



**Njenga & 2 others v Kemboi (Civil Appeal E258 of 2023)
[2025] KEHC 6540 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E258 OF 2023
SM MOHOCHI, J
MAY 22, 2025**

BETWEEN

ANNE NYAMBURA NJENGA 1ST APPELLANT

WESTWAY SCHOOL 2ND APPELLANT

CHARLES NJENGA KIMANI 3RD APPELLANT

AND

HILLARY KIPNGETICH KEMBOI RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. Peter A. Ndege
(SPM) delivered on 24th August, 2023 in Nakuru CMCC No. E342 of 2022)*

JUDGMENT

1. By a plaint dated 30th March, 2022 the Respondent sued the Appellants herein for general damages, loss of income/earnings at Kshs 1000 per month and or minimum wage, costs of future medical expenses, special damages of Kshs 182,890 costs of the suit, and interest for bodily injuries sustained out of a road accident that occurred on or about 7th December, 2021 along the Gilgil-Nakuru road
2. The Respondent claimed that he was a pillion passenger aboard motorcycle registration number KMEN 779Y when Motor Vehicle Registration Number KAZ -867V Mitsubishi Bus, which was driven by the Appellants driver hit the motorcycle causing him to sustain serious injuries.
3. The Appellants in their response dated 4th of May, 2022 denied the particulars of negligence attributed to them and stated that if the accident occurred the same was wholly caused by the negligence of the rider of the motorcycle.



4. A consent on liability was adopted on 15th March, 2023 at the ratio of 80:20 in favour of the Respondent as against the Appellants. During the hearing, the Respondent called one witnesses, while the Appellants did not call any witness.
5. After hearing and an in-depth analysis of the evidence, the Trial Court proceeded to award the following: -
 - i. General damages Kshs. 900,000
 - ii. Loss of income/earnings Kshs. 63,525.45
 - iii. Costs of future Medication Kshs. 100,000
 - iv. Special damages Kshs. 1,216,415.45
 - v. Less 20% contribution Kshs. 243,283.09Total Kshs. 973,132.36
6. Vide Memorandum of Appeal dated 15th December, 2023, the Appellants preferred the instant appeal on the following 8 grounds:-
 - i. The Learned Trial Magistrate erred in law and in fact in failing to properly evaluate the evidence adduced on the issue of quantum thereby rendering judgment that is unsound in principle and not reflective of the evidence adduced.
 - ii. The Learned Trial Magistrate erred in law and in principle in making an award of Kshs 900,000 on account of general damages for pain and suffering contrary to the principles governing the making of such an award and in the absence of evidence to justify such an inordinately high award under the said head.
 - iii. The Learned Trial Magistrate erred in law and in fact in making an award of Kshs 100,000 for future medical expenses without appreciating and or considering the medical report by Dr. Malik who is a consultant surgeon, more particularly with regards to future medical expenses likely to be incurred.
 - iv. The Learned Trial Magistrate erred in law and in fact in failing to consider that the injuries and a single fracture of the right femur which had fully healed and thereby arrived at an award that is inordinately excessive.
 - v. The Learned Trial Magistrate erred both in fact and in law by failing to show how he arrived at the award of Kshs. 63,535 as loss of income when there was no proof that the Respondent was in gainful employment and earning a salary.
 - vi. That the Learned Trial Magistrate erred both in law and in facts in making an award of Kshs. 152,890 on special damages in excess of what was prayed.
 - vii. The Learned Trial Magistrate erred in both law and facts in making an award on quantum and loss of income which was unsupported by authorities.
 - viii. The Learned Trial Magistrate erred in law and fact in failing to consider in totality the evidence adduced submissions and authorities filed on behalf of the Appellants in support of their defence therefore arriving at a wrong decision
7. The Appellants seek that the appeal be allowed with costs and judgment on quantum of the lower court be set aside and or reviewed and substituted with a reasonable judgement.



Appellants' Submissions

8. On quantum of general damages, it was submitted for the Appellants that the Award by the trial court was inordinately high considering the injuries sustained by the Respondent being soft tissue injuries and a single fracture of the femur.
9. It was further submitted that comparable injuries must attract comparable awards and in the judgement of the Trial Court, there was no element of analysis, comparison or reliance to any previous decided cases. On this counsel cited the decisions in *Marube and Another v Nyamboga* [2024] KEHC 3395 eKLR that the Plaintiff in that case was awarded Kshs. 350,000 for almost similar but grievous injuries and *Bonafide Clearing & Forwarding Co. Ltd & another v Karanja* [2024] eKLR where an award of Kshs 1,800,000 was reduced to Kshs. 500,000.
10. On future medical expenses, it was submitted that the same was a special claim and relied on the pronouncement in *Tracom Limited & Another vs Hassan Mohamed Adan* [2009] eKLR. It was argued that the Court should not have awarded the amount pleaded as the same was based by the first medical report which was contradicted by the second medical report which gave a lesser amount. That the more probable and fairer amount would be Kshs. 50,000.
11. On loss of income/earnings, the Appellants submitted that the same was special damage which ought to have been pleaded and proven as was stated in *Cecilia W. Mwangi & Another v Ruth W. Mwangi and Another* [1997] eKLR as was cited in *Hussein v Hakika Transport Services Limited & another* [2023] KEHC (KLR). That the Respondent never substantiated that he was an electrician earning Kshs 1000 per day. That the prayer was baseless and awardable.
12. Special damages it was submitted that there was no sufficient evidence to support the award by the trial Court. Reliance was placed in *Abdi Wedi Abdulahi v James Royo Mungatia & Another* [2019] eKLR to submit that invoices and bills are not prove of payment and should not be used to summarize special damages.

Respondent's Submissions

13. Through counsel, it was submitted that as regards the general damages Appellant only focused on the injuries sustained and failed to take into account the nature and particulars of the Respondent's injuries and relied on *John Kamore & Another vs Simon Irungu Ngugi* [2014] eKLR. It was further submitted that the award was made within the range set by decided cases and the Court cannot be faulted for factoring in inflation and passage of time.
14. On costs of future medical expenses, it was submitted that the Trial Court's decision to be guided by the past decided cases on similar awards as opposed to confining itself to the estimates made by the two doctors and making the award was not erroneous and relied on *Peter M. Mailan v Mohamed Hassan Musa & 2 Others* [1998] eKLR
15. Loss of income/earnings was submitted to having being challenged by the Appellants due to lack of documentary evidence. It was argued that Section 2 of the Insurance Motor Vehicle Third Party Risks) Amendment Act provides for the use of Minimum Wage Regulation in the absence of any documentary evidence. Further that it is not mandatory to proof profession by way of documents moreso the Court ought to take judicial notice of Section 59 of the [*Evidence Act*](#),
16. It was submitted that the special damages of Kshs 83,890 were adequately proven



Analysis and Determination

17. I have considered the record of appeal alongside the judgment of the Trial Court. I have also considered the submissions of the parties and authorities cited for and against the appeal. This is a first appeal and I have duty to re-evaluate re-examine and re-consider the evidence produced before the Trial Court and come to my own findings while bearing in mind that the Trial Court had the advantage of hearing the witnesses. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR and in *Selle & Anor – Vs- Associate Motor Boat Co. Ltd* [1968] EA 123.
18. The issue of liability having been compromised the Appeal is essential on quantum only.

General damages

19. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that comparable injuries should attract comparable awards.
20. Guided by the Superior Court's decision, the issue subject for determination is whether the award of general damages of Kshs. 900,000 in view of the injuries sustained is inordinately high to persuade this Court to interfere with it.
21. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* [2004] 2 KLR 55 held:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
22. The Respondent pleaded that he sustained a displaced fracture of the right femur and soft tissue injuries of the face. The P3 report dated 13th January, 2022, the medical reports by Dr. Kiambaa dated 17th January 2022 and 27th May, 2022, the hospital records and the medical report dated 13th May, 2022 by Dr. Malik confirmed the injuries.
23. In making the award, the Trial Magistrate gave a blanket statement that the authorities relied upon by the parties supported an award of Kshs. 900,000. The Trial Magistrate should have at least cited those decisions or in the alternative gave a justification for the award with past decisions in line with the doctrine of stare decisis.
24. Be that as it may, in considering the injuries sustained by the Respondent and in further consideration that the award of general damages is discretionary, I wish to note that no injury is similar to the other and there are other considerations to be made besides the nature of the injury.
25. The Respondent was hospitalized for 10 days before being discharged and at the final medical checkup, he still had metal nails in his leg which require future treatment. His quality of life was affected as a result of the injury. It is simply not sufficient to rule an injury inconsequential merely because it was one fracture. Even the location of the fracture is up for consideration.



26. The Court in Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR had the following to state about a femur fracture

“In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body.”

27. In Chepnyangoi & another v Mwangi [2024] KEHC 11020 (KLR) the Court, held as thus:-

“It is important to note that when it comes to the issue of assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. The court is however conscious of the fact that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in Stanley Maore vs Geoffrey Mwenda [2004] eKLR stated as follows-

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

28. Having noted the above authorities and since the Trial Court did not demonstrate what cases were relied upon to arrive at the award, my duty is to analyze the injuries, the evidence and similar injuries and consider if the award was appropriate.

29. In Prima Management Ltd v Wilson Suba Kindaranga [2017] eKLR The Plaintiff suffered a fracture of the left femur with 12% permanent disability and the trial court’s award of Kshs 900,000 was upheld.

30. In Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR Appellant sustained blunt injury to the right shoulder and fracture of the femur. The Court on appeal increased the award of damages from Kshs. 350,000 to Kshs. 600,000.

31. In Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR Respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh with 4% incapacity. The court on appeal set aside an award of Kshs 1,200,000 and substituted it with one of Kshs. 800,000.

32. On this basis, and in factoring in the lapse of time and the inflation trends, I find that the award of Kshs. 900,000 was adequate compensation and was not inordinately high as to amount to an erroneous estimate of damages. I decline to interfere with the finding of the Court on this award.

Cost of future medical treatment

33. The Appellant main argument is that the award should not have been based on Dr. Kiamba’s opinion in the reports dated 17th January 2022 and 27th May, 2022 of Kshs. 100,000 since Dr. Malik’s report of 17th May, 2022 gave a contradictory opinion of Kshs. 50,000 as costs for future medical treatment. What is not disputed is the fact there will be need for future treatment. What is disputed is the amount awarded.

34. However, the Court of Appeal in Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK -minor) [2021] KECA 52 (KLR) reference to the decision in Tracom



Limited & another v Hassan Mohamed Adan (supra) and as relied by the Appellants herein to state that:

“ [28].As has been held above, in as much as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.”

35. It is clear that there was need from future medical treatment and I am in agreement that the same is special damage that needs to be pleaded and proven. Looking at the Plaintiff in paragraph 7, the Respondent pleaded as specific figure and attached the doctors report in support of that figure. The Appellants produced Dr. Malik’s report to counter that of the Respondent.
36. The argument by the Appellants that the future medical expenses should not have been awarded as pleaded and they were not specifically proved has no basis. The argument that Dr. Kiamba may have been biased as he received instructions from the Respondent is a nonstarter since the same argument can be brought forth against Dr. Malik’s report as he received instructions from the Appellants.
37. The latest report by Dr. Kiambaa of 27th May, 2022 which was a re-examination of the Respondent and which also came after the report of Dr. Malik opines that the costs of future medical treatment to be KShs. 100,000. I hold that Dr. Kiamba’s report on future medical expenses being the latest represented the latest prognosis.
38. Further, the Court takes judicial notice of the fact that hospitals vary in terms of billing. The charges for a particular treatment would not be the same in all hospitals and also the cost of medical expenses has been increasing over the years. The Court had no basis to disregard the latest report on the face of a lesser amount stated in Dr. Malik’s report.
39. I find no reason to interfere with the Trial Court’s award on the same.

Loss of income/earnings

40. The Respondent pleaded and testified that he worked alone privately in houses as an electrician and as a result of the injuries sustained, he was not able to resume normal duties and was not able to go for work for four months. He claimed that he was being paid 1,000 per day in cash.
41. The Appellants contest the award made on the grounds that no documentation was produced to proof gainful employment or the stated amounts. The Respondent challenged the argument and submitted that it is not mandatory to prove income or profession by documentation.
42. The Trial Court based the award on minimum wage regulation for that year as KShs. 21,175.15 multiplied by the four months. The Court also stated that the time that the Respondent was out of work was supported by the medical report of Dr. Kiambaa.
43. The Court of appeal in *SJ vs Francesco Di Nello & Another* [2015] eKLR stated as follows:-

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Llyod’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:



“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

44. In *Jacaranda Bodaboda Operators & another v Nyasero* [2023] KEHC 23806 (KLR) the Court at paragraph 30 stated that:-

“Diminished earning capacity is decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.”

45. Loss of earning or loss of income is the income the Respondent lost as a result of the injuries sustained from the accident during the recovery period. It is therefore a special damage. Being a special damage claim it is trite that it same has to be strictly proved.

46. The Respondent to prove he was an electrician he produced an attachment letter from AIC Diguna Tinderet for August to September 2018. He stated that he was working privately as an electrician earning 1000 shillings per day. To prove he was incapacitated, he produced a medical report which support his incapacity as a result of the injury. The Appellant argued that the same was not sufficient.

47. An electrician can be considered as part of the informal sector or otherwise known as ‘Jua Kali’. I agree with the Respondent that the nature of the job prevents them from having signed contracts or letters of appointments to prove employment. That does not necessarily mean they do not earn an income as they earn their living based on their skill. I find that the Respondent has satisfied the Court that he is an electrician. Secondly a broken leg will interfere with the quality of life of anybody including the ability to earn a living.

48. On whether the award is justified, as an electrician with no defined earnings or proof of that he was earning the amount pleaded, Section 2 of the *Insurance (Motor Vehicles Third Party Risks) Act* defines earnings and adds that in the absence of documentary evidence to prove the same, the fall back is the applicable minimum wage under the *Labour Relations Act*.

49. At the time of accident Regulation of Wages (General) (Amendment) Order, 2018 which was in force at the time and was only replaced with the Regulation of Wages (General) (Amendment) Order, 2022, the monthly rate for a Grade III artisan in Nakuru a former municipality was the rate of Kshs 21,175.15/=. The same was the amount relied on by the Trial court in arriving the figure.

50. It is therefore this Court’s considered view that the award was based on correct principles and shall therefore not be disturbed.

Special Damages

51. The Respondent pleaded Kshs. 182,890 as special damages and the Court awarded Kshs 152,890. According to the Appellants, the Respondent only proved Kshs 66,340.

52. The Respondent conceded that the receipts at pages 20 and 21 of the record of appeal totals the sum of Kshs 66,340/- and that the net awardable is Kshs 82,890/-.

53. From the record the Respondent proved Kshs.16,000/- for the medical report, 66,340/- medical expenses (the receipts dated 7th, 8th and 10th December, 2021 are summarized in the receipt dated 21st



December, 2021 on page 21 of the Record of Appeal) and also motor vehicle search of Kshs 550/- totaling Kshs. 82,890/-.

54. Appeal on this ground succeeds to the extent that the award of Kshs 182,890/- is set-aside and substituted by an award of Kshs. 82,890 as special damages.

55. Accordingly, the Appeal herein partially succeeds to the extent that;

- a. The award general damages, loss of earnings and costs of future medical treatment is upheld.
- b. The award of special damages is hereby set-aside and substituted with an award of Kshs 82,890.
- c. The Respondent shall have costs of the Appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND OF MAY, 2025

MOHOCHI S.M

JUDGE

