



**Real Tillak Enterprises v Wambua (Civil Appeal E069 of 2021)
[2025] KEHC 11102 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E069 OF 2021**

**RC RUTTO, J
JULY 22, 2025**

BETWEEN

REAL TILLAK ENTERPRISES APPELLANT

AND

STEPHEN WAMBUA RESPONDENT

*(Being an appeal from the Judgment and Decree of Honourable Chief Magistrate
C.C Oluoch in Mavoko CMCC No. 932 of 2016, delivered on 14th April, 2021)*

JUDGMENT

1. This is an appeal against quantum. In the trial court, the Respondent sued the Appellant for general damages and special damages arising from a road traffic accident that occurred on 2nd February 2016 along Mombasa Road at Mlolongo Township. In the Plaint, the Appellant was sued as the registered owner of Motor Vehicle Registration Number KCA 051W, in which the Respondent herein was a passenger.
2. It was alleged that Motor Vehicle Registration Number KCA 051W was negligently and carelessly driven by the Appellant herein without warning and without ensuring that the Respondent had fully boarded the vehicle. As a result, the vehicle drove off, causing the Respondent to fall and be run over by the same vehicle, thereby sustaining injuries, pain, loss, and damage.
3. In his defence, the Appellant denied the claim, however before the hearing commenced in the trial court, parties recorded a consent on liability in the ration of 75% to 25% in favour of the Respondent herein which was adopted as the order of the court.
4. Upon hearing the parties on quantum, the trial court entered judgment in favour of the Respondent as against the Appellant. Judgment was in the following terms:
 - a. Liability 75%:25%



- b. General Damages Kshs.600,000/=
 - c. Special Damages Kshs.14, 850/=
 - d. Future Medical Expenses Kshs.150,000/=
 - e. Diminished earning capacity Kshs.500, 000/=
- Total Kshs.1, 264, 850/=
- Less 25% Kshs.948, 637/=
5. Being aggrieved by the judgment, the Appellant herein filed this appeal citing grounds that the Learned Magistrate erred in law and in fact in awarding the sum of Kshs.600, 000/= as general damages which amount was inordinately high taking into account the injuries sustained by the Respondent and relevant case law; awarding the sum of Kshs.14, 850/= as special damages which amount was not strictly proven to the required standard in law; awarding the sum of Kshs.150, 000/= as future medical expenses which amount was not strictly prayed for as by law required; awarding a global award in the sum of Kshs.500, 000/= for diminished earning capacity when the evidence adduced did not support such a claim and basing the awards on extraneous considerations and factors.
 6. The Appellant prayed that the appeal be allowed with costs; the quantum of damages be varied and reduced to the extent that the court deems fit.
 7. At the same time, the Respondent filed an appeal against the trial court’s judgment, Machakos Civil Appeal No. E070 of 2021 vide its Memorandum of Appeal dated 13th January 2021. In this appeal, the Respondent grounds of appeal were that the Learned Trial Magistrate misdirected herself and erred in law and in fact; by not considering the medical reports on record and hence arrived at a wrong assessment of damages that are so manifestly low as to be erroneous; by not properly considering the severity of the Appellant’s injuries and hence arrived at a wrong assessment of damages that are so manifestly low as to be erroneous; by failing to properly consider the Appellant’s submissions and authorities cited and provided and hence did not write a considered judgment on quantum; by considering extraneous matters in arriving at the award for future medical expenses away from evidence adduced; by failing to consider the age of the appellant, the assessed permanent incapacity, nature of work and his ascertainable income in arriving at an award for diminished earning capacity that is manifestly low as to be erroneous and by failing to consider precedent and the doctrine of stare decisis.
 8. The Respondent equally sought that the appeal be allowed with costs and the whole judgment on quantum delivered on 14th April 2021 be set aside.
 9. The Appeal E069 of 2021 was taken as the lead file was canvassed by way of written submissions. The Appellant’s submissions are dated 30th May 2022 while the Respondent’s submission are dated 30th July 2024. Appeal No. E069 of 2021 was designated as the lead matter and was canvassed by way of written submissions. The Appellant filed their submissions on 30th May 2022, while the Respondent filed theirs on 30th July 2024.

Appellants’ Submissions

10. The Appellant identified one issue for determination, namely: whether it is entitled to the relief sought in the Memorandum of Appeal dated 13th May 2021. The Appellant began by addressing the court’s jurisdiction, citing *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR and *Kridha Limited v Peter Salai Kituri* [2020] eKLR, and submitted that, based



on the facts and legal principles outlined in its submissions, this court should interfere with the trial court's exercise of discretion.

11. On the issue of general damages, the Appellant cited the decisions in *Aloise Mwangi Kahari v Martin Muiya & Another* [2020] eKLR and *Tirus Mburu Chege & Another v JKN (a minor suing through the next friend and mother DWN) & Another* [2018] eKLR. It was submitted that the Respondent did not experience prolonged suffering following the accident and that the injuries had fully healed. The Appellant contended that the award of Kshs.600,000 was manifestly excessive and urged the Court to revise it to Kshs.500,000, arguing that such a sum would constitute adequate compensation for the injuries sustained.”
12. On the issue of future medical expenses, the Appellant relied on the medical report by Dr. Wokabi, which estimated the cost of future treatment at Kshs.300,000. However, the Appellant noted that the trial court had observed the report did not specify the category of hospital where the Respondent would receive treatment. As such, it was argued that the Respondent had not sufficiently discharged the burden of proof in support of this claim. The Appellant further cited the medical report of Dr. Mwendé dated 17th May 2016, which indicated that no long-term disability or incapacity was expected. Similarly, Dr. Wambugu's report dated 15th February 2017 noted that the fractures had fully healed, although there was residual deformity and stiffness in the ankle joint. The Appellant urged the court to assess the necessity of future medical expenses, and—while relying on the authority of *Tracom Limited & Another v Hassan Mohammed Adna* [2009] eKLR—submitted that an award of Kshs.30,000 would be reasonable compensation under this head.
13. Regarding diminished earning capacity, the Appellant relied on the cases of *Alpharama Limited v Joseph Kariuki Cenron* [2017] eKLR, *Jeremiah & Brothers Contractor & Another v Francis Egusangu Kaguli* [2019] eKLR, and *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR. The Appellant urged this court, to take into account that the Respondent had fully recovered from the injuries, was 52 years old at the time of the accident, and was assessed to have a low permanent incapacity of 8% as noted in the medical report by Dr. Wambugu dated 15th February 2017. It was submitted that the amount awarded by the trial court was excessive and the appellant urged the court to revise the award to Kshs.80,000/= which it considered fair compensation in the circumstances.
14. On special damages, the Appellant submitted that, contrary to the court's dictum in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR that special damages must be specifically pleaded and strictly proved, the Respondent failed to strictly prove the medical and travel expenses claimed under this head. Accordingly, the Appellant urged the court to adopt the sum of Kshs 11,900/= as the amount awardable as special damages, as reflected in its written submissions filed before the trial court.
15. In conclusion, the Appellant prayed that the appeal be allowed with costs. The Appellant proposed that general damages be reduced to Kshs.500,000/=, future medical expenses to Kshs.30,000/=, diminished earning capacity to Kshs.80,000/=, and special damages to Kshs.11,900/=. After factoring in the agreed 25% contribution, the Appellant submitted that the total award should be Kshs.446,425/ =.

Respondent's Submissions

16. The Respondent began his submissions by outlining the duty of the court on a first appeal, relying on the case of *Selle & Another v Associated Motor Boat Co. Limited & Others* [1968] EA 123. He identified three issues for determination: whether the award of general damages was manifestly high or low; whether the trial court's award for future medical expenses was erroneous and based on extraneous



considerations; and whether the award for diminished earning capacity was manifestly low as to be erroneous.

17. On the first issue, the Respondent referred to the medical report by Dr. Wokabi dated 18th April 2018, which documented the injuries sustained as a complete dislocation of the left ankle joint, displaced fractures of the left tibial and fibular malleolus, and assessed permanent incapacity at 25%. Dr. Wokabi further noted that the Respondent was unable to stand for extended periods due to gross deformity and stiffness in the ankle joint, conditions that arose from multiple fractures and required corrective surgical intervention. The Respondent also referenced the earlier medical report by Dr. Wambugu dated 15th February 2017, which observed difficulty in walking, significant swelling of the ankle, limited mobility, and lasting deformity more than a year post-accident. That report assessed permanent incapacity at 8%. Emphasizing that Dr. Wokabi's assessment was more recent and noted that, even after corrective surgery, a residual permanent incapacity of 20% would remain, the Respondent argued that the trial court's award of Kshs 600,000 was unreasonably low. In support of a higher award, the Respondent relied on the decisions in *Kimathi Muturi Donald v Kevin Ochieng Aseo* [2021] eKLR; *Mwangi v Siloma & Another (Civil Appeal E102 of 2022)* [2023] KEHC 26140 (KLR) (Interim Judgment); and *Kakuli v Ngase & Another (Suing as legal representatives of the Estate of Stanley Alemba Chavasi, Deceased) (Civil Appeal E192 of 2021)* [2022] KEHC 12132 (KLR). The Respondent submitted that an award of Kshs 1,500,000 would represent fair and adequate compensation for the injuries sustained.
18. On the second issue, the Respondent submitted that the subordinate court considered extraneous matters beyond the scope of the parties' pleadings and evidence in arriving at its award for future medical expenses. He noted that Dr. Wokabi had assessed permanent incapacity at 25% pre-surgery and 20% post-surgery, and had estimated future medical expenses at Kshs 300,000/=, which he clearly tabulated. The Respondent further submitted that, during cross-examination, Dr. Wambugu testified that the gross deformity of the ankle could only be corrected through surgery, and conceded that his failure to note this in his report was an oversight. In light of this evidence, the Respondent argued that the award of Kshs.150,000/= by the trial court was erroneous, and urged this court to substitute it with the sum of Kshs.300,000/= as assessed in the medical reports to cover the cost of corrective surgery.
19. On the third issue, the Respondent submitted that he was earning Kshs.1,500 per day working in the construction industry. He presented a witness from the same industry who testified to having worked with the Respondent, confirming that daily earnings typically ranged between Kshs.1,500 and Kshs.3,000. The Respondent argued that construction work is strenuous and physically demanding, and that due to his deformity and incapacity resulting from the accident, his ability to secure similar employment had been significantly compromised. In support of his claim, the Respondent relied on *Mohamed Hussein v Muhat Kuno Roble* [2019] eKLR and *Mumias Sugar Co. Ltd v Francis Wanalo* [2007] eKLR, seeking an award of Kshs 2,053,125 for diminished earning capacity. Without prejudice to the foregoing, the Respondent further relied on *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR, *SBI International Holdings (AG) Kenya v William Ambuga Ongeru* [2018] eKLR, and *Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & Another* [2018] eKLR, urging the court to instead award a global sum of Kshs.2,500,000 under the same head.
20. In conclusion, the Respondent urged the court to dismiss the appeal HCCA 69 OF 2021 with costs and uphold his appeal in HCCA 70 of 2021.

Analysis and Determination

21. As this is a first appeal, the appellate court bears the responsibility of re-evaluating and reassessing the evidence on record and drawing its own conclusions. However, it must remain mindful that the trial



court had the distinct advantage of observing the witnesses' demeanor and hearing their testimonies firsthand. This principle was aptly articulated by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424.

22. Upon a thorough analysis of the record of appeal and the parties' submissions, it is evident that the appeal relates solely to the quantum of damages awarded by the trial court. The applicable approach in such circumstances was clarified in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* (Civil Appeal No. 2 of 1986) KLR 730, where Nyarangi JA held:

“an appellate Court does not interfere with quantum of damages simply because in its opinion the damages awarded is excessive, it only interferes if there is evidence. That the damages have been assessed on wrong grounds or are unreasonable.”

23. In consideration of the above, the following issues arise for determination;
- a. Whether the trial magistrate erred in awarding general damages that were either manifestly high or manifestly low given the nature of injuries sustained.
 - b. Whether the award for future medical expenses was proper, reasonable, and supported by evidence.
 - c. Whether the award for diminished earning capacity was justified, reasonable, and based on the evidence adduced.
 - d. Whether the award of special damages was strictly proved to the requisite standard.

Whether the trial magistrate erred in awarding general damages that were either manifestly high or manifestly low given the nature of injuries sustained.

24. The principles upon which this court can interfere with an award of damages made by the trial court are well settled. In *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (Emphasis mine).

25. The trial court awarded Kshs.600, 000/= for injuries suffered by the Respondent herein. The injuries set out in the Amended plaint dated 14th September 2019 specifically at Paragraph 5 and medical report of Dr. Wokabi are complete dislocation of the left ankle joint, displaced fractures of left tibial and fibula and severe pain on the injured site. The permanent incapacity assessed by the two medical doctors, that is Dr. Wokabi and Dr. Wambugu ranges between 8% and 25%. The Appellant submitted that the award was excessive and proposed a reduced amount of Kshs.500,000, while the Respondent maintained that the award was insufficient and sought a higher sum exceeding Kshs.1,500,000.
26. This court has considered the award of Kshs.600, 000/= was based on the authority of *Continental Hauliers Limited & 2 others* [2019] eKLR, *Lucy Muthoni Mucaki v Frida Nyaguthii* [2015] eKLR and the case of *Dennis Mwendwa Mbithe Kathuku versus George M. Mwangi* [2016] eKLR. I have



also considered other comparative cases where awards for leg fractures and permanent incapacity were made as follows;

- a. In the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR the court upon considering injuries in the nature of fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain in the injured areas, with a permanent incapacity of 18%, awarded the sum of Kshs.600,000/= on appeal.
 - b. In *Twiga Construction Company Limited v Vincent Muruli* [2021] eKLR the court in that case considered two reports, one by Dr Mwaura that found the plaintiff to have sustained a fracture of the tibia/fibular with disability assessed at 25% and the other by Dr.Wambugu who was the opinion that he suffered a bimalleolar fracture of the right ankle joint. Although the court in *Twiga Construction Company Limited* case did not make a finding on the injuries sustained by the plaintiff therein, it upheld the award of Kshs.600,000/-.
27. The injuries sustained by the Respondent herein are comparable to the injuries sustained by parties in the above authorities, therefore, the award by the trial Magistrate was adequate compensation in general damages for the Respondent herein. It is neither inordinately high nor low and warrants no interference.

Whether the award for future medical expenses was proper, reasonable, and supported by evidence.

28. The second issue relates to the award for future medical expenses. The trial magistrate awarded Kshs.150,000/= under this head. The Respondent's medical report by Dr. Wokabi estimated the cost of corrective surgery at Kshs.300,000/=-, which he confirmed was an estimate. The Appellant, however, argued that the Respondent had failed to specify the category of medical facility or to prove the likelihood of incurring the expense. On his part, Dr. Wambugu opined that the Respondent did not necessarily require further surgery but nonetheless estimated the cost of such a procedure at Kshs.120,000/= in a public hospital and Kshs.160,000/= in a private hospital. During his testimony, Dr. Wambugu conceded that the deformity would indeed need to be corrected through a medical procedure, thereby confirming the necessity of future treatment.
29. Taking into account that the trial court gave clear reasons for reducing the amount proposed by Dr. Wokabi, and noting that the Respondent had undergone extensive treatment at a public medical facility, I am satisfied that the award of Kshs.150,000 was fair and justified. Accordingly, I affirm the trial court's finding and hold that the award for future medical expenses is well-founded and supported by the available evidence.

Whether the award for diminished earning capacity was justified, reasonable and based on the evidence adduced.

30. Regarding the award for diminished earning capacity, the Appellant has challenged the trial court's decision and has urged this court to consider that the Respondent has fully recovered in respect of the injuries sustained, that the Respondent is aged 52 years at the time of the accident and the low 8% degree permanent incapacitation as opined by Dr. Wambugu in his medical report. The Appellant then proposes the sum of Kshs.80, 000/= as adequate compensation. The Respondent on the other hand have contended that the absence of documentation on the Respondent's earnings should not be a bar to recovery of damages and that the court should consider that the Respondent could have worked for a period of not less than 15 years. The Respondent also contends that in as much as Dr. Wambugu indicated 8% incapacity, Dr. Wokabi in his report provided that even with corrective surgery



the resultant permanent incapacity would be 20%. The Respondent urges this court to consider a global award of Kshs.2,000, 000/=.

31. The principles to be considered in determining whether an injured person is entitled to damages under this head were settled by the Court of Appeal in *Butler vs Butler* [1984] KLR 225. It was held there as follows -

- “ 1. 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 as paid as before the accident are lessened by his injury.
2. 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.
3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.
4. Loss of earning capacity can be a claim on its own, as where the 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.
5. 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 proper to award it under its own heading.
6. 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.”

32. Assessment of damages in respect to diminished earning capacity is also a matter in the discretion of the trial court and it depends on the circumstances of each case. In *Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & another* (2018) eKLR, the court in making an award for diminished capacity stated thus:

- “ 69.damages under this heading are awarded where it is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered....
70. ...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 in assessing damages for lost and diminished earning capacity provided the judge takes into account the relevant factors....”

33. In *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR the Court of Appeal held that loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering



and loss of amenities or as separate head of damages, as a token, modest or substantial depending on circumstances of each case. The Court added that there was no formula for assessing loss of earning capacity. The Court faulted a trial Court for using the multiplier/multiplicand approach in assessing damages for loss of earning capacity.

34. In *Chelimo v Njami* (Civil Appeal E001 of 2023) [2024] KEHC 12000 (KLR) (7 October 2024) (Judgment), the appellant sought damages for loss of future earning capacity. The court emphasized that such claims are general damages and should be awarded as a global sum, considering the case's circumstances. The trial court's award of Kshs 600,000 for diminished earning capacity was deemed reasonable.
35. It is well established that a claim for diminished earning capacity falls under general damages, and that there is no fixed formula for its assessment. The quantum awarded is discretionary and depends on the specific circumstances of each case. Such compensation may either be incorporated into the general award for pain, suffering, and loss of amenities, or pursued independently under a separate head of damages.
36. In the present case, the Respondent prayed for damages for loss of earning and earning capacity, and the trial court was correct in making a global award under this head. The next consideration is whether the sum of Kshs.500,000/= awarded was reasonable. Dr. Wambugu estimated the Respondent's incapacity at 8%, but in his testimony, he acknowledged that although the Respondent could still work, he would do so with difficulty. On the other hand, Dr. Wokabi assessed the Respondent's post-surgery incapacity at 20%. This evidence confirms that the Respondent is likely to experience ongoing difficulty in performing his work. Taking into account that the Respondent was a skilled worker in the construction industry, as corroborated by PW3, and that the 20% incapacity assessed by Dr. Wokabi significantly limits his ability to work normally, the claim under this head was well justified.
37. Considering the Respondent's age, the physically demanding nature of his occupation, and the extent of his disability, I find that the award of Kshs.500,000/= was within the discretion of the trial court and reasonable in the circumstances. I therefore decline to interfere with it.

Whether the award of special damages was strictly proved to the requisite standard.

38. The trial court awarded Kshs.14,850/= as special damages. The Appellant argued these were not strictly proved. The record shows that receipts and documentary evidence were indeed produced at trial to support medical and travel expenses.
39. The amount was properly pleaded and proved and thus properly awarded. The appeal under this head therefore fails.
40. The upshot of the above is that the appeal herein (Machakos 069 of 2021) and that filed by the Respondent in Machakos 070 of 2021 lacks merit and the trial court judgment as to quantum is upheld.
41. Each party shall bear the costs of their respective appeal.
42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;



.....Appellant

.....Respondent

Selina Court Assistant

