



**Mbatia & another v Maina alias Boniface Karanja Maina alias
Boniface Mwangi Maina alias Boniface Mwangi (Civil Appeal
E034 of 2023) [2025] KEHC 8265 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E034 OF 2023
DKN MAGARE, J
JUNE 10, 2025**

BETWEEN

JOSEPH NJERU MBATIA 1ST APPELLANT

ELIUD KINGORI NGUNYI 2ND APPELLANT

AND

**BONIFACE KARABA MAINA ALIAS BONIFACE KARANJA MAINA ALIAS
BONIFACE MWANGI MAINA ALIAS BONIFACE MWANGI RESPONDENT**

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.S. Kosgei, Senior Resident Magistrate, dated 24 April 2023, in Karatina PMCC No. E033 of 2021. In the lower court, the Respondent, who was the Plaintiff, was known by four similar but distinct names. Although one might initially question whether these four names all denote the same individual, that issue is not before us in this appeal.
2. The Appellants, who were Defendants below, now appeal against entire of the said judgment and decree. They set out a Memorandum of Appeal dated 10.5.2023, which raised the following grounds:
 - a. The learned magistrate erred in law and fact in assessing general damages at Ksh. 3,500,000 which was excessive.
 - b. The trial court erred in law and fact in awarding Ksh. 1,000,000 for permanent prosthesis and Ksh. 1,500,000/- for diminished earning capacity without basis.
 - c. The learned trial magistrate erred in law and in fact by failing to weigh all the evidence placed before her before delivering the judgment.
 - d. The learned magistrate erred in evaluation of the evidence and submissions.



- e. The learned trial magistrate failed to consider the relevant factors and based her judgment on irrelevant factors.
3. The parties had settled the question of liability by consent at 80:20. The appeal is therefore in respect of three aspects of quantum; that is general damages, diminished earning capacity and the cost of future medical expenses in form of an artificial prosthesis. The third ground is not an independent ground capable of being addressed separate from the findings on quantum.

Pleadings and Evidence

4. The plaint dated 29.3.2021 claimed damages arising from an accident that occurred on 3.9.2020. The accident involved the respondent while riding motorcycle Registration No. KMEB 464M along Kiamariga-Hombe Road at Mutaga Shopping Centre when the 2nd appellant drove the 1st appellant's motor vehicle registration No. KCD 664C so negligently that the said motor vehicle hit the motorcycle hence the accident.
5. The Respondent set forth particulars of negligence for the accident motor vehicle. He pleaded Ksh. 98,750/= as special damages. The Respondent claimed for general damages arising from the following injuries:
 - a. Compound fracture of the right tibia
 - b. Compound fracture of the right fibula
 - c. Fracture of the right femur
 - d. Bleeding from the right thigh
 - e. Bleeding from the right leg
 - f. Amputation of the right leg below the knee with 23cm-25cm stump.
 - g. Shortening of the right femur
6. It is important to note that bleeding from the right thigh and bleeding from the right leg, are not strictly speaking, injuries but consequences of the injuries in those areas. The most difficult aspect of the pleadings is that it is not certain but fluctuating. The Respondent indicated that there was between 45% and 60% permanent disability. At the same time there was a pleading that the cost of prosthesis will cost between 300,000/= and Ksh. 1,000,000/= and subsequent replacements every 8-10 years.
7. The then 24 years old Respondent pleaded that there was a cost of Ksh 80,000/= to remove K-nails. They also claimed for diminished earning capacity as general damages.
8. The Appellants entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the Plaint.
9. The lower court heard the parties and proceeded to render Judgment as follows:
 - a. Liability by consent 80:20 in favour of the Plaintiff.
 - b. General damages Ksh. 3,500,000/=
 - c. Special damages Ksh. 98,750/=
 - d. Permanent prosthesis Ksh. 1,000,000/=
 - e. Diminished earning capacity Ksh. 1,500,000/=



10. Aggrieved, the Appellants lodged appeal against the award of damages only.

Evidence

11. On liability, the Respondent testified as PW1. He relied on his witness statement which he adopted in his testimony. He also produced the list of documents dated 29.3.2021 and supplementary list of documents dated 26.4.2022. It was his case that he surfed fractures. The right leg broke 3 times and plates were inserted. He was a boda boda rider earning between Ksh. 1,000-1,500 per day. He had a fixation plate that would cost Ksh. 80,000/= to remove. He could not ride after the accident since his right leg was amputated. He prayed for award of cost for prosthetic leg between Ksh. 300,000/= -1,000,000/=.
12. Both parties produced the medical reports without calling the makers. The medical report dated 8.12.2020 was by Dr. Wokabi. He established compound fracture of the right tibia and right femur, loss of right leg and right knee with 45% permanent disability. He also recommended artificial limb at an estimated cost of Ksh. 300,000/= which would require changing between 8-10 years.
13. The respondent produced a medical report dated 1.12.2020 by Prof. John Ating'a, Mch, Orth., a Consultant Orthopedic Surgeon. He found the cost of a permanent prosthesis to be Ksh 1,000,000/= . He posited that myodesis was adequate but the Respondent will need a permanent prosthesis. He stated that the right leg was amputated at the point of the fracture. Surgical toileting and femoral nailing was done. The right femur is now 51 cm as opposed to the left femur which is now 57 cm. The stump was in 40 degrees of flexion with very little flexion jog and no extension. The anterior aspect of the thigh had a 10 cm surgical scar through the quadriceps muscle.
14. He opined that the cost of prosthesis was Ksh. 1,000,000/= and the Respondent would need a permanent prosthesis. He assessed permanent disability at 60% and found compound femoral fracture.
15. The P3 form indicated crushed right foot injuries that caused below the knee amputation. The injuries were classified as grievous harm. It also indicated that the mid femur fracture comminuted and as a result there was open reduction and internal fixation done. The patient went to theatre three times for surgical toileting, open reduction and internal fixation and for amputation.
16. The discharge summary from Karatina District Hospital showed that the Respondent was admitted from 23.09.2020 to 21.10.2020. He was discharged to care for the amputation at home. Dr. Wokabi placed the loss at 45%. The respondent required to have an artificial limb costing Ksh 300,000/= every 8-10 years. There were no practical differences on the cost between all the doctors. Replacing a limb at Ksh 300,000/= 8-10 years for a 24-year-old is equivalent to doing the same at Ksh. 250,000/= for a similar period or a permanent one at a million shillings.
17. Respondent also produced the medical report dated 20.4.2022 by Dr. Maina Ruga. He found fractures of the right femur, crush injuries on the right leg with subsequent below knee amputation. Permanent disability was assessed at 45% for loss of right leg and fracture of the right femur. He estimated the cost of prosthetics at Ksh. 250,000/=.

Submissions

18. The Appellant filed submissions dated 7.3.2025. It was submitted that on general damages, Ksh. 1,500,000 would be adequate compensation. Reliance was placed on *Mose & Another v Ochieng* (2024) eKLR where Ksh. 1,800,000 was awarded for fracture of the mid femur bone, crush fracture of the left foot and amputation below the left distal of the left foot.



19. They also relied on *Ruth v Makau* (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024) (Judgment) where the court awarded Ksh.2,000,000 in general damages where Respondent sustained severe crush injuries to the right leg which was amounted and a permanent disability of 50% awarded.
20. The Appellant also submitted that the cost of artificial limb of Ksh. 1,000,000 was excessive and not supported as the Appellant’s doctor suggested Ksh. 250,000 as the cost and Dr. Wokabi Ksh. 300,000 as cost, whereas Dr. Ating’a proposed Ksh. 1,000,000 as current cost of prosthetics.
21. On damages for diminished earning, the Appellant submitted that Ksh. 500,000/- would be adequate compensation. Reliance was placed on *Mbasu v Swaka* (2024) eKLR where it was submitted Ksh. 300,000 was awarded for loss of earning capacity due to below knee amputation.
22. The Respondent filed submissions dated 26.3.2025 in which it was submitted that award of damages was proper and the findings of the lower court should be upheld. He cited *Abdi Werdi Abdullabi v James Royo Mungatia & Another* (2019) eKLR where an award of Ksh. 3,500,000/- was made for amputation of the right tibia and fibula, and fractures right femur in 2019.
23. Similarly, he relied on *Paul Gachina v Mohammed G Awale & Another* (2018) eKLR where the High Court upheld Ksh. 3,000,000 for traumatic amputation of the right leg, and compound comminuted fracture of the right tibia.
24. It was submitted that the damages for loss of earning capacity of Kshs. 1,500,000 was proper and should be upheld. Similarly, that Dr. Atinga’ as Consultant Orthopedic was the most suited to give an opinion on the cost of prosthetics and so Ksh. 1,000,000 was the most accurate figure under this head.

Analysis

25. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
26. The duty of the first appellate court was set out in the case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held 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 re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
27. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
28. This court’s jurisdiction to review the evidence should be exercised with caution. In the cases of *Peters v Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

29. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions.
30. On quantum, the lower court awarded of Kshs. 3,500,000/- in general damages though it did not cite any authority as basis for the award. The Respondent pleaded the following injuries:
- i. Compound right tibia fracture
 - ii. Compound right fibula fracture
 - iii. Fracture of the right femur
 - iv. Bleeding from the right thigh
 - v. Bleeding from the right leg
 - vi. Amputation of the right leg below the knee with 23cm-25cm stump
 - vii. Shortening of the right femur.
31. It is the compound fractures on the tibia and fibula that caused the amputation of the right leg below the knee. The Respondent also suffered fracture of the right femur. There is general consensus on the medical reports that the Respondent suffered a fractured right femur with amputation of the right leg below the knee. The percentage of Permanent disability is generally agreed to be at least 45% and the cost of prosthetics at least Ksh. 250,000, to the maximum of Ksh.1,000,000/=.
32. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in *Shah and Another v Shah and Others* [2003] 1 EA 290:
- “The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”
33. A court is entitled to reject the opinion of an expert if upon consideration alongside all other available evidence, the court is of the view that the opinion is not one of sufficient probative value to establish the fact under judicial consideration. Further, the Court of Appeal, on its part in *Kimatu Mbuvi T/ A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:
- “... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”
34. Therefore, it is settled that expert evidence must be considered along with all other available evidence in arriving at a justifiable outcome. In *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:
- “It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them.



Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

35. On future medical expenses which was the cost of prosthetics, the same is a special damage. In the case of, *Tracom Limited & Another v Hassan Mohamed Adan* Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

"We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount. It will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

36. Future medical expenses as special damages should be pleaded and proved. As was held in the cases of *Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited* Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and *Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others* Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

37. There were no practical differences on the cost between all the doctors. Replacing a prosthesis at Ksh 300,000/= 8-10 years for a 24-year-old is equivalent to doing the same at Ksh. 250,000/= for a similar period or a permanent one at a million shillings. The proposed value of Ksh. 250,000/- by Dr. Maina Muga did not indicate whether it was permanent or temporarily. The percentage of disability ranged between 45% to 60%. The court considered the three reports. The court arrived at Prof. Ating'a as having been more convincing. This court cannot differ with the court below simply because it could have arrived at a different conclusion. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of *Mbogo and Another v Shah* [1968] EA 93 the court stated:

"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."



38. The evaluation of evidence by the court and its discretion on which court report to believe was well within the discretion of the court. I do not find the finding to be without regard to relevant factors. The court equally relied on the three reports and came to the inevitable conclusion that was correct. Indeed the Appellant deviated from their own doctor's findings and requested that Dr. Wobaki's figure be used. If that is to be done, it will result to an award of between Ksh.900,000/= to Ksh. 1,200,000/=. This is buttressed by the decision of Matheka J, in the case of Geoffrey Kamuki & another v RKN (Minor suing through her late father and next friend ZKN [2020] eKLR, where she posited as doth:

This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it.

39. In effect the appeal on the question of prosthesis lacks merit and is accordingly dismissed.

40. On general damages, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. v Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR. However, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

41. The principles governing the award of damages is settled. In Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] KEHC 4447 (KLR), Riechi J, enunciated the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.



42. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of *Kenya Bus Services Limited v Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

43. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another* (No 2) [1985] eKLR as follows:

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.

44. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

‘The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.’

We find the words of Lord Denning in the *West (H) & Son Ltd* (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”



45. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover as set out in the words of Lord Denning, which were reiterated by Nyarangi, JA. in *Kigaragari v Aya* [1985] eKLR thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

46. Further, in the case of *Kilda Osbourne v George Bamed and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

47. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v Shepherd* [1964] AC.326 (*supra*) where it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

48. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

49. I proceed to determine similar fact cases in relation to damages as applicable this appeal. This will be on basis of similar cases, having regard to the extent of the injuries, the age of the decision, the permanent nature of the injuries and other relevant factors. In the case of *Ruth v Makau* (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024) (Judgment) the court awarded Ksh.2,000,000 in general damages where Respondent sustained severe crush injuries to the right leg which was amputated and a permanent disability of 50% awarded.



50. Further, an award of Ksh. 2,000,000/= was upheld for amputation of the left leg at the knee joint in the case of *Kurawa Industries Ltd v Dama Kiti & Another*, [2017] eKLR. In that case the court posited as follows:

The scenario given by the above awards show that damages for amputation of one's leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries. There is the case of *Samuel Musinga Mwatete v Taz freighters Ltd & Another*, Mombasa HCC No. 230 of 2009 where Kshs.1.5 million was awarded in 2012. The case of Patrick Mbatha Kyengo was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of Cosmas Mutiso Mwema (*supra*)

51. The Respondent in *John Kipkemboi & Another v Morris Kedolo* [2019] eKLR sustained the following injuries - amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. The doctor assessed incapacitation at 50% due to the amputation. The High Court (Musyoka J) reduced the award of Ksh. 3,000,000 in general damages made by the lower court to Ksh. 2,500,000 in 2019.
52. In *Kurawa Industries Limited v Dama Kiti & Another* (*supra*), based on the above, it is the finding of this court that the award of Ksh. 3,500,000 was inordinately high and amounted to an erroneous estimate of damages. Having considered the awards in similar matters, I find that an award of Ksh. 3,500,000/= is inordinately excessive as to amount to an erroneous estimate of damages. An award of Ksh. 2,500,000 would be adequate compensation taking into account inflation, passage of time and the principle of harmony and uniformity in judicial decision making. To that extent the appeal herein is allowed.
53. On diminished earning capacity, the lower court awarded Ksh. 1,500,000/-. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in *Butler v Butler* [1984] KLR 225, as follows:-
- a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
 - b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
 - c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
 - d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
 - e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and



- f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.
54. The Appellants proposed Ksh. 500,000/- as appropriate award for loss of earning capacity. Loss over earning capacity is compensated by an award in general damages, once proved. In this case, it was a disputed fact that the Respondent used to earn from boda boda business. He could have been injured in the course of his self-employment as a boda boda rider. It was also not a disputed matter that he could earn from the boda boda trade. However, there was no evidence that he earned Ksh. 1,000 to 1,500 per day as projected in the Plea and his testimony. I am unable to interfere with the award of Ksh. 1,500,000/- under this head as the lower court correctly exercised its discretion in granting the award. I do not find it excessively high or low. I have taken into consideration the permanent disability of no less than 45% following amputation of his right leg below the knee as well as fractured femur bone. The Respondent is incapacitated and largely reliant on others for assistance.
55. The minimum wage in 2020 was Ksh. 13,572/=. This was *vide* Legal Notice No. 2 of 19.12.2018. The Respondent falls under the Machist or Machine Operator and allied work. A minimum wage for such was Ksh 14,315. Given that the respondent could have worked up to the age of 60 with vicissitudes of life in between, the loss of earning capacity works out as follows:
- a. 20 years of active work life, with 45% disability for a minimum wage of 14,315/=. This can be arrived at presuming Ksh 500/= as daily income making a total of ksh. 15,000/= per month.
 - b. This works out as $14,315 \times 45\% \times 20 \times 12 = 1,546,020/=$.
56. It is hoped that as much as is possible, the injured person in an accident might, by way of an award of the most reasonable estimate of damages, get well and be restored to his or her original health status prior to the accident. However, this is largely not always the case. As a general rule, an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the magistrate 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. In the cases of *Butt v Khan* (1981) KLR 470 and *Kitavi v Coastal Bottlers Ltd* (1985) KLR 470 the court held thus:
- “Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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.”
57. In this case, the award of Ksh. 1,500,000/=:, though based on a global figure is within range. Consequently, the appeal in this respect fails.
58. There was no appeal on special damages.

Determination

59. In the upshot, I make the following orders: -



- a. Judgment of the lower court awarding general damages of Ksh. 3,500,000/= is hereby set aside and substituted with an award of Ksh. 2,500,000/= for general damages.
- b. Appeal on the award of Ksh. 1,000,000/- as cost of the prosthetics is unmerited hence dismissed.
- c. The appeal against the award of loss of (diminished) earning capacity of Ksh. 1,500,000 is without merit and is hereby dismissed.
- d. As the appeal partly succeeds, each party to bear their own costs of this appeal.
- e. 30 days stay of execution.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF JUNE, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Waweru for the Appellant

Ms. Naututu for the Respondent (muted)

Court Assistant – Jedidah

