



**Mburu v Ogutu (Civil Appeal E189 of 2024)
[2025] KEHC 13092 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E189 OF 2024**

G MUTAI, J

SEPTEMBER 22, 2025

BETWEEN

SAMUEL MWAURA MBURU APPELLANT

AND

JONES OBARA OGUTU RESPONDENT

JUDGMENT

1. According to an amended plaint dated 27 September 2022, on or around 25 February 2022, the respondent was lawfully riding his motorcycle registered as Number KMDD 255Q along the Mombasa-Malindi road when the motorcycle collided with the appellant's motor vehicle registration number KDE 060F. At the time of the accident, the motor vehicle was being driven by the appellant, who was also its owner. It was pleaded that as a result of the road traffic accident, the respondent was seriously injured and his motorcycle was extensively damaged.
2. The respondent attributed the road traffic accident to the negligence of the appellant. Accordingly, he sued the appellant for both general and special damages and future medical expenses. He also asked for the costs of the suit and interest.
3. At the conclusion of the trial, the learned magistrate (Honourable L.K. Sindani) entered judgment for the respondent against the appellant in the following terms:-

“The upshot is that judgment is entered for the plaintiff and against the defendant as follows:-

1. Liability 75%:25% if (sic) favour of the plaintiff
2. General damages Kes.1,800,000/-;
3. Lost income Kes.121,000/-;
4. Diminished earning capacity Kes.1,200,000/-;



5. Special damages Kes.257, 046/-;
 6. Future medical expenses Kes.120,000/-;
 7. Total- Kes.3,498046/- less 25%= Net Kes.2,623,535/-;
 8. costs and interest at court rates from the date of judgment till payment in full.”
4. The appellant was aggrieved by the judgment and filed the instant appeal. In the memorandum of appeal dated 1st July 2024, the appellant set forth the grounds of appeal as follows:
- “1. The Learned Trial Magistrate erred in fact and law by making contradictory decisions on the issue of liability, whereas the court agrees consent was at 20:80 at the beginning of the judgment, the court went ahead to hold liability at 75:25 at the end;
 2. The Learned Trial Magistrate erred in fact and law by whimsically making orders on future medical expenses, special damages and loss of income based on a non-existent consent; a consent that parties to the suit are strangers to;
 3. The Learned Trial Magistrate erred in fact and law in awarding the Respondent diminished earning capacity when the same was neither pleaded nor proved;
 4. The Learned Trial Magistrate erred in fact and in law by failing to give reasons for her findings and or conclusions;
 5. The Learned Trial Magistrate erred in fact and in law by failing to consider the evidence tendered during the examination in chief and cross examination and thereby arrived at erroneous conclusions;
 6. The Learned Trial Magistrate erred in fact and in law by failing to take into consideration the Appellant’s written submissions and authorities;
 7. The learned trial magistrate erred in fact and in law by awarding general damages that were exorbitantly too high and without giving any reasons behind the award;
 8. The Learned Trial Magistrate erred in fact and law by only relying only on the Respondent’s authority and not doing own research and analysing comparable case laws;
 9. The Learned Trial Magistrate erred in fact and law by relying on the Plaint dated 4th July 2022 when in fact there was a further amended plaint dated 8th December 2022.”
5. The appellant beseeches this Honourable Court to set aside the magistrate’s judgment and decree delivered on 20 June 2024 and that the respondent’s claim on general damages, future medical expenses and special damages be assessed afresh by this Honourable Court. He also seeks the costs of the appeal.
6. In *Mwanasokoni v Kenya Bus Services Ltd (1985) eKLR*, it was held that although an appellate court on appeal will not lightly differ from the judge at first instance on a finding of fact, it is undeniable that the appellate court has the power to examine and re-evaluate the evidence on a first appeal if this



should become necessary. In so holding, the Court of Appeal followed the decision of the House of Lords in *Sotiros Shipping v Sauviet Sohold*, *The Times*, March 16, 1983 where it was held:

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said.”

7. Again, in *Peters v Sunday Post Ltd* (1958) EA 424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.”

8. Thus, this Honourable Court has the obligation, in exercise of its appellate jurisdiction, to evaluate the evidence at the trial and make its own factual findings that may either be consistent with or vary from those conclusions reached by the lower court. Regardless of the conclusions this court reaches, it is bound to bear in mind that the lower court had the advantage, which this Court does not have, of seeing and hearing the witnesses.

9. The record shows that on 31st October 2023, parties reached and recorded a consent on liability. The court captured the consent as follows:

“By consent: liability be assessed at 80:20 in favour of the plaintiff.”

The court then made an order to the effect that:-

“consent on liability adopted”.

10. Not much was said in terms of oral evidence, for the only witness who testified was the respondent. His evidence was that he worked at Diamond Trust Bank and that on 25th February 2022, he was riding a motorcycle when he was involved in a road traffic accident. He blamed the driver of the motor vehicle, with which his motorcycle collided, for the accident. He testified that, immediately after the accident, he lost consciousness for a few minutes and also sustained injuries to the head and the left leg. He also lost a tooth. It was his evidence that at the time he testified, he had not healed fully and that he was still walking on crutches; a fact that the trial magistrate noted.
11. Upon cross-examination, he referred to an invoice of Kes.345,618/- from Premier Hospital, apparently being the expenses incurred on account of his treatment. The amount was to be paid by Jubilee Insurance. It was his testimony that the insurance company only made some payments and left it to the appellant to settle the rest of the medical expenses out of his pocket. As far as the damages to his motorcycle are concerned, he testified that the motorcycle had not been repaired, and neither had he filed any assessment report, apparently of the extent of the damages to the motorcycle.
12. I have considered the parties' submissions, and one issue that can be quickly disposed of is the learned magistrate's apportionment of liability at the ratio of 25:75 in favour of the respondent. On this issue, I need not say more except to hold that, having adopted, as its own order, the consent of parties on liability, the court could not go behind the order and purport to vary it by apportioning liability afresh.



To the extent that the learned magistrate varied the consent order, her judgment is tainted, and the appeal against her finding on liability must succeed.

13. The head of damages, defined as diminished earning capacity or loss of earning capacity as distinguished from loss of earnings, was defined in *SJ v Francesco Di Nello & another* (2015) eKLR, where the court held:-

“Claims under this (sic) heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award of general damages once proved...”

14. As to when damages under this head can be awarded, the Court in *Mumias Sugar Limited v Francis Wanalo* (2007) eKLR held 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 of 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 the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future...”

15. This follows the Court of Appeal holding in *William J Butler v Maura Kathleen Butler* [1984] KECA 34 (KLR), where it was held:

“A plaintiff’s loss of earning capacity occurs where, as a result of his 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.”

16. The respondent testified that he worked at Diamond Trust Bank. He did not suggest in his evidence that as a result of the accident, he could not work anymore and, therefore, he could not possibly lay any claim for damages under the head of lost income or earnings. But, going by the medical report by his doctor, Dr Udayan R Sheth, dated 17th October 2022, and which was admitted as part of the respondent’s evidence, the respondent would be entitled to damages under the head of loss of earning capacity.

17. In the medical report, the doctor made the following findings about the respondent:

“He was involved in a road traffic accident on 25/2/22. He was admitted at Premier Hospital till 2/3/22. He sustained comminuted fracture lower 1/3rd of the left femur, loss of upper front incisor no. 22, cut over forehead, soft tissue injury over both upper and lower limbs. Surgical toilet of the wound was done and stitched. Fracture was fixed with nail and screws.”



18. At the time of the medical examination, the respondent complained of pain over knee. The doctor also established that:-

“I find 7cm scar over left knee, 2cm 2 scars over lateral aspect of left thigh. He is walking with crutches. He has mild painful restricted movement of left knee, there is no shortening of the left leg. I find 10cm scar over forehead, multiple 2-3 cm scars over both legs.”

19. And in his opinion, the doctor stated in his report as follows:

“Mr. James sustained above injury due to road traffic accident on 25/2/22. At present, he has permanent incapacity of 7% (seven percent). He needs to remove the nail and screws 2 years after surgery which at the -same hospital will cost approximately Kshs. 120,000/= (shillings one hundred and twenty thousand only).”

20. It is, therefore, more probable than not that as a result of the respondent’s injuries, 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.

21. There is, therefore, a valid basis for the award for loss of earning capacity.

Damages under this head would ordinarily be covered under the head of general damages. They may also be awarded under a distinct head of “loss of earning capacity” but they were not so pleaded in the respondent’s plaint. Accordingly, the damages ought to have been awarded as part of a global sum of general damages. In the circumstances, I will set aside the award of diminished earnings of Kes.1,200,000/-.

22. It has been noted that damages under the head of lost income or earnings are awarded where there is proof of real, actual loss of future earnings. As was held in *SJ v Francesco Di Nello & another* (supra), loss of income or future earnings is compensated for real assessable loss which is proved by evidence. The learned magistrate erred in law when she purported to make awards under both heads. A claimant cannot benefit from both loss of earning capacity and loss of future earnings or income.

23. As far as the respondent is concerned, the evidence available pointed to an award of loss of earning capacity only, but which, for reasons I have given, ought to be considered as part of a global sum of general damages. I will, therefore, set aside the award of Kes.121,000/- awarded as lost income.

24. As for special damages, it is not clear how the learned magistrate arrived at the figure of Kshs. 257, 046/- because, as far as I can gather from the record, there is no evidence of this sum having been expended under this head. It is only in answer to a question asked during cross-examination that the respondent referred to an invoice of Kes.345,618/- from Premier Hospital. However, there was no evidence of payment of that money.

25. Further, the respondent testified that part of that money was to be paid by Jubilee Insurance Company. It is not clear from the record how much, if at all, of that money was paid by the insurance company or by the respondent. I will, therefore, substitute the award of Kes.257,000/-, as special damages with the amount of Kes.55,279/-, a sum the appellant has admitted as due and payable to the respondent under the head of special damages.



26. According to the doctors' report, the respondent required future medical treatment. To be precise, the doctor opined:
- “He needs to remove the nail and screws 2 years after surgery which at the same hospital will cost approximately Kshs. 120,000/= (shillings one hundred and twenty thousand only).”
27. I will, therefore, retain the award of future medical expenses of Kes. 120,000/- as made by the learned magistrate.
28. As for the award of Kes.1,800,000/- as general damages, I am satisfied that although the injuries of the plaintiffs in the cases submitted for this award appear to be more severe than those sustained by the respondent, there is the component of loss of earning capacity which the learned magistrate had awarded under a distinct head but which can be included in the global sum of general damages. Thus, the learned magistrate, at the very least, considered previous decisions on the awards made for near-similar injuries and to which she had been referred by the claimant.
29. According to the judgment of the learned magistrate, the respondent had sought Kes.2,000,000/- as general damages and in that regard relied on P.N. Mashru Limited versus Omar Mwakoro Makenge (2018) eKLR and Boniface Mugendi Njiru versus Ochieng T/A Tohel Agencies 2011 eKLR.
30. In Boniface Mugendi Njiru v Ochieng T/A Tohel Agencies & another [2011] eKLR, the plaintiff was awarded Kes.1,000,000/- for a blunt head injury and loss of consciousness for over 24 hours; he also lost four upper incisor teeth and a fracture of the shaft of the right femur. The claimant also suffered a compound fracture of the right tibia with loss of soft tissues, including tendons.
31. And in P.N. Mashru Limited versus Omar Mwakoro Makenge (supra) this Honourable Court, sitting at Voi, upheld the lower court's award of Kes.1,200,000/- as general damages for pain and suffering and loss of amenities. According to the judgment of the court at Voi, the claimant had suffered serious injuries that necessitated his admission in hospital for seventeen days. The injuries left the claimant with a limp, five per cent loss of function of the hip joint, painful limbs due to piercing of the leg by the metallic plate and inability to stand for long periods.
32. The assessment of damages is discretionary and the Court of Appeal held in Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KECA 21 (KLR), that an appellate court should be slow in interfering with the award of general damages by the trial court unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award.
33. The same point was reiterated in Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No 2) (1982-88) KAR 727 at page 703 where it was held that: -
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.”
34. Taking this principle of assessment of general damages into account, perhaps the only addition I can make is that the award of Kes.1,800,000/- will include damages for loss of earning capacity. Were it not for this aspect of damages, there would have been a case for a lower award, considering the injuries sustained in the decisions which the respondent relied upon appear to have been about injuries more severe and extensive than those suffered by the respondent.



35. In conclusion, I hold that, except for the award on general damages and future medical expenses, and subject to apportionment of liability at the ratio of 80:20, I hereby vary the award as follows:-
- i. General damages for pain, suffering, and loss of earning capacity Kes.1,800,000/-;
 - ii. Future medical expenses Kes.120, 000/-;
 - iii. Special damages Kes.55,279/-;
36. The respondent will have the costs of the suit in the lower court. Parties will bear their respective costs of the appeal. Interest shall be calculated at court rates and shall accrue from the date of judgment in the magistrate's court till payment in full.
37. Orders accordingly.

DATED AND SIGNED AT MOMBASA, THE 22ND DAY OF SEPTEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mwatu, for the Respondent;

Ms Monari, holding brief for Mr Omwenga for the Appellant;

Arthur - Court Assistant.

