



**Mwangi & another v Radol (Civil Appeal E1498 of 2024)
[2025] KEHC 12868 (KLR) (Civ) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1498 OF 2024

AC MRIMA, J

SEPTEMBER 18, 2025

BETWEEN

ERASTUS MWANGI 1ST APPELLANT

JOHN BAPTIST KURIA MACHARIA 2ND APPELLANT

AND

MICHAEL OWINO RADOL RESPONDENT

(Being an appeal from the Judgment of Hon. M. Malingu (SRM) in Chief Magistrates Court Civil Case No. E5156 of 2023 delivered on 19th November 2024)

JUDGMENT

Background:

1. Through the Complaint dated 4th December 2023, Michael Owino Radol, the Respondent herein, sought reliefs among them, general damages for pain and suffering, loss of income, future medical costs and special damages as a result of a road traffic accident he claimed was caused by the negligence of Erastus Mwangi and John Baptist Macharia, the Respondents herein.
2. The Appellants challenged the claim through the Statement of Defence dated 10th February 2024, where they denied liability.
3. In its judgment dated 19th November 2024, the trial Court observed that the Respondent proved its case on a balance of probability. It held the Respondents 100% liable for the accident and awarded the Respondent Kshs.1,100,000/- a general damages for injuries sustained, Kshs. 120,000/- for future medical expenses, Kshs. 3,550/- in special damages and 593,988/- for loss of income.
4. That was the decision the Respondents were dissatisfied with and preferred the instant appeal against it.



The Appeal:

5. Through a Memorandum of Appeal dated 14th December 2024, the Respondents proposed the setting aside of the trial Court's judgment on grounds as hereunder: -
 1. That the learned magistrate in the matter herein delivered judgment on 19th November 2024 in favour of the Appellant herein contrary to the law and facts availed before the honourable court.
 2. That the learned trial magistrate erred in law and in fact in finding that the Respondent herein was entitled to damages of Kshs. 1,817,538/-.
 3. That the learned trial magistrate erred in law and in fact in finding that the Respondent herein was entitled to damages of Kshs. 1,100,000/- for fractured tibia malleolus and fracture of the fibula.
 4. That the learned trial magistrate erred in law and in fact in finding that the Respondent herein was entitled to damages of Kshs. 593,988/- for lost wages.
 5. That the learned trial magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion in particular relating to damages.
 6. That the learned trial magistrate erred in law and in fact by failing to take into account authorities stated in the Appellant's submissions particularly authorities stated therein in order to arrive at a reasonable sum awardable to the Respondent herein.
 7. That the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

The Appellants' submissions:

6. In their submissions dated 28th February 2025, the Appellants submitted on the issue of quantum only. It was their case, based on the decision of the Court of Appeal in *Gitobu Manyara & 2 Others -vs- Attorney General*, that comparable injuries should attract comparable awards and as such the damages awarded for the injuries was excessive. In challenging the loss of earning capacity, the Appellant submitted that the Respondent had pleaded that he was a casual labourer but he produced a payslip which contradicted his position. As such, they stated that he was not entitled to loss of income of Kshs. 593,988/-
7. In conclusion, he urged this court to award the Respondent Kshs. 800,000/- for injuries sustained, quash the award on loss of income and they be awarded costs of the appeal.

The Respondent's case:

8. The Respondent challenged the appeal through written submissions dated 29th March 2025. On the issue whether the trial Court erred on the assessment of damages at Kshs. 1,100,000/-, it was his case that the fact of the accident was undisputed and that of fracture of the right tibia malleolus, of the right fibula, stiff swollen right ankle, surgical scars and difficulties getting around were never disputed. It was his case that it required him 10-12 months to heal properly.



9. In urging the Court not to interfere with the findings of fact, the Respondent cited that case of Simon Taveta -vs- Mercy Mutitu Njeru (2014) eKLR and further submitted that the injuries will never be fully comparable to other person's injuries and what a Court considers is that as far as possible, comparable to the other person's injuries and the after effects. The Respondent also submitted that since the Appellants neither called nor produced any evidence, they did not substantiate their case and his case remained unchallenged.
10. It was his case that the Appellants' authorities in the trial Court were distinguishable from the Respondent's. He drew support from the case of Jackline Kamunyi Kamau -vs- Simon Kiiru Njoki (2018) KEHC 6333 (KLR) where Kshs. 1,200,000/- was awarded for fracture of right femur which was fixed with a K nail and permanent disability assessed at 15%. In view of the 12% incapacity he suffered, the uncontroverted medical report, the fact that the cited authorities happened a long time ago and the inflationary trends, it was his case that the sum of Kshs. 1,100,000/- ought not to be disturbed.
11. On the question of loss of income, it was his case that he was gainfully employed as a Senior Executive Supervisor and his payslip of the year 2023 was duly admitted as evidence. He claimed that the Appellants elected not to cross-examine him on the issue of employment.
12. In the end, the Respondent stated that the trial Court considered all the relevant factors and this Court ought not interfere with the findings of the trial Court.

Analysis:

13. From the record, the parties' rival submissions and the decisions referred to, the issues for determination are whether the trial Court properly directed itself in the assessment of damages for pain and suffering and loss of income. This being the first appeal, the role of this Court was set out in Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates [2013] eKLR where it was observed: -

.... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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 vs Kustron (Kenya) Limited 2000 2EA 212....
14. As the appeal is on quantum of damages, the guiding principle in the award of general damages by a trial Court was set out by the Court of Appeal in Kemfro Africa Ltd t/a Meru Express & Another -vs- A. M. Lubia and Another [1982-1988] KAR, where it was observed that the trial Court exercises discretion and such can only be interfered with on appeal where the trial Court considered an irrelevant factor or left out a relevant. The discretion can also be interfered with if the award is inordinately high or low as to represent an erroneous estimate.
15. Turning to the evidence at hand, the Respondent stated that he suffered a fracture of the right leg, was subjected to an operation and metal implants made and that it would take 10-12 months to heal. On cross-examination, it was his evidence that he sustained a fracture on the right leg, had a swollen right ankle joint, surgical scars on the joint.
16. This Court has gone through the decisions relied upon by the trial Court in arriving at the impugned award. Among them are Akamba Public Road Services -vs- Abdikadir Adan Galgalo (2016) eKLR where, for similar injuries, the Court on Appeal, awarded Kshs. 500,000/- in 2016. In Maina Humphrey vs. Kinyua Rukeria (2016) eKLR, the Court awarded Kshs. 600,000/- for general damages



- for fractures and soft tissue injuries. In *Kagechu -vs- Joseph Kirui & Another* [2019] eKLR the Court awarded Kshs. 1,600,000/- for bilateral compound fractures of the tibia and fibula to both right and left legs and permanent disability assessed at 8%.
17. The Court has further appreciated the decisions relied upon by the Respondent. In *Daniel Oduor Shieuda -vs- Christopher Wambugu* (2021) KEHC 13483 (KLR) the Court awarded Kshs. 800,000/- in 2021. In *Jackline Kamunyi Kamau -vs- Simon Kiiru Njoki* (KEHC) the court awarded Kshs. 1,200,000/- as general damages for fracture of the right femur which resulted in incapacity for one year and permanent disability that was assessed at 15%. In *Subati Flowers Limited -vs- Walter Wanyonyi Wekesa* [2019] eKLR, the Court upheld an award of Kshs. 1,600,000.00 as general damages for the plaintiff who suffered a fracture of the right and left tibia and fibula, fracture of L2 of the lumbar spine and blunt injury to the right side of the chest.
 18. In this appeal, the Respondent isolated the injuries sustained in paragraph 10 of his Plaint as fracture of the tibial malleus, fracture of the fibula, stiff and swollen ankle joint, difficulties in getting around, inability to get around and to stand up without external support. From the record, the Medical Report was produced without the calling of its maker. The Appellants were not in opposition. The was, therefore, no contestation to its contents.
 19. From the foregoing decisions, it is evident that Courts have variously awarded general damages ranging between Kshs. 600,000/- and Kshs. 1,200,000/- for such injuries as those sustained by the Respondent. The decision relied upon by the Respondent in *Subati Flowers Limited -vs- Walter Wanyonyi Wekesa* [2019] eKLR, where the claimant was awarded Kshs 1,600,000/- is distinguishable and not applicable in this instance since in that case, over and above the fracture on the legs, there were injuries on the back that affected the spine and the lumbar, hence the award of Kshs. 1,600,000/-.
 20. In the premises, this Court finds no fault in the award of Kshs. 1,100,000/- in general damages for pain and suffering in the circumstances of the case. The award is not inordinately high as to represent an erroneous estimate.
 21. On the loss of income, the trial Court relied on the payslip produced by the Respondent indicating a salary of Kshs.49,499/- and adopted a multiplicand of 12 months and eventually made an award of Kshs. 593,988/=. In his testimony before the Court, the Respondent stated that he was not permanently healed and that he had a metal implant. He testified that he had lost income that he used to get and was not able to maintain a social life. On cross-examination, it was his evidence that the medical report did not indicate that he was unable to work. He further admitted that he did not have any record showing inability to work. Crucially, despite stating that he lost for not being able to work, he conceded that he did not have proof to that end.
 22. The Appellants urged this limb of the appeal with the argument that the Respondent ought not to have been awarded Kshs. 593,988/- because such an award is made under general damages.
 23. Having perused the Plaint, the Respondent pleaded loss of income in paragraphs 12 and 13 thereof and not loss of earning capacity. Therefore, as was observed by the Court of Appeal in *S.J. -vs- Francesco Di Nello & Another* (2015) eKLR, loss of income is a loss compensable upon being pleaded and specifically proved by way of evidence.]
 24. As to whether the trial Court was right in compensating the Respondent on this head, the pleadings and the oral evidence will offer some insight. The Respondent pleaded in paragraph 12 that he was a casual labourer undertaking various tasks at industrial area and would make a minimum of Kshs. 49,499/-. However, in his evidence-in-chief, he testified that he was an Executive Manager Producer in a manufacturing company earning Kshs. 110,000/-. Concededly, there is a big variance between



the Respondent's claim in the plaint and what came out in evidence. If indeed he was an Executive Manager, he would have pleaded so, and it would have come out in evidence that he was one. Similarly, if indeed he earned a salary of Kshs. 49,499/-, his oral testimony would have spoken to that fact, not Kshs. 110,000/-.

25. It is a legal principle that parties are bound by their pleadings. A party cannot rely on evidence or facts not pleaded. In Daniel Otieno Migore -vs- South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR) this Court, while relying on Court of Appeal and Supreme Court decisions observed thus: -

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

26. Deriving from the foregoing, it is this Court's finding that the trial Court overlooked the impact of the inconsistency in the pleadings and the evidence both in respect to the Respondent's occupation and amount he earned in salary. Since such inconsistency was not reconciled, it could not be a basis of an award. The limb was not proved and, with utmost respect, the Learned trial Magistrate erred in allowing it. It is on that score that this Court steps in to interfere with the finding.

Disposition:

27. In the end, this Court finds the appeal to have partially succeeded and the judgment of the Trial Court is hereby reviewed as follows:

- (a) The award of Kshs. 1,100,000/- as general damages for pain and suffering is hereby upheld.
- (b) The award of Kshs. 593,988/- in respect of loss of earning is hereby set aside in its entirety.
- (c) The rest of the awards made in the trial Court's judgment are hereby affirmed.
- (d) Each party to bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:



Mr. Magero, Learned Counsel for the Appellants.
Ms Anyango, Learned Counsel for the Respondent.
Michael/Amina – Court Assistants.

