



Laria v HJS (Minor suing through her father And Next Friend JSM) (Civil Appeal E064 of 2022) [2025] KEHC 10373 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E064 OF 2022**

**M THANDE, J
JULY 11, 2025**

BETWEEN

DORCAS KARAMBU LARIA APPELLANT

AND

**HJS (MINOR SUING THROUGH HER FATHER AND NEXT FRIEND
JSM) RESPONDENT**

JUDGMENT

1. The Appellant challenges the decision of trial court in respect of a suit instituted by the Respondent against her claiming both general and special damages arising from a road traffic accident. In her plaint dated 9.7.18 and amended on 6.7.19 and further amended on 19.11.2020, the Respondent averred that she was travelling as a pillion rider aboard motorcycle registration number KMDB 481M on 10.7.15 along the Kilifi-Malindi Road when upon reaching Mikoroshoni motor vehicle registration number KCD 392A, driven by the Appellant's driver, violently collided with the motorcycle. As a result of the collision, the Respondent, then a 7 year old child sustained serious bodily injuries and suffered pain, loss and damage.
2. The Respondent further claimed cost of future medical expenses for physiotherapy estimated at Kshs. 80,000/= per year for at least 3 years; purchase of painkillers and joint/bone care medication estimated at Kshs. 3,000/= per month for at least 3 years and thereafter when necessary. The medical report further indicated that the Respondent, a minor of 14 years, had sustained a partial permanent disability of 8% due to ankyloses/stiffness of left knee joint; shortening of lower limb; recurring post fracture pains in left knee/thigh. As such the Plaintiff has sustained diminished capacity to participate in school physical activities and diminished future work output.
3. Following a hearing, the trial Magistrate entered judgment in favour of the Respondent against the Appellant as follows:



- a. Liability 100%
 - b. General damages for pain and suffering Kshs. 650,000/=
 - c. Damages for diminished earning capacity Kshs. 350,000/=
 - d. Cost of future medication Kshs. 198,000/=
 - e. Special damages Kshs. 5,800/=

Total Kshs. 1,203,800/=
 - f. Costs of the suit and interest.
4. The Appellant is aggrieved by the award on quantum of damages, and preferred the Appeal herein. The Appellant listed the following grounds of appeal:
1. That the Learned Resident Magistrate in awarding a sum of Kshs. 650,000.00/= to the Respondent (hereinafter referred to as the Plaintiff) as general damages for pain and suffering on the basis of 100% liability.
 2. That the said award of Kshs. 650,000.00/= is in all the circumstances of this case so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the Plaintiff considering the injuries suffered by him and the opinions of Dr Ajoni Adede in his medical report dated 21st November, 2018, Dr Darius W.Kiema in his medical report dated 29th October, 2019 and Dr Udayan Sheth in his medical report dated 1st October, 2019 which were all tendered in evidence.
 3. That the said award of Kshs. 650,000.00/= is altogether disproportionate to the injuries sustained by the plaintiff and is not keeping with other comparable awards made in respect of similar injuries.
 4. That the Learned Resident Magistrate erred in failing to consider or properly consider the medical report dated 14th October, 2019 prepared by Dr Udayan Sheth which was produced in evidence and marked (D exhibit 1).
 5. That the Learned Resident Magistrate erred in putting too much emphasizes on the medical report dated 10th May, 2021 prepared by Dr Darius W.Kiema as opposed to the one by Dr Udayan Sheth dated 14th October, 2019 when it was clear that Dr Udayan Sheth being a Consultant Orthopaedic Surgeon is more qualified than Dr Kiema who is an MCChB(Moi) with a Post Graduate Diploma in Diabetes, Royal Liverpool Academy(UK) and Dr Sheth's report was more authoritative than Dr Kiema's report.
 6. The Learned Resident Magistrate erred in not considering or adequately consider that a claim for loss of future medical expenses is a special claim though within general damages and needs to be specifically pleaded and strictly proved before a court of law can award it.
 7. That the Learned Resident Magistrate erred in awarding the sum of Kshs. 350,000/= for future earning capacity when the same was neither pleaded nor proved as required.
 8. The Learned Resident Magistrate erred in awarding to the Plaintiff a sum of Kshs. 198,000/= for future medical expenses when the same had not been pleaded for in the Plaint and when there was no documentary evidence led before him in respect thereof.



9. That the Learned Resident Magistrate erred whilst making awards under the various heads by failing to take into account that the general damages for pain, damages for diminished earning capacity, costs of future medication awarded to the Plaintiff would be invested to earn interest. If the Learned Resident Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the Plaintiff under each head.
10. That the Learned Resident Magistrate erred in failing:-
 - i. To appreciate the significance of the various facts that emerged from Dr Ajoni Adede his medical report dated 21st November, 2018, Dr Kiema's medical report dated 10th may, 2021 and Dr Udayan Sheth's medical report dated 14th October, 2019.
 - ii. To consider or properly consider all the evidence before him and/or
 - iii. To make any or any proper findings on the aspect of quantum of damages on the evidence before him.
11. That the Learned Resident Magistrate erred in failing to adequately consider the written submissions filed by counsel for the Defendant/Appellant.
5. The Appellant prayed that the Appeal be allowed and that the Judgment be set aside or varied as to what this Court appears proper and that an appropriate order for costs be made in respect of this appeal and in respect of the proceedings in the court below.
6. The Respondent, being aggrieved, filed a cross appeal, challenging the decision of the trial Magistrate on quantum. The grounds of appeal reproduced hereunder:
 1. The Learned Trial Magistrate erred in fact and in law in making awards for general damages for pain, suffering and loss of amenities and for diminished future earning capacity which are so inordinately low such as to represent a wholly erroneous estimate of the damages payable.
 2. The Learned Trial Magistrate erred in fact and in law in departing from the principles governing the awards for General damages for pain, suffering and loss of amenities and for Diminished future earning capacity when he assessed them in the sums of Kshs. 650,000.00/= and Kshs. 350,000.00/=, respectively which sums are so inordinately low. Had he applied the proper principles, he would have given much higher and reasonable awards.
 3. The Learned Trial Magistrate misdirected himself in fact and in law in failing to appreciate the oral and documentary evidence tendered by the Plaintiff/Respondent in support of the claims for General damages for pain, suffering and loss of amenities and for Diminished future earning capacity.
 4. The Learned Trial Magistrate misdirected himself in fact and in law by failing to consider Plaintiff/Respondent's submissions and Judicial authorities on awards made in similar cases tendered by the Plaintiff's counsel with regard to the awards for General damages for pain, suffering and loss of amenities and for diminished future earning capacity.
 5. The Learned Trial Magistrate erred in fact and in law in acting in complete disregard to the principle of stare decisis and in particular in failing and/or refusing to follow the principles laid down by the High Court of Kenya and the Court of Appeal in regard to assessment of General damages for pain, suffering and loss of amenities and for diminished future earning capacity.



7. The Respondent prayed that the Appeal be dismissed with costs and that the Cross-Appeal be allowed with costs. The Respondent further prayed that the trial court's finding on quantum of damages be set aside or varied as the Court deems fit.
8. This being a first appeal, the Court has reconsidered and re-evaluated the evidence with a view to drawing its own conclusion. The Court has however made due allowance with respect to the fact that it neither saw nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd. & Others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).
9. In all the grounds of appeal raised by the parties, the only issue to be determined are whether the learned Magistrate erred on quantum.
10. The record shows that the injuries suffered by the Respondent as enumerated in the medical report by Dr. Darius W. Kiema dated 29.10.19 are supracondylar fracture distal third left femur (thigh) bone, post traumatic arthritis and stiffness left knee; post traumatic shortening of left lower limb; cut wound on left leg, forehead and occipital region and bruises on the buttocks and left elbow.
11. On general damages for pain and suffering, the Appellant submitted that a sum not exceeding Kshs. 350,000/= was adequate compensation. The Appellant opposed the Respondent's cross appeal that challenged the sum awarded as too low and urged the Court to disregard the same. It was argued that although Dr. Kiema for the Respondent had stated that the injuries sustained by the Respondent resulted in 8% permanent disability, the report by Dr. Udayan Sheth indicated that the Respondent has no permanent incapacity. Relying on the case of *Reamic Investment Limited v Joaz Amenyia Samuel* [2021] eKLR where the court lowered an award of Kshs. 600,000/= to Kshs. 350,000/= for open left femur fracture, abrasion on left knee, face, neck right upper limb and lip and contusion on anterior chest, the Appellant urged the Court to find that the award of Kshs. 650,000/= awarded to the Respondent to be manifestly excessive.
12. For the Respondent, it was submitted that the trial court failed to take into account the injuries sustained and how it affected her day to day life including her diminished working capacity with a lifetime of post traumatic pain. The Respondent thus contended that in light of the severity of the injuries, the sum awarded was manifestly low. The Respondent urged that the sum be enhanced upwards to Kshs. 2,000,000/=. Reliance was placed on the case of *Damaris Wamucii Kagechu v Joseph Kirui & another* [2019] eKLR where the court awarded Kshs. 1,600,000/= for bilateral fractures of the tibia and fibular to both legs with 8% permanent disability. Also relied on was *Charles Wanyoike Gitbuka v Joseph Mwangi Thuo & 2 others* [2008] eKLR where the court awarded Kshs. 2,000,000/= for fracture of the mid-shaft of the right femur amidst other injuries.
13. In arriving at the amount awarded, the trial Magistrate after considering the 3 medical reports, found that Dr. Sheth, though an orthopedic surgeon, did not give a true picture of the condition of the Respondent at time of examination. She further found Dr. Kiema's assessment on disability to be more



reliable as it was based on a scientifically approved approach. With respect to compensation, the trial Magistrate considered the authorities cited by the parties. She found the sum of Kshs. 2,000,000/= to be inordinately high. The trial court further found that while *Reamic Investment Limited* (*supra*) presented comparable injuries, the Respondent had undergone further traumatic changes flowing from the injuries, like the shortening of the left leg and stiffness and rigidity at the knee joint. The trial court thus awarded the sum of Kshs. 650,000/= as general damages for pain and suffering.

14. I have looked at the record as well as the cited authorities and find that the *Reamic Investment Limited* (*supra*) did present the most comparable injuries to the those sustained by the Respondent. There was however no indication of any disability. In the present case, Dr. Kiema indicated that the X-ray confirmed shortening of the limb and arthritis. He stated that the Respondent's bones would continue to grow but that the deficiency will remain as both limbs grow together. The limb will always be there and arthritis and disability will worsen. In his testimony, Dr. Sheth acknowledged the shortening of the limb but said that based on his experience, the same would heal.
15. As I consider the challenge to the award of damages, I am mindful that the award of damages is discretionary and an appellate court should be slow in interfering with a trial court's exercise of discretion in this regard. In the case of *Butt v Khan* [1981] KLR 349 Law, JA stated as follows:

An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely 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.
16. I have considered the nature of the injuries sustained by the Respondent including the fact that as a result of the same, she will always walk with a limp due to the shortened leg. I do not find the amount awarded to be manifestly high or inordinately low, neither do I find that the trial court proceeded on wrong principles. I am also satisfied that the trial court did fully understand the evidence before it as it arrived at the award. In light of this, I find no reason to disturb the award on special damages by either enhancing or reducing the same.
17. The Court is also guided by the decision in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*(1982 –88) 1 KAR 727 at p. 730 where Kneller JA said:-

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.
18. I now turn to the award for future medical expenses. The Appellant submitted that the award was inordinately high and urged the Court to be guided by the evidence of Dr. Sheth, a consultant orthopaedic surgeon rather than that of Dr. Kiema, a general practitioner and a diabetes specialist. Citing the case of *Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited* [2016] eKLR, it was submitted that Dr. Kiema did not annex any quotations to his medical report nor justify how he became knowledgeable in a field that is not his expertise. The Appellant urged the Court to be guided by the report of Dr. Sheth who did not see the need of future medical expenses.
19. For the Respondent, it was submitted that Dr. Kiema examined the Respondent when she was not fully recovered and indicated the need for future medical attention. Further that Dr. Kiema



indicated that the Respondent would require physiotherapy, painkillers and joint/bone medication. The Respondent urged the Court to uphold the trial court's award under this head.

20. The record shows that in his testimony, Dr. Kiema stated that Dr. Sheth ordered the x-ray dated 22.10.19 but ignored the arthritis indicated therein. He indicated that the Respondent would require physiotherapy for at least 3 years at the rate of Kshs. 6,000/= per quarter. The charges at Kilifi Hospital, a public institution range between Kshs. 600/= -1000/=. And painkillers to manage the arthritis at the rate of Kshs. 3,000/= per month for 3 years. On his part, Dr. Sheth indicating that the fracture was not visible in the x-ray and that the limb discrepancy would disappear when she grows. He did not state that that any further medical intervention would be required.
21. I have considered the medical reports of the 2 doctors as well as their testimonies. Dr. Sheth's prognosis as an orthopaedic surgeon, is more reliable than that of Dr. Kiema, a diabetes specialist. Further, Dr. Kiema did not provide any document showing the physiotherapy rates at Kilifi Hospital to support the figures he indicated in his report. Similarly, the amount of Kshs. 3,000/= for monthly pain medication are also unsupported by evidence. I therefore find that the trial court erred in accepting this evidence without further interrogation of the same. In this regard I associate with Kamau J. who in the case of Peninah Mboje Mwabili (supra) stated:
- However, as the Defendant rightly argued, there was no proof of the cost of the aforesaid items. The court noted that Dr Ajoni Adede was a family physician/specialist venerologist. He was not an Orthopaedic surgeon. He gave an opinion relating to the cost, maintenance and replacement of the said orthopaedic items. If at all he had any expertise on the costing, use and maintenance of gadgets that would have assisted the Plaintiff in her mobility, he ought to have indicated how he came to be knowledgeable in an area that was not of his expertise. He did not do so. He also ought to have provided documents showing the costs of the items from AIC Kijabe Mission Hospital as that is where he based his opinion on.
22. In light of the foregoing, I find that the ground challenging the award for future medical expenses succeeds. Having so found, it follows that the challenge to the award for loss of earning capacity also succeeds.
23. In the end and in view of the foregoing, I find that the Appeal partially succeeds while the Cross-Appeal fails. The awards for future medical expenses and loss of earning capacity are hereby set aside. All other awards remain the same. There shall be no order as to costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF JULY 2025

M. THANDE

JUDGE

