



REPUBLIC OF KENYA



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Njuguna v Onditi (Civil Appeal 18 of 2020) [2025] KEHC 8035 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 8035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY**

CIVIL APPEAL 18 OF 2020

OA SEWE, J

MAY 22, 2025

BETWEEN

DENNIS KIMANI NJUGUNA APPELLANT

AND

MARY JOASH ONDITI RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Celesa Okore,
Senior Resident Magistrate, delivered on 30th April 2020 in the
Principal Magistrate's Court at Oyugis in PMCC No. 59 of 2019)*

JUDGMENT

1. This appeal arises from Oyugis Principal Magistrates Civil Case No. 59 of 2019: Mary Joash Onditi v Dennis Kimani Njuguna. The respondent had sued the appellant claiming general and special damages in respect of injuries sustained by the respondent in a road traffic accident that occurred on 12th March 2019 involving the appellant's Motor Vehicle, Registration No. KBA 667Q, Mercedes Benz Tanker. The accident occurred along Kisii-Oyugis Road at Oyugis Town. The contention of the respondent was that the defendant's driver, agent, worker, employee and/or servant in the course of his duty, so negligently and/or carelessly drove the said motor vehicle that he permitted it to hit and cause severe injuries to the appellant who was walking on the verge of the road.
2. The appellant supplied the particulars of negligence at paragraph 5 of the Plaintiff in addition to pleading the doctrine of Res Ipsa Loquitur. She also relied on the Highway Code and the provisions of the [Traffic Act](#), Chapter 403 of the Laws of Kenya. She likewise furnished the particulars of her injuries as well as particulars of diminished earning capacity at paragraph 7 of the Plaintiff. Consequently, the appellant prayed for judgment against the respondent for:
 - (a) Special damages and diminished loss of earning capacity of Kshs. 5,000/= per month.
 - (b) General damages to be assessed by the lower court.



- (c) Costs of the suit.
3. In his Statement of Defence dated 17th June 2019, the appellant denied the respondent's allegations and put her to strict proof thereof. He denied being the registered owner of Motor Vehicle Registration No. KBA 667Q Mercedes Benz Tanker as alleged in the Plaint. He also denied that an accident occurred in the manner alleged by the respondent. In the alternative, the appellant averred that if ever an accident occurred then the same was wholly occasioned and/or substantially caused by the negligence on the part of the respondent. The appellant provided the particulars of negligence by the respondent at paragraph 7 of the Defence. He also denied the particulars of injuries set out in the Plaint and put the respondent to strict proof thereof. At paragraph 13 of the Defence, the appellant averred that the respondent's suit was poorly pleaded, ambiguous, unclear and/or otherwise defective. He therefore gave the indication that he would raise a preliminary objection in that regard.
4. Upon hearing the parties, the learned magistrate found in favour of the respondent and entered judgment for her in the sum of KShs. 2,400,000/= made up as hereunder:
- (a) Liability 20:80 in favour of the respondent
 - (b) General damages:
 - (i) Pain, suffering and loss of amenities KShs. 2,500,000/=
 - (ii) Loss of future earning capacity KShs. 500,000/=(Less 20% contributory negligence) KShs. 600,000/=
 - Total KShs. 2,400,000/=
 - (c) Costs of the suit
 - (d) Interest at court rates to run from the date of judgment
5. Being aggrieved by the decision of the lower court, the appellant filed this appeal on 28th May 2020 on the following grounds:
- (a) That the learned magistrate erred in law and fact in failing to dismiss the respondent's suit as she had not proved her case on a balance of probabilities.
 - (b) That the learned magistrate erred in law and fact in apportioning liability at 80% against the appellant without any sufficient proof.
 - (c) That the learned magistrate erred in law and fact by awarding the respondent KShs. 3,000,000/= in general damages, an amount which was excessive, hence amounting to an erroneous estimate of the loss suffered.
 - (d) That the learned magistrate erred in law and fact in awarding the respondent a sum of KShs. 2,500,000/=: an amount which is excessive thus amounting to an erroneous estimate of the loss or damage suffered by the respondent.
 - (e) That the learned magistrate erred in fact and law in awarding the respondent KShs. 500,000/= for loss of future earnings without any legal basis.
 - (f) That the learned magistrate erred in fact and law in over-relying on the evidence of the respondent which was not corroborated.



- (g) That the learned magistrate erred in law and fact in disregarding the relevant evidence on record hence resulting in a wrong decision.
 - (h) That the learned magistrate erred in law and fact in failing to consider the appellant's submissions and authorities relied upon in support of his defence.
 - (i) That the learned magistrate erred in law and fact by overly relying on the respondent's submissions and authorities which were not relevant and without addressing her mind to the circumstances of the case.
 - (j) That the decision of the learned magistrate, albeit a discretionary one, was plainly wrong.
6. In the premises, the appellant prayed that the appeal be allowed and that the judgment of the lower court delivered on 30th April 2020 be set aside and the same be substituted with a proper finding/judgment. He also prayed that the respondent be condemned to pay the costs of the lower court suit as well as the costs of the appeal.
 7. The appeal was canvassed by way of written submissions pursuant to the directions given herein on 8th October 2021. The appellant relied on his written submissions dated 8th November 2021. He submitted on the role of the Court as provided for in Section 78 of the *Civil Procedure Act*. He also relied on *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 for the principle that the Court is under duty to re-evaluate the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither heard nor saw the witnesses and make allowance in that respect.
 8. On liability, the appellant submitted that the learned magistrate erred in fact and law in holding him 80% liable when there was no evidence to show that his driver contributed to the occurrence of the alleged accident. He relied on Sections 107 and 108 of the *Evidence Act*, Cap 80 of the Laws of Kenya and submitted that he who alleges must prove their allegations.
 9. According to the appellant, the respondent did not give any cogent evidence as to the circumstances of the accident that would lead to him being held liable. In the alternative, the appellant submitted that the learned magistrate ought to have apportioned liability equally between him and the respondent. In support of this argument, he relied on *Express Kenya Limited & another v Geoffrey Lekut Olagui* (suing as the legal representative of the estate of the late Olagui Koriwai Olendoiga [2018] eKLR.
 10. The appellant further submitted that, regarding his contention that his driver was framed, the learned magistrate misdirected herself by descending into the arena of the dispute and making a finding on liability based on facts that were neither pleaded nor proved by way of evidence. He relied on *Kenya Commercial Bank Ltd v Mwanzau Mbaluka & another* [1998] eKLR to buttress his submission.
 11. On quantum, the appellant submitted that awards must be reasonable; and that, as far as possible comparable injuries should be compensated by comparable awards. He urged the Court to find, on the basis of the evidence of PW4 (at page 76 of the Record of Appeal), that the respondent healed completely with no permanent disability. He therefore proposed that the award by the lower court for pain, suffering and loss of amenities be reduced to Kshs. 800,000/=. He relied on *Kisumu Concrete Products Limited v Kennedy Onyango Olwa* [2016] eKLR in which Kshs. 750,000/= was awarded for traumatic amputation below the knee.
 12. On loss of future earnings, the appellant contended that the respondent never pleaded damages for loss of future earnings; and therefore that it was as an afterthought that she testified that she was a tailor. According to the appellant, the award by the lower court of Kshs. 500,000/= under this head was erroneous. He relied on *Dauglas Erick Nyakundi Masira v Rongai Workshop Ltd & another*



- [2009] eKLR for the proposition that such a claim must not only be specifically pleaded but also strictly proved. Consequently, the appellant prayed that the award of Kshs. 500,000/= for loss of future earnings be set aside.
13. Lastly, it was the submission of the appellant that the learned magistrate erred by failing to consider his submissions and authorities. According to him, there was no indication in the judgment that the learned magistrate paid attention to his submissions; and that even if she did, no reasons were given as to why she rejected them. Consequently, the appellant prayed that the appeal be allowed and the orders sought in his Memorandum of Appeal granted.
 14. The respondent relied on her written submissions dated 23rd January 2025. She defended the decision of the lower court on liability and contended that she discharged the burden of proving all the particulars of negligence alleged by her by way of cogent evidence. She was categorical that she exercised due caution while crossing the road and therefore liability was well fixed by the lower court.
 15. On general damages, the respondent reiterated that she suffered traumatic amputation of the left lower leg; and therefore suffered a disability. According to her, it was immaterial that she had healed well. She therefore urged for a finding that the appeal is devoid of merit and is for dismissal.
 16. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. The principle was restated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
 17. I have therefore carefully perused the record of the lower court and noted that the respondent testified as PW1. She adopted her witness statement dated 28th May 2019 as part of her evidence in chief. She stated that, on the 12th March 2019, she was walking on the verge of the road on within Oyugis town on her way home from the market when she was hit from behind by Motor Vehicle Registration No. KBA 667Q. She got injured on the left lower leg. She was rushed to Kisii Teaching and Referral Hospital where she was admitted for three weeks before being transferred to Tenwek Hospital. The injured leg was ultimately amputated.
 18. The respondent further stated that upon discharge, she went to Oyugis Police Station and recorded her statement. She was then issued with a P3 Form which was later filled by a doctor and returned to the police station. She was also examined by a doctor who prepared a Medical Report for her. She thereafter instructed the firm of Ombati & Ombati Advocates to take up her claim on her behalf. She also stated that at the time of the accident, she was gainfully occupied as a tailor and was also selling tomatoes, onions and vegetables for a living from which she could earn between Kshs. 1,000/= to Kshs. 2,000/= per day. She added that when business was good she would earn Kshs. 5,000/= per day.
 19. Cpl. Benedict Gichaba of Oyugis Police Station testified as PW2. He confirmed that an accident report was made to their office on the 12th March 2019 to the effect that Motor Vehicle Registration No. KBA 667Q Mercedes Benz had hit a pedestrian by the name Mary Joan Onditi along the Oyugis-Kisii



- Road in which the pedestrian had sustained injuries. He produced the Police Abstract as the Plaintiff's Exhibit 4 before the lower court.
20. The respondent's third witness was Clinton Okoth Walo (PW3), a boda boda operator at Oyugis Town. He testified that he knows the respondent well as she does business in Oyugis Town. PW3 further stated that he witnessed the accident that occurred on the 12th March 2019 at about 7.30 pm in which the respondent was hit by a tanker. He added that the tanker did not stop after the accident but sped off and disappeared.
 21. Dr. Philip Abuga (PW4), a doctor at Gesusu Sub county hospital in Kisii County testified that he examined the respondent, Mary Joash Onditi on the 30th April 2019; and that she presented a history of having been involved in a road traffic accident. He confirmed that she had suffered a traumatic amputation of the left leg due to a fracture suffered in the road traffic accident. He further pointed out that the amputation crippled the respondent and therefore she will require an aesthetic limb. He produced the Medical Report prepared by him as the Plaintiff's Exhibit 5 before the lower court. PW4 also produced the P3 Form that was filled by a colleague as the Plaintiff's Exhibit 3.
 22. On behalf of the appellant, Mutai Kiplangat (DW1) testified on 27th February 2020. He adopted his witness statement dated 30th June 2019 in which he stated that he is a competent driver with 5 years' experience. He added that, at the material time, he was working for Kenol Kobil. It was the testimony of DW1 that, on the 21st March 2019 at around 6.00 pm, while driving along Oyugis-Kisii Road at Oriang area, he was stopped by the Traffic Base Commander of Oyugis Police Station on allegations that he had caused an accident on the 12th March 2019 and injured a pedestrian who was walking on the verge of the Oyugis-Kisii Road. He was required to go to the police station and record his statement; which he did.
 23. DW1 denied the allegation that he caused an accident and injured the respondent. He added that he had never been charged or summoned in any court over the alleged accident. He therefore prayed that the suit be dismissed with costs to the defendant.
 24. I have given careful consideration to the evidence placed before the lower court in the light of the Grounds of Appeal filed herein, as well as the written submissions filed herein by learned counsel. The twin issues for determination are, firstly whether the trial magistrate's finding on liability is tenable and secondly, whether the quantum awarded by way of compensation is proper in the circumstances.
 25. Needless to say that it was the duty of the appellant to discharge the legal burden of proof, for, Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya, is explicit that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
 26. Thus, in *Statpack Industries v James Mbithi Munyao* [2005] eKLR it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.”
 27. In this matter, the respondent adduced evidence to show that she was walking on the verge of the Oyugis-Kisii road on the left side when she was knocked from behind by the appellant; and that in that process she sustained an injury on the left leg which had to be amputated. An eye witness who



saw the occurrence (PW3) corroborated the testimony of PW1 and therefore, given the testimony of DW1 in which he focused more on the event of 21st March 2019 when he was summoned by the Base Commander to go and record his statement, there was no contestation before the lower court as to the occurrence of the accident; and I so find.

28. PW3 testified that he witnessed the accident happen and took note of the registration number of the motor vehicle concerned. A report was consequently made to the Police whereupon DW1 was traced and summoned to Oyugis Police Station for purposes of recording his statement. Whereas DW1 admitted that he drove through Oyugis Town on his way to Kisii on the material date, he denied that he was involved in any accident. Granted the uncontroverted evidence by PW1 and PW3, this posturing, if anything further confirms that DW1 was, as a matter of fact, driving without due care or attention within a built up area. Indeed, it was the testimony of PW3 that the driver failed to stop after the accident, but instead sped off.
29. The appellant impugned the decision of the lower court on liability, contending that, while the learned magistrate found as a fact that the respondent was in the process of crossing the road at night without first ascertaining that it was safe to do so, she still held the respondent blameworthy by apportioning his liability at 80%. The question to pose therefore is, to what extent was DW1 to blame for the accident?
30. In *Stapley v Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681, Lord Reid had the following to say, which was quoted with approval by the Court of Appeal in *Michael Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”
31. Considering that the accident occurred within Oyugis town, and therefore a built up area for purposes of the *Traffic Act*, DW1 was expected to be more cautious not only in terms of speed but also alertness for any pedestrians that might want to cross the road ahead of him. I do not think, in the circumstances the reference by PW3 to moderate speed is of any help to the appellant, because moderate is relative. PW3 was not probed to explain what, in his perspective, amounts moderate speed because he also mentioned that the driver did not stop but sped off after the accident. The whole purpose of speed limit in built up areas is to enable drivers to navigate their way without any mishap. In the circumstances, I find no reason to fault the finding of the learned magistrate on liability.
32. The respondent relied on the Police Abstract produced by PW2 to prove that the suit motor vehicle belonged to the appellant and was being driven at the material time by his driver and/or authorized agent. There is therefore credible proof that the subject motor vehicle belonged to the appellant at all times material to the suit; and therefore he was legitimately held liable to the respondent on the basis



of the doctrine of vicarious liability. The Court of Appeal in *Joel Muga Opija v East African Sea Food Limited* [2013] eKLR pointed out that:

“...in our view, an exhibit in evidence and in this case, the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on a point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

33. On quantum, it is trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In *H. West & Son Ltd v Shephard* [1964] AC 326, for instance, it was held that:

“...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

34. Similarly, in *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja v *Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held that:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to 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. The Court 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 high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt v Khan* [1981] KLR 349)

35. In addition to the foregoing, guidance has been given by the Court of Appeal that comparable injuries ought to attract comparable awards. Hence, in *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR, for instance, the Court of Appeal held that:

“...in assessment of damages for personal injuries the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases...”

36. With the foregoing principles in mind, I have taken into account the injuries suffered by the respondent. She pleaded traumatic amputation of the left leg. Her evidence was to the effect that she was rushed to Kisii Teaching and Referral Hospital where she was admitted for three weeks before being transferred to Tenwek Hospital for surgery. The Discharge Summary issued by Kisii Teaching



and Referral Hospital dated 1st April 2019 confirms that the respondent suffered degloving injury of the distal left foot. At the time of discharge, she was still feeling pain with bleeding on the left foot.

37. The P3 Form dated 23rd March 2019, filled by Dr. Murauni and produced before the lower court by Dr. Philip Nyameri Abuga (PW4), shows that the degree of injury suffered by the respondent was assessed as “Grievous Harm.” The same finding, more or less, was made by Dr. Abuga. In his Medical Report dated 30th April 2019, he described the injury sustained by the respondent as traumatic amputation of the left lower leg. The report further shows that, as at the time of examination, the respondent was in fair general condition. Consequently, PW4 concluded that:

“Following the road traffic accident MARY sustained severe injuries which led to the traumatic amputation of the LT lower leg making her completely crippled. She will need an artificial limb.”

38. For the above injury, the appellant proposed an award of Kshs. 400,000/= before the lower court and relied on *Wangui Murage v Dakianga Distributors Limited* [2012] eKLR where an award of Kshs. 400,000/= by the lower court for crushed injury to the left leg was sustained on appeal. The lower court duly considered the submissions by both counsel and awarded the sum of Kshs. 2,500,000/= for pain, suffering and loss of amenities.
39. The lower court was guided by the awards made in Nairobi HCCC No. 287 of 2007: *Simon Ano Mua v Kioga Mukwano & 2 others* and *Daniel Kosgei v Catholic Trustee Registered & another* and Eldoret HCCC No. 111 of 2006: *Daniel Kosgei v Catholic Trustee Registered & another* in which Kshs. 2,100,000/= and Kshs. 2,500,000/=, respectively, was awarded for traumatic amputation of the left leg.
40. Before this Court, the appellant proposed that the award by the lower court for pain, suffering and loss of amenities be reduced to Kshs. 800,000/=. He relied on *Kisumu Concrete Products Limited v Kennedy Onyango Olwa* [2016] eKLR in which Kshs. 750,000/= was awarded for traumatic amputation below the knee.
41. Having evaluated the evidence adduced before the lower court and the submissions made herein, including the authorities cited by the parties, I find no basis for interfering with the award under the head of pain, suffering and loss of amenities. The submission by the appellant that respondent healed completely with no permanent disability is, to say the least, callous, granted the evidence on record, particularly the evidence of the respondent as corroborated by the evidence of PW4, that her left leg was amputated below the knee. In particular, PW4 made it plain that the respondent is completely crippled as a result of the injuries she suffered in this particular accident and that She will need an artificial limb to move around.
42. On loss of future earnings, the lower court awarded Kshs. 500,000/=. The learned magistrate reasoned that:

“It has not been sufficiently proved that the plaintiff was earning Ksh. 5000/= or thereabout from her tailoring business as alleged. It is therefore difficult to gauge her income on a monthly basis.

However the court is alive to the fact that the accident has occasioned her a disability that could derail and/or diminish her earning capacity in future. I therefore find an award of Kshs. 500,000/= sufficient under this head.”



43. The appellant impugned this award on the ground that the respondent never pleaded damages for loss of future earnings; and therefore that her evidence to the effect that she was earning a living as a tailor was as an afterthought. In support of his submissions that the award by the lower court of Kshs. 500,000/= was erroneous, the appellant relied on *Dauglas Erick Nyakundi Masira v Rongai Workshop Ltd & another* [2009] eKLR, contending that for such a claim to be awarded, it must not only be specifically pleaded but also strictly proved. Consequently, the appellant prayed that the award of Kshs. 500,000/= for loss of future earnings be set aside.
44. The respondent simply defended the award and stated that it was correctly made.
45. Needless to mention that a clear distinction exists between loss of future earnings and loss of future earning capacity. In *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR the distinction was drawn as follows:

“There is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution in earning capacity is awarded as part of general damages...The award for damages under loss of earning capacity only arises where a plaintiff at the time of the trial is in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is different from an actual loss of future earnings, which can already be proved at the time of the trial. The claim for loss of future earnings is assessed on the ordinary multiplier/multiplicand basis. In contrast where there is a substantial risk that a plaintiff at some future date before the end of his working life will lose his job and be thrown into the labour market, the assessment of risk and damages is much more difficult. No mathematical calculation is possible and the multiplier/multiplicand approach is impossible or inappropriate and it is impossible to suggest any formula for determining the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market. It is not correct that whenever a plaintiff established a claim under the head of loss of earning capacity, the damages are to be considerable and that it can never be right to award only a few hundred pounds damages. Each case must depend on its own facts, but if the court decides that the risk of the plaintiff losing his present job, or of his being unable to get another job or an equally good job or both, are only slight, a low award is right. If as will be rare both are negligible or fanciful no award should be made. If one or both are real or substantial, but neither is serious, the award should not be a token or derisory award but should generally be in hundreds of pounds. If both risks are serious, the compensation should generally be in thousands of pounds...”

46. In this case the respondent pleaded special damages as well as “diminished loss of earning capacity” of Kshs. 5,000/= per month. The lower court dismissed the special damage component and made an award by way of general damages for loss of earning capacity. That is perfectly defensible. In *Mumias Sugar Company Limited v Francis Wanalo* (supra), the Court held:

“A court can, in appropriate cases, give an award for loss of future earnings and for loss of earning capacity to the same plaintiff so long as the overlap of the two awards of damages is avoided...Loss of earning capacity can be a claim on its own apart from a claim for general damages for pain and suffering (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then or at the date of the trial). Once it is in principle accepted that the victim of personal injuries who has lost his



earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if damages are payable. This type of claim (loss of future earnings) could be a claim on its own and the figure need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure would be based...The award of 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 the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of the trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. 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 factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

47. The respondent testified that she was selling tomatoes, onions and vegetables before the accident; and that she was also a tailor but could not perform those activities after her left leg was amputated. She added that she could make between Kshs. 1,000/= to Kshs. 2,000/= in a day; and that when business was good, she used to make Kshs. 5,000/=. In the circumstances, I am unable to find fault with the reasoning and finding of the learned magistrate. Indeed, as was observed by Sir Kenneth O'Connor in *Peters vs Sunday Post Limited* [1958] EA 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”

48. Lastly, it was the submission of the appellant that the learned magistrate erred by failing to consider his submissions and authorities. He added that there was no indication in the judgment that the learned magistrate paid attention to his submissions; and that even if she did, no reasons were given as to why she rejected them. I have no hesitation in rejecting this submission because a perusal of the judgment dated and delivered on 30th April 2020 shows, at page 88 line 8 and following, that the magistrate considered the written submissions filed by both counsel for the parties as well as the authorities referred to. She also justified her awards by reference to specific authorities.
49. It is my finding therefore that the decision arrived at by the trial magistrate on both liability and quantum was justified in the circumstances and is hereby upheld.
50. In the result, I find no merit in the appeal. It is hereby dismissed with costs.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 22ND DAY OF MAY 2025



OLGA SEWE
JUDGE

