



Ichura v Mwai (Civil Appeal E032 of 2023) [2025] KEHC 9722 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E032 OF 2023**

MA ODERO, J

JULY 4, 2025

BETWEEN

LUCY WAMBUI ICHURA APPLICANT

AND

JEREMIAH MUTURI MWAI RESPONDENT

JUDGMENT

1. The Appellant herein Lucy Wambui Ichura filed in this Court the Memorandum of Appeal dated 27th April 2023 seeking the following orders:-
 - “(a) This Appeal be allowed and the Judgment of the learned trial magistrate be set aside.
 - (b) That the Honourable Court does proceed and determine the issue of quantum finally.
 - (c) This Honourable Court does issue such further orders or directions as it may deem fit.
 - (d) The costs of this Appeal be awarded to the Appellant.”
2. The Respondent Jeremiah Muturi Mwai did not enter appearance or participate in the trial before the lower court. Similarly the Respondent did not respond to this appeal neither did he appear. As such the appeal was not opposed.
3. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 19th March 2025. The Respondent did not file any submissions.



Background

4. The Appellant's evidence in the lower court was that on 14th December 2019 at about 9.00pm, she was standing at the roadside along the Nyeri-Karatina Road. A motor-vehicle Registration No. KAZ 456S was being driven on said road. That the motor vehicle in question which was being driven at an excessive speed, veered off the road and hit the Appellant, knocking her down.
5. The Appellant was rushed to hospital. The Appellant stated that as a result of the accident she sustained the following injuries;-
 - (i) Right leg fractured tibia.
 - (ii) Right leg fracture.
6. The Appellant then filed in the Nyeri Chief Magistrate's Court Civil Suit No. E198 of 2021 seeking the following reliefs against the Defendant.
 - “(a) General damages for pain and loss of amenities, lost earnings, loss of earning capacity and future medical expenses.
 - (b) Special damages.
 - (c) Costs of the suit plus interest.”
7. The matter was heard in the lower court where the case was heard as an undefended claim. Vide the judgment delivered on 22nd March 2023 Hon. M. Okuche Senior Principal Magistrate made the following awards in favour of the Appellant;-
 - (i) Liability against the Defendant at 100%.
 - (ii) Pain and suffering - Kshs. 500,000/=.
 - (iii) Special Damages - Kshs. 7,550/=
 - (iv) Costs of the Suit and InterestTotal Award - Kshs. 507,550/=.
8. The trial court dismissed the Appellants claim for loss of earnings as well as for loss of earning capacity.
9. Being aggrieved by this decision the Appellant filed the present appeal which was premised upon the following grounds;-
 - “1. That the Learned trial Magistrate erred in law and fact in failing to consider adequately, or at all, the totality of the evidence that was tendered on quantum, and in so doing he arrived at an erroneous finding on quantum.
 2. That the learned trial magistrate erred in law and in fact in the manner that he assessed general damages and in awarding damages that were low in the circumstances.
 3. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submission on quantum and in so doing he arrived at an erroneous decision.”
10. As stated earlier the Appeal was not opposed.



Analysis And Determination

11. I have carefully considered this memorandum of appeal as well as the record of Appeal filed on 9th October 2023.
12. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see *Peters v Sunday Post Limited* [1958] E.A 424]
13. In *SELLE and Another v Associated Motor Boat Company Ltd & Others* [1968] E.A 123 it was stated as follows:-

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
14. Likewise in *Gitobu Imanyara & 2 Others v Attorney general* [2016] eKLR, the court of Appeal stated thus;-

“An appeal to this court is by way of a 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.”
15. The Appellant does not take issue with the finding of 100% liability against the Respondent. However the Appellant challenges the trial courts award of Kshs. 500,000 for general damages arguing that given the injuries which she sustained the said award is too low.
16. In order for an appellate court to interfere with an award made by the trial court there must be sufficient grounds to do so. In the case of *Bashir Ahmed v Uwais Ahmed Khan* [1981 KLR it was held that

“.....An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge [or Judicial Officer] 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”.
17. It must however be remembered that the measure of quantum lies at the discretion of the trial magistrate.
18. In coming to the figure of Kshs. 500,000 the trial magistrate noted the injuries which the Appellant had suffered i.e mild head injury, fracture of left tibia fibilua and fracture of midshaft femur.



19. It is trite law that's similar injuries ought to attract similar awards of damages. In the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR, the court of Appeal made the following observation.

“On our part we note that an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries.” [Own emphasis]

20. In a similar vein this court will take into consideration the following cases in which comparable injuries were sustained;-

- (i) In George Raini Atungu v Moffat Onsare Aunga [2021] eKLR (Ougo, J), Kshs. 650,000.00 was awarded for a fracture of the right tibia and fibula bones, a fracture of the left radius and ulna, and contusions to the chest and the pelvis.
- (ii) Nahason Nyabaro Nyandega v Peter Nyakweba Omboga [2021] eKLR (Maina, J), where the victim sustained a compound fracture of the right tibia bone; cut wound on the right leg; and bruises on the face, and the court awarded Kshs. 650,000.00
- (iii) In Ndwiga & another v Mukimba [2022 KEHC 11793 (KLR) Njuguna, J), the court awarded Kshs. 500,000.00, for fractures of the tibia and fibula, and tenderness and swelling on the left leg.
- (iv) In Atunga v Mogambi [2022] KEHC 9854 (KLR) (Ougo, J), the injuries were fractures of the tibia and fibula bones; dislocation of the right hip joint; multiple lacerations on the lower limb; bruises, with multiple cut wounds, on the upper limbs; Dislocation of the right shoulder; chest trauma; and bruises on the frontal part of the head, and Kshs. 550,000.00 was awarded.
- (v) In Sammy Mugo Kinyanjui & another v. Kairo Thuo [2017] eKLR; where the Respondent suffered slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs, fracture of the right and left tibia and left fibula, he was awarded Kshs. 600,000.00
- (vi) In Tirus in Mburu Chege & another v. JKN & another [2018] eKLR; the Respondent suffered fractures of the tibia and fibula, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. He was awarded Kshs. 500,000.00.

21. It is quite evident that the injuries enumerated in the above cases are far more grievous than the injuries which the Appellant sustained. As such I find that the award of Kshs. 500,000 though unpalatable to the Appellant was not at total divergence to awards made in similar circumstances. As such I am not inclined to interfere with said award.

22. The Appellant was also aggrieved by the trial courts dismissal of her claims for loss of earning and loss of earning capacity and future medical expenses. In her evidence the Appellant had indicated that prior to the accident she was a farmer and was earning approximately Kshs. 30,000 per month from her farming activities.

23. In the medical report dated 7th June 2021 it was indicated that the Appellant suffered 20% permanent disability as a result of her injuries.

24. In the case of Nyatogo v Mini Bakeries Limited [2023] eKLR, the court in addressing a similar situation stated this

“.....loss of earnings must be specifically pleaded and proved. Usually loss of earning capacity is concerned with the effect of the injury on the person's future earning



ability as opposed to the present loss. However, it is the responsibility of the respondent to demonstrate, by way of evidence.” [Own emphasis]

25. Though the Appellant claimed that she was a farmer and was earning a sum of Kshs. 30,000 monthly no evidence was tendered to prove this claim. The Appellant adduced no evidence to show how long she had been incapacitated and how much income she lost as a result of said incapacity. Therefore the claim for loss of earnings was not proved.
26. Likewise the Appellant made no effort to adduce any evidence to show the effect which the injuries she had sustained would have on her future earnings. I therefore find that the failure of the trial court to make an award under the heading loss of future earnings was justified.
27. On the Appellant’s claim for loss of earning capacity I rely on the case of *Mumias Sugar Company v Francis Wanalo* [2007] eKLR where the court stated as follows;-

“The award for loss of earning capacity can be made 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 a plaintiff is employed, is to compensate the plaintiff for the risk that the disability has exposed him to either losing his job in the future or case he loses the job, his diminished 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 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 to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.” [Emphasis my own]

28. An award for loss of future earning capacity can be made under the general damages or under a separate heading. In this case the Appellant made this claim under a separate heading. It is not clear why the trial court failed to make assessment under the claim for loss of future earnings.
29. The medical report dated 7th June 2021 clearly indicates that the Appellant suffered permanent incapacity at 20%, I therefore opine that an award of Kshs. 500,000 for loss of future earnings would be appropriate.
30. The Appellant’s claim for future medical expenses was also dismissed by the trial court, yet the medical report dated 7th June 2021 prepared by Dr. Munyi clearly indicated that the Appellant would require further treatment to assess left leg function with physiotherapy.
31. In the case of *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR the Court of Appeal stated as follows:

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* [2004] 1 EA 91, this Court stated:-
And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect



thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a persons' legal right should be pleaded. We understand that to mean that once the plaintiff pleads that there would 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 treatment is undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course then turn that the injury will have taken at the time of treatment. We think that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that future medical expenses will require.”

32. The medical report proves that this claim was merited. The Appellant did plead for the same in her plaint. The trial magistrate erred in failing to make an award for future medical expenses.
33. The medical report indicated that an amount of Kshs. 300,000 would be required for future medical expenses. I award this sum under this heading.
34. Finally this Appeal succeeds. The judgment delivered on March 22, 2023 is hereby set aside. In its place this court enters judgment in favour of the Appellant and against the Respondent as follows;-
 - (i) General Damages - Kshs. 500,000
 - (ii) Loss of Future Earnings - Kshs. 500,000
 - (iii) Future Medical expenses - Kshs. 300,000
 - (iv) Special Damages - Kshs. 7,550Total Award - Kshs. 1,307,550
35. Finally this court enters judgment in favour of the Appellant in the amount of Kshs. 1,307,550/= plus costs of the suit and interest at court rates from the date of delivery of judgment in the lower court until payment in full.

DATED IN NYERI THIS 4TH DAY OF JULY 2025.

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MAUREEN A. ODERO

JUDGE

