



**Esther & another v Kinyua (Civil Appeal E1348 of 2023)
[2025] KEHC 27 (KLR) (Civ) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 27 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E1348 OF 2023
RC RUTTO, J
JANUARY 13, 2025**

BETWEEN

**NGARI WARUGURU ESTHER 1ST APPELLANT
ELIAS NGARI EZEKIEL 2ND APPELLANT**

AND

GEOFFREY MUCHUI KINYUA RESPONDENT

(Appeal from the judgment of Honourable E.Wanjala (PM) delivered on 27th October 2022)

JUDGMENT

1. The Appellants being dissatisfied with the judgment delivered on 27th October, 2022 filed a memorandum of appeal dated 1st December, 2023. The grounds of appeal are as follows:
 - i. The Learned Magistrate erred in law and in fact in failing to consider the Defendants evidence by way of submissions on record.
 - ii. The Learned Magistrate erred in Law and in fact in awarding the General Damages of Kenya Shillings One Million Three Hundred Thousand (Kshs. 1,300,000/=) which is excessive for the injuries suffered by the Plaintiff.
 - iii. The Learned Magistrate erred in law and in fact in making an award for General Damages, which is too high in comparison with current awards for similar injuries as per the authorities in the Defence submissions.
 - iv. The Learned Magistrate erred in law and in fact in awarding General Damages for Loss of earning capacity when the same was not pleaded and proved.



- v. The Learned Magistrate erred in law and in fact in awarding Special Damages of Kshs. 200,710/= when the same were not specifically pleaded and proved.
 - vi. The Learned Magistrate erred in law and in fact in awarding Future Medical Expenses when the same were not specifically pleaded, proved and prayed for.
2. The Appellants urged the court to set aside the judgment in the trial court and substitute the same with a judgment dismissing the Respondent's case with costs.
 3. The court on 21st June, 2024 admitted the appeal for hearing and the same was heard by way of submissions.
 4. In its submission dated 10th June 2024, the Appellant herein submitted under the following heads; general damages, loss of earnings capacity and special damages.
 5. On general damages the Appellant submitted that an award of Kshs 1,300,000/= was not commensurate with the current awards in similar cases. That the Respondent sustained compound open fracture on the right radius and fracture on the left radius with total disability assessed at 20%. They proposed that an award of kshs 300,000/- would have been sufficient. To support his argument, he relied upon the case of *Kago & Another v Karoki & Another Civil Appeal 337 of 2023 (2024)KEHC5828(KLR)* where the High Court upheld an award of ksh. 700,000/- as general damages for grievous harm and 20% permanent disability. Also relied upon was the case of *Koyi v Obanga Civil Appeal No. 73 of 2017(2022)KEHC 9772 (KLR)* where the injuries were more grievous and an award of kshs 400,000/- was upheld
 6. On loss of earnings, the Appellant submitted that an award of kshs 200,000/- would have been sufficient and relied on the *Koyi v Obanga*(supra). He faulted the trial court for not making reference to similar cases.
 7. On special damages, it was submitted that the trial court awarded kshs 200,710/- being costs of motor cycle, medical report and medical expenses of kshs 100,000/-, yet the respondent pleaded a sum of kshs 153,146/- being hospital expenses which the trial court noted that it had not been wholly proved. That the trial court erroneously made reference to a sum of kshs 53,140/- being the invoiced amount but from that exhibit the correct amount is kshs 83,146/-. It was their submission that only a sum of kshs 73,000/- had been proven.
 8. On future medical expenses the Appellant submitted that the medical report indicated that "elective removal of the metal plate" which cost could reduce if done in a public hospital thus he submitted that an award of kshs 100,000/- should be substituted with a lesser amount.
 9. The Appellant urged the court to find that the trial court proceeded on the wrong principles or misapprehended the law and allow the appeal with costs.
 10. The Respondent in its submissions dated 15th June 2024 urged the court to reconsider and re-evaluate the evidence and set out four issues for determination summarized as follows; whether the general damages were excessive in the circumstance; whether the award of kshs 500,000/- for loss of earnings capacity was pleaded and proven; whether special damages of kshs 200,710/-was pleaded and proven and whether future medical expenses were pleaded, proven and prayed for.
 11. The Respondent urged the court to be guided by the decision in the case of *Bunde Makube (an infant suing by his next friend Thomas Bundi) vs Joseph Onkoba (1983)* and not to interfere with the award made by the trial court since no irrelevant factors were considered in the assessment of damages.



12. It was submitted that the award of kshs 1,300,000/- for general damages was not exorbitant or excessive and that the court was guided by the respondent medical report which was not controverted. Reference was made to the case of BN(Minor suing through next friend IMS)v Mary Chebet Koskey Chumo & 3 Others (2021 eKLR) and Geoffrey Mwaniki v Ibero (K) Limited & another eKLR where in both cases an award of kshs 2,000,000/- was awarded as general damages. He urged the court to grant an award of kshs 3,000,000/- .
13. On loss of earning, it was submitted that the respondent was making not less than 1500/- per day by operating his motor bike. That he has since become totally dependent on his family. Thus, he submitted that an award of ksh 500,000/-is reasonable in the circumstances and within the global award. In support of this, reference was made to the case of SBI International Holdings (AG)Kenya vs William Ambuga Onger (2018) eKLR.
14. On Special damages it was submitted that the Appellant assertions were not correct, that a simple calculation of the receipts produced amounted to kshs 200,710.
15. The Respondent submitted that they pleaded future medical expense of ksh 100,000/= and produced a medical report that confirmed that indeed he needed the removal of the metal plate. He urged court to find that this head was pleaded and strictly proved. Reference was made to the case of Capital Fish Limited v Kenya Power & Lighting Company Limited (2016) eKLR. In conclusion, the respondent urged the court to find no merit in the Appeal and dismiss the same in its entirety.

Analysis and determination`

16. Upon reviewing the record of appeal, the appellant’s submissions and the pleadings, the sole issue for determination is whether the award on quantum was excessive in the circumstances. This issue will be addressed under the following headings:
17. General damages; This Court notes that the Respondent’s injuries are undisputed. The respondent sustained the following injuries: a compound (open) fracture of the right radius and a fracture of the left radius. According to the medical report, the total disability was assessed at 20%.
18. In arriving at the quantum, the trial court made reference to the cases referred to by both the Appellant and the Respondent. The trial court considered the award made in the case of Kakuzi Limited v Stephen Njoroge Mungai & Another (2020) eKLR as well as the inflation rate and awarded the sum of kshs 1,300,000/- as general damages for pain and suffering.
19. This court makes reference to the case of Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2) (1985) eKLR where the Court of Appeal held 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 court are that the trial court took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
20. Thus, this calls for this court to re-examine the same in order to determine whether the award was comparable to similar injuries or was inordinately higher to warrant substitution.
21. In Karanja & Another v Mwachala (Civil Appeal E749 of 2021)(2024) KEHC 7171 (KLR) (4 June 2024) the appellate court set aside the award of general damages of kshs 900,000 and substituted the same with an award of kshs 700,000/ for the following injuries; compound (open) fracture of left tibia and compound open fracture of the left fibula. That decision was delivered in June 2024.



22. In *Mwangi v Siloma* [*Another \(Civil Appeal E102 of 2022\)*](#) (2023) KEHC 26140 (KLR) 27 November 2023 the court set aside the award of ksh 800,000/- damages and substituted with kshs 1,200,000/- for the following injuries fracture distal end of the right tibia and fibula; fracture left lateral malleolus of the left ankle joint; fracture proximal end of the humerus; blunt injury to the left hand leading to post traumatic radial nerve palsy; soft tissue injuries to the right leg and left ankle joint. Permanent disability was assessed at 30%. This court notes that these were more serious injuries as compared to the injuries sustained by the Respondents.
23. Consequently, after a careful perusal of the authorities provided, this court finds that the trial magistrate award of kshs 1,300,000/= is inordinately high, in view of the injuries sustained by the respondent namely a compound (open) fracture of the right radius and a fracture of the left radius. That being the case, I substitute it with an award of Kshs. 800,000/= general damages for pain and suffering
24. On loss of earnings – this court notes that the Respondent specifically pleaded and prayed for the loss of earnings. In his evidence he testified that he was a rider. The trial court in awarding the global amount for the claim for loss of earnings considered the extent of disability suffered, and age of the victim since the income was not pleaded and not ascertainable.
25. In *Mumias Sugar Company Ltd vs Francis Wanalo* (2007) eKLR case, the Court of Appeal stated: “The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future... The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”
26. In this instance, this court notes that the lower court record indicates that the accident occurred while the respondent was riding his motor cycle in the course of his work. In addition, he produced a copy of his driving license; a certificate of insurance of motor cycle and a copy of the motor cycle log book. This goes to establish that he was indeed earning a living. Considering this, and the fact that he was assessed and granted a 20% total disability rating, this court finds that the global amount of Kshs 500,000/- to be sufficient compensation.
27. On Special Damages the Respondent pleaded a total of kshs. 365,086/- whose particulars were as follows



Medical Report	Kshs 3000
Hospital Expenses	Kshs 153,146
Cost of motor cycle	Kshs 108,000
Motor vehicle search for Copy of Records	Kshs 940
Cost of future medical expenses	Ksh 100,000
Total	Kshs 365,086

28. The trial court proceeded to award as follows Kshs 108,000 being the cost of motor cycle as pleaded and proved; kshs 92,710/ being costs of medical report; a claim of kshs 53,140 medical expense was declined since only an invoice was produced. Future medical expense was awarded at kshs 100,000/=
29. Upon perusing the court record, regarding medical expenses, I note that a receipt for kshs 3000/- was produced as proof of payment for the medical report. Numerous other receipts from Nairobi Women's hospital, Kenyatta Hospital and Ngong Sub County Hospital were provided. However, I note that these receipts have since faded and become ineligible. Consequently, I defer to the trial court's finding since it had the advantage of evaluating the primary evidence. The trial court held that out of the total of kshs 156,146/- (medical report and hospital expenses) pleaded kshs 92, 710/- was the total proved costs of the medical report and hospital expenses. Of On the cost of motor cycle, I agree with the trial court's finding that this was sufficiently proved by the copy of the sale agreement and payment receipt of kshs 108,000/-. On the cost of Motor vehicle search for copy of records, this court notes that no receipt was provided to substantiate the claim. With regard to future medical expenses, this court notes that they were determined based on the medical report recommendation and the appellant did not submit any evidence to the contrary. Accordingly, I see no reason to interfere with the award of future medical expense.
30. As a result of the above the award of Special damages awarded by the trial court is upheld.
31. The upshot of the above is that the appeal succeeds to the extent that only the general damages award of kshs 1,300,000 is substituted with an award of kshs 800,000/-. Since the appeal has partially succeeded each party shall bear its own costs of the appeal.
32. Following the above, the Orders of the court are as follows:
- (a) The award for general damages of Kshs. 1,300,000 is substituted with an award of Kshs. 800,000.
 - (b) The award for future medical expenses is upheld.
 - (c) The award for special damages is upheld.
 - (d) The award for loss of earnings is upheld.

Orders accordingly

RHODA RUTTO

JUDGE



DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

