



REPUBLIC OF KENYA



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**Ombati v Ena Investments Limited t/a Ena Coach (Civil Appeal
E021 of 2024) [2025] KEHC 10357 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E021 OF 2024**

WA OKWANY, J

JULY 3, 2025

BETWEEN

RICHARD MONANDA OMBATI APPELLANT

AND

ENA INVESTMENTS LIMITED T/A ENA COACH RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Chief Magistrate's
Court at Keroka in Keroka CMCC No. E007 of 2021 delivered by
Hon. C. Ombija, Senior Resident Magistrate on 3rd July 2024)*

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where he sued the Respondent/Defendant seeking the following orders: -
 - a. Special Damages
 - b. General Damages
 - c. Costs of and incidental to the suit
 - d. Interest on (a), (b) and (c) above at court rates.
 - e. Any other relief that the court may deem just and fit to grant
2. The Appellant's case was that he was on or 2nd November 2019, travelling aboard motor vehicle Registration No. KCP 839V, along Keroka-Kisii Road when at Nyansira area the said vehicle collided with the Respondent's motor vehicle Registration No. KCG 024Z. The Appellant attributed the accident to the negligence of the Respondent's driver/agent whom he faulted for driving the Respondent's said motor vehicle recklessly and/or negligently thereby permitting it to cause the accident that occasioned him serious injuries.



3. The Respondent entered appearance and filed a defence in which it denied the averments made in the Plaintiff and instead blamed the accident on the negligence of the Appellant and/or the driver of the Motor Vehicle KCP 839V.
4. The matter proceeded for hearing in which the Appellant testified and called two witnesses namely; No. 69256 Cpl. Prisca Nyanchama who produced the Abstract (P.Exh8) and Dr. Ezekiel Ogando Zoga who produced the Medical Report (P.Exh7). The Respondent, on the other hand, called the evidence of Dr. Steve Ochieng who produced a second Medical Report prepared by Dr. Jennifer Kahuthu (D.Exh1) and Dr. Jaban Kouko who produced the radiology report dated 4th March 2022 (D.Exh2). Dr. Kahuthu assessed permanent disability at 20% and noted that the Appellant will not need future medical attention.
5. At the close of the case, the trial court entered judgment in favour of the Appellant as follows: -
 Liability at 100% against the Defendants
 General Damages for Pain and Suffering – Kshs. 500,000/=
 Special Damages – Kshs. 97,925
 Total – Kshs. 597,925/= together with costs and interests until payment in full.
6. Aggrieved by the said decision, the Appellants filed the instant appeal in which he listed the following grounds of appeal: -
 1. The Learned Trial Magistrate erred in law and fact in evaluation of the evidence before him and in reaching a wrong conclusion in assessment of damages.
 2. The Learned Trial Magistrate erred in law and fact in failing to award the Appellant damages for loss of earning capacity pleaded and proved by the Appellant.
 3. The Learned Trial Magistrate erred in law and fact in and/or failure of assessment of the evidence, submissions and authorities presented before him by the Appellant on loss of earning capacity.
 4. That the Learned Trial Magistrate made the award of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) only as General Damages for pain and suffering on an entirely erroneous and low estimate of damages to which the Appellant was entitled.
 5. The Learned Trial Magistrate erred in law and fact in his assessment of the Appellant's injuries, residual injuries and/or permanent incapacity and inflation in his assessment of General Damages for pain and suffering.
7. The Appellant sought orders for the reassessment of the quantum of general damages for pain and suffering and for loss of earning capacity.
8. The Appeal was canvassed by way of written submissions which I have considered.
9. The duty of the first appellate court was explained in the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* Civil Appeal No. 161 of 1999, where the Court of Appeal held thus: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give



reasons either way. See the case of *Kenya Ports Authority v Kustbon (Kenya) Limited* 2000 2EA 212 wherein the Court of Appeal held, *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

10. I have carefully considered the grounds of appeal and the parties’ respective submissions and I find that the only issue for my determination is whether the trial court arrived at the correct finding on quantum.

Analysis and Determination

11. The principles to be considered in determining whether or not to interfere with the trial court’s assessment of damages were explained in the case of *Butt v Khan* [1981] KLR 349 where it was held thus: -

“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 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.”

12. In the present case, the Appellant took issue with the entire award made by the trial court on the basis that it was an inordinately low assessment of damages and that the said court erred when it failed to make an award under loss of earning capacity.

13. I have considered the nature of injuries that the Appellant sustained in the accident which were enumerated at paragraph 5 of the Plaint as follows: -

- a. Compound fracture of the right Tibia
- b. Compound fracture of the right fibula
- c. Traumatic extraction of the lower incisor teeth
- d. Cracked two upper incisor teeth
- e. Anterior dislocation of the proximal end of tibia, left knee and sequel.
- f. Cut wound right lower limb.

Residual Injuries

- i. Ambulates with the aid of crutches
- ii. The right limb is deformed distally.
- iii. Ugly scars
- iv. Permanent loss of 2 incisor teeth
- v. Shortening of the right lower limb
- vi. Difficulty sitting and walking for long
- vii. Pain on the right leg



- viii. Cannot walk faster or run
 - ix. Risk of osteoarthritis of the right leg
 - x. 35% permanent disability.
14. I have perused the medical report by Dr. Ezekiel Zoga (PW3), the original treatment notes (P.Exh3), the P3 Form (P.Exh4) and the Medical Report by Dr. Zoga (P.Exh 7). I note that the medical evidence support the injuries listed in the Complaint and that even though loss of teeth is not mentioned in the treatment notes, the P3 Form indicates that the Appellant had traumatic injury on the two lower incisor teeth. I also note that the medical report by Dr. Ogando Zoga, indicates that the Appellant lost the incisor teeth.
 15. I find that the Appellant established, on a balance of probabilities, that he lost teeth as a result of the injuries that he sustained in the accident. The same injuries were also confirmed by the Respondent's witness Dr. Kahuthu's report (D.Exh1). I am satisfied that the Appellant proved the injuries that he sustained in the accident, as pleaded in the Complaint, on a balance of probabilities.
 16. It is trite that comparable injuries should attract comparable awards. In *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR the court held as follows: -

“On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages”.
 17. I have considered the following cases where the claimants sustained injuries that are similar to the Appellant's injuries: -
 - a. In *Stephen Wanderi Kamau & Anor v Gladys Wanjiku Kungu* (2006) eKLR, the plaintiff who sustained compound fractures of the left fibula and fibula, extensive skin loss from the knee downwards which required skin grafting, loss of full function of her legs, shortened left leg and had the degree of permanent disability assessed at 20% was awarded general damages at Kshs. 600,000/=.
 - b. In *Joseph Musee Mua v Julius Mbogo Muigi & 3 Others* (2013) eKLR the court awarded Kshs. 1,300,000/= general damages to the Plaintiff who sustained injury to the left leg, the head, and face, fractured left leg tibia and fibula, two broken upper jaw teeth i.e. one molar and one canine tooth, chest injury and right shoulder injury as well as bruises on the left elbow.
 - c. In *Ahmed Mohammed v Abdulhafidh Mohamed Banragab* (2004) eKLR, the Plaintiff who sustained a fractured left femur subtrochanteric and comminute compound fracture on the left tibia and fibula which was treated by external fixation of tibiofibular and he was put on skeletal traction was awarded Kshs. 750,000/= general damages. The Plaintiff in the said case also required skin and bone grafting of the left tibia, was operated on three times and was admitted in hospital for nine months. He suffered shortening of the left lower limb and was diagnosed with a likelihood of osteoarthritis of the left lower limb joints and he was not able to walk without crutches.
 18. Having regard to the injuries that the claimants in the above cases suffered and the age of the above cited cases, I find that the trial court's award of Kshs. 500,000/= general damages was inordinately



low. I am of the view that an award of Kshs. 900,000 will be appropriate and commensurate with the Appellant's injuries.

19. On the issue of loss future earning capacity, I find guidance in the principles stated in the case of *Butler v Butler* (1984) KLR 225 where the court held thus: -

“Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* (1973) 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did... ...what a victim whose earning capacity is diminished through an accident loses is an interest which if not saleable on the labour market, has an assessable value. It is therefore an economic loss of the same class as the 'lost years' for which the wrongdoer should fairly compensate the victim.”

20. In this case, the Appellant testified that he was a casual labourer earning Kshs. 15,000/= per month. He stated that he has not been able to go back to work because his job requires him to be physically fit since it involves manual work. I note that the radiology report (D.Exh2) indicates that the Appellant's injuries were likely to interfere with his normal work operations and movement and that he faced the risk of developing osteoarthritis later in life thereby leading to incapacitation. I am in agreement with the Appellant's assertion that he proved the claim for loss of future earning capacity and ought to have been given an award for loss of earning capacity.

21. In *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR the court discussed the principles governing awards for loss of earning capacity as follows: -

“The award for 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 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.” [Emphasis added].

22. In the instant case, I note that the Appellant did not provide any proof of earnings and I therefore find that the global sum would be applicable in assessing loss of earning capacity. I am guided by the decision in the case of *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR where the court stated: -

“The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors.”

23. I have considered the fact that the Appellant was 35 years old at the time of the accident as shown in his discharge summary and that he suffered 20%-35% permanent disability coupled with the fact that he was not suffering from any illness that would have diminished his working capacity prior to the accident. I find guidance in the following similar cases: -



- a. In *Hussein Sambur Hussein v Shariiff A. Abdulla Hussein & 2 others* [2022] eKLR, the court on appeal upheld an award of Kshs. 700,000/= for loss of earning capacity where the claimant was a 43-year-old driver who suffered 10% permanent disability.
- b. In *Ochiel & another v Musyoki* (Civil Appeal E42 of 2022) [2024] KEHC 4943 (KLR) (14 May 2024) (Judgment), the High Court at Kitui upheld an award of Kshs. 500,000/= for loss of earning capacity where the claimant suffered 20% permanent disability.
- c. In *Musili v Mwende alias Daniel Mutisya Mwende* (Civil Appeal E022 of 2022) [2024] KEHC 8444 (KLR) (9 July 2024) (Judgment) the High Court at Kitui upheld the award of Ksh. 250,000/= where the claimant who was 46 years old had suffered 10% permanent disability according to one doctor and 5% according to a second medical report.
24. In this case, I find that a global award of Kshs. 300,000/= would be sufficient compensation under ‘loss of future earning capacity’.
25. I note that the Appellant pleaded and proved the claim under special damages and I therefore find no justification in interfering with the said award. The Appellant did not however plead or prove the award for future medical expenses which is in the nature of special damages. In *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, the Court of Appeal held thus: -

“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 thereon 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 the infringement of a person’s legal right should be pleaded.”

26. For the reasons that I have stated in this judgment, I find merit in the instant appeal which I hereby allow by setting aside the trial court’s findings on quantum and substituting it with judgment for the Appellant as follows: -

Liability at 100% against the Respondents

General Damages for Pain and Suffering – Kshs. 900,000/=

General Damages for loss of future earning capacity – Kshs. 300,000/=

Special Damages – Kshs. 97,925

Total – Kshs. 1,297,925/=

Costs of the trial court suit and Appeal.

I also award the Appellant interests on the above award at court rates until payment in full.

27. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY 2025.

W. A. OKWANY

JUDGE

