



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E097 OF 2022**

**SIMJAM HOLDINGS LIMITED.....APPELLANT**

**VERSUS**

**TITUS MIANO NGARI.....RESPONDENT**

**(Being an Appeal from the Judgment of Honorable D.M Ileri (S.R.M) delivered on 12/10/2022 at Baricho SRMCC No. 43 of 2022)**

**JUDGMENT**

- [1] By a plaint dated 9/3/2022, the Respondent sued the Appellant seeking general damages for pain, suffering and loss of amenities, lost earnings, loss of earning capacity, future medical expenses, special damages and costs of the suit plus interest. The Respondent pleaded that on 3/9/2021, he was a lawful passenger aboard motor vehicle registration No. KCV 352 E along Kenol - Sagana road, when the Appellant's driver or agent so negligently drove Motor Vehicle Registration No. KCT 275 T that it hit the vehicle he was travelling in from behind.
- [2] The Appellant denied the claim vide its statement of defence dated 25/3/2022 and prayed for the Respondent's suit to be dismissed with costs.
- [3] The parties recorded a consent judgment on liability at the ratio of 20:80 in favour of the Respondent against the Appellant, and upon full hearing on quantum, the trial court awarded Ksh. 2,000,000 for pain, suffering and loss of amenities, Ksh. 700,000 for loss of earning capacity, Ksh. 600,000 for future medical expenses and special damages of Ksh. 241,090 less 20% contribution = Ksh. 2,832,872 together with costs and interest.

**The appeal**

- [4] On appeal, the Appellant vide its memorandum of appeal filed on 31/10/2022 set out 4 grounds as follows:

1. *The learned trial magistrate erred in law by awarding future medical costs that were inordinately high and which were neither specifically pleaded nor strictly proved.*
2. *The learned trial magistrate erred in law by awarding damages of loss of earning capacity that were inordinately high and which were neither specifically pleaded nor strictly proved.*
3. *The Learned trial magistrate gravely erred in law by finding that the Plaintiff is entitled to general damages for pain, suffering and loss of amenities of Kshs. 2,000,000/-.*
4. *The Learned trial magistrate gravely misdirected himself in law in failing to consider and analyze the Appellant's closing written submissions.*

### **Duty of the Court**

- [5] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**).
- [6] **PW1 Titus Miano Ngari**, the Respondent herein adopted his statement dated 9/3/2022 as his evidence in chief and produced the list of documents evenly dated as exhibits. He testified that, *“On 3.09.2021 I was involved in an accident. My left leg sustained 3 fractures plus other injuries. I was treated at Murang’a Hospital. I used to work with Bidco Africa, Thika where I was getting a salary of Kshs.16,500/= per month. I no longer work. I walk using a walking stick (noted). I have not healed. I pray for compensation as per my plaint.”*
- [7] On cross examination, he stated that, *“I was injured on the eye. I am using drugs for my eyes but I cannot tell how much money I have used for eyes. I have not stated the eye injuries in my statement. I was working in the warehouse. I hold depend on my parents. I feel pain on my leg and that is why I am using a walking stick. I go to the clinic. I was lastly in hospital in July 2022 and my next visit is in September 2022. I pay Kshs.1,000/= for physiotherapy. I have done 6 sessions. I have had 2 surgeries. I cannot tell the amount used for surgery.”*
- [8] In re-examination, he stated that, *“I was injured on the eyes. I still attend physiotherapy. I also attend orthopaedic. I still but drugs. The implants have not been removed. I cannot work for now. I depend on my parents. I have not healed.”*

[9] The defence adopted the statement of Joseph Wanjohi Wangui without calling the maker, and closed its case.

### **Submissions**

[10] The Appellant urges that an award of general damages for pain, suffering and loss of amenities should be modest and proportionate to the nature and extent of injuries sustained, and cites *Tayab v Kinau (1983) KLR, 114 at 115*, *Bernard Muinde Kilonzo v Andrea M. Maiko Mogi & another (2021) eKLR*, *Civicon Limited v Richard Njomo Omwancha & 2 Others [2019] KEHC 8373 (KLR)* and *Peris Wanjiru Kahiga v Moses Kabata Mwangi [2020] KEHC 339 (KLR)*. It urges that an award of Ksh. 850,000 for pain, suffering and loss of amenities and Ksh. 500,000 for loss of earning capacity would adequately compensate the Respondent, and cites *Abdi Werdi Adulahi v James Royo Mngatia & another (2019) eKLR*. It faults the Respondent for failing to specifically plead and strictly prove future medical expenses, and cites *Valji Jetha Kerai & another v Julius Ombasa Manono & another (2019) eKLR*. It urges the court to award Ksh. 10,000 for future medical expenses, which was proved by receipts.

[11] The Respondent cites *Selle & another v Associated Motor Boat Co. Ltd & Others (1968) EA 123*, on the duty of the first appellate court. He urges that he pleaded future medical expenses which were not challenged by the Appellant, and cites *Geoffrey Kamuki & another v RKN (Minor suing through her late father and next friend ZKN [2020] eKLR)*. He urges that he sustained severe injuries which reduced his capacity to earn, and the award of Ksh. 700,000 under this head was fair and reasonable. He implores the court to dismiss the appeal with costs, and cites *Twokay Chemicals Limited v Patrick Makau Mutisya & another (2019) eKLR*, *Christine Mwigina Akonya v Samuel Kairu Chege (2017) eKLR* and *Penina Waithira Kaburu v LP (2019) eKLR*.

### **Analysis and determination**

[12] From the grounds of appeal as framed, the twin issues for determination are whether the awards made were excessive and whether the Appellant's submissions were considered.

### **Excessive damages**

[13] This court has previously considered the principles for appellate interference with an award of damages by a trial court in **Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA** [2020] eKLR as follows:

***“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in Henry H. Ilanga v. M. Manyoka [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking in some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell, [1935] 1 K.B.), approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601.”***

[14] The injuries sustained by the Respondent are particularized in the medical report of Dr. Kenneth W. Munyi dated 21/2/2022 as a left midshaft thigh bone (femur) fracture, a left midshaft tibia fibula fracture, a left suprapubic ramus – acetabulum fracture and left hip dislocation.

[15] On examining the Respondent, the doctor noted that, he was unable to walk without support of a crutch, he had pain on the left leg, stiffness of the left knee and a surgical scar on the left leg which was mildly swollen. The Respondent’s current complains were dizziness, blurred vision, recurrent headaches, insomnia, pain on the left hip joint when walking, inability to walk with support of a stick and numbness of the left leg.

[16] Undoubtedly, the injuries sustained by the Respondent were life altering and considerably severe, necessitating his admission at St. Peter’s Orthopaedic and Surgical Speciality Center from 4/9/2021 to 17/9/2021.

[17] In *John Mutuga Kamau v Kanini Haraka Enterprises Limited [2019] KEHC 1107 (KLR)*, the court (*Richard Mwongo J*) substituted a trial court's award of Ksh. 1,500,000 with Ksh. 2,400,000 for a claimant who sustained a fracture of the right femur, right acetabula fracture, deep cut wound on the forehead, loss of one upper incisor tooth, fracture distal end of the right radius, severe soft tissue injury of the right wrist joint, blunt injury to the right shoulder joint leading to soft tissue injuries and deep cut wound on the right hip joint leading to severe soft tissue injury, with a 40% permanent disability.

[18] Comparatively, in *Ochiel & another v Musyoki (Civil Appeal E42 of 2022) [2024] KEHC 4943 (KLR) (14 May 2024) (Judgment)*, the court (*R. K Limo J*) substituted a trial court's award of Ksh. 1,700,000 with Ksh. 1,000,000 for a claimant who sustained comminuted fracture to the mid shaft of the right femur, fracture to the distal femur, comminuted fracture to the right tibia, comminuted fracture to the right fibula, cut wound on the right leg measuring 5cm by 6cm and severe lower back pains with permanent incapacity of 20%.

[19] In *John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2016] KEHC 238 (KLR)*, the court (*R.E Aburili J*) awarded Ksh. 1,800,000 for a claimant who sustained multiple fractures of ribs, fracture of the right ulna bone, displaced and comminuted fracture of the right mandible, fracture of right superior and inferior pubic ramus of the pelvis bone, fracture of the left scapula, fracture of left superior pubic ramus of the pubic bone, multiple lacerations and cut wounds on the right forearm and both legs, cut wounds on the head, contusion of the chest, blood loss, physical and psychological pains with 35% permanent incapacity.

[20] This court finds that the award of Ksh. 2,000,000 for pain, suffering and loss of amenities was commensurate with the pain suffered by the Respondent, and consistent with precedent.

[21] In distinguishing between loss of future earnings and loss of earning capacity, the Court of Appeal in *S J v Francesco Di Nello & another (2015) eKLR* noted as follows;

***“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or 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 in general damages, once proved.”***

[22] It is therefore trite that loss of future earnings or loss of income is awardable for real assessable loss proved by evidence, while loss of earning capacity is awardable as part of the general damages.

[23] The Respondent suffered 35% permanent incapacity, which tremendously diminished his ability to earn a living in future, and thus deprived him of the capability to earn a living.

[24] This court finds that the trial court's award of Ksh.700,000 under this head was reasonable.

[25] On future medical expenses, the court in *Kenya Bus Services Ltd v Gituma (2004) 1 EA 91*, held that;

*“While an award of damages to meet the cost of future medication 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 thereon. In personal injury cases, the only damage that is contemplated by law as arising naturally is the personal injury itself and the consequential pain and suffering. Accordingly, matters pertaining to hospitalization, treatment and management, the need for further medical care, the disabilities, and attendant pecuniary losses (present and future) are special damages which must be pleaded.”*

[26] In *Geoffrey Kamuki & another v RKN (Minor suing through her late father and next friend ZKN (Supra)* cited by the Respondent, the court (*Mumbua T. Matheka J*) held that:

*“To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it.”*

[27] The Respondent reiterated on re-examination that, ***“I still attend physiotherapy. I also attend orthopaedic. I still but drugs. The implants have not been removed. I cannot work for now. I have not healed.”***

[28] In his medical report dated 21/2/2022, the doctor estimated future medical expenses at Ksh. 600,000, medication at Ksh.100,000, physiotherapy and doctor’s visits at Ksh. 500,000. The good doctor concluded that, ***“The client will require extensive physiotherapy due to joint stiffening. He requires multiple visits to the orthopaedic surgeon to ensure proper healing. Chronic pain likely to persist for long.”*** The contents of that medical report were uncontested, as the Appellant did not produce any other report to controvert them.

[29] In the absence of any evidence to the contrary, the trial court was bound to adopt the findings and estimates of the doctor in assessing and awarding future medical expenses of Ksh. 600,000, and no fault can be ascribed to it for so doing.

#### **Consideration of the Appellant’s submissions**

[30] The trial court properly considered the Appellant’s submissions and authorities against those of the Respondent, and there is clearly no merit in the ground that the court disregarded the Appellant’s submissions and authorities.

#### **ORDERS**

[31] Accordingly, for the reasons set out above, this court finds the appeal to be without merit and it is hereby dismissed.

[32] Costs of the Appeal to the Respondent.

*Orders accordingly.*

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF OCTOBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **APPEARANCES:**

Ms. Lumumba for Mr. Mwangi Maina for the Respondent.

Mr. Ontita for the Appellant.