluating the applicable principles governing assessment of general damages, and taking into account the nature and extent of the injuries sustained, I am persuaded that an award of Kshs. 300,000/= for the soft tissue injuries suffered by the Respondent constitutes a wholly erroneous estimate of the damages suffered. The figure is manifestly excessive and falls outside the range of comparable awards made for similar injuries, thereby warranting appellate interference.
32. Considering the Respondent suffered a mild loss of consciousness and was left with a residual scar, his injuries went beyond mere soft tissue injuries, however.

Nevertheless, I note that his recovery was without permanent incapacity - an award of Kshs. 200,000/= would be appropriate and commensurate with the injuries sustained.

33. The upshot is that this appeal has merit, and the same is allowed. The trial court's award of general damages in the sum of Kshs 300,000/= is hereby set aside, and the same is substituted with an award of Kshs. 200,000/=.

34. The Appellant is awarded half the costs of this appeal.

35. Orders accordingly.

Dated, signed, and delivered at Kakamega, this 12<sup>th</sup> day of February 2026.

**A. C. BETT**  
**JUDGE**

**In the presence of:**

Ms Turgut holding brief for Ms Wesonga for the Appellant

Ms Oriko holding brief for Mr Okara for the Respondent

Court Assistant: Polycap

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