



**Registered Trustees of Kids Alive Kenya Trust & another v ERDM (Suing
as Next Friend and Farther to MCM (Minor) (Civil Appeal E532 of 2022)
[2025] KEHC 15364 (KLR) (Civ) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15364 (KLR)

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

CIVIL

CIVIL APPEAL E532 OF 2022

JN MULWA, J

OCTOBER 30, 2025

BETWEEN

**REGISTERED TRUSTEES OF KIDS ALIVE KENYA TRUST 1ST APPELLANT
BENSON WOKABI WANJIRA 2ND APPELLANT**

AND

**ERDM (SUING AS NEXT FRIEND AND FARTHER TO MCM
(MINOR) RESPONDENT**

*(Being an appeal against the judgement of the Hon. D.W. Mburu (SPM)
delivered on 9th July, 2021 in Nairobi Milimani MCCC No. E4037 of 2020)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 09/07/2021 by the lower Court in Nairobi Milimani MCCC No. E4037 of 2020 (hereafter the lower Court suit). The lower Court suit was instituted via a plaint by Ezekiel Robi David Manganga (next friend of Manganga Collins Marwa (Minor), the plaintiff in the lower court (hereafter the Respondent) against Registered Trustees of Kids Kenya Trust and Benson Wokabi Wanjira, the 1st & 2nd Defendant in the Lower Court (hereinafter the 1st & 2nd Appellants). The Respondent's claim was for inter alia damages for pain & suffering; damages for loss of earning capacity; special damages; & future medical expenses founded on negligence as a result of a road traffic accident that occurred on 16/06/2019.
2. It was averred that on the date in question, the Respondent minor was lawfully and safely onboard motor vehicle KBB 136Z with his safety belt on along Narok-Mai Mahiu Road when motor vehicle KCF 587R was so negligently and or carelessly driven by the 2nd Appellant that the same was allowed



to veer from its lane and violently collide with motor vehicle KBB 136Z as a result of which the minor sustained severe bodily injuries and has suffered loss and damage.

3. The Appellants filed a statement of defence denying the key averments in the plaint and liability. They went on to aver in the alternative and without prejudice to the averments in their statement of defence that if any accident occurred, then the same was solely caused by the whole or contributory negligence of the driver of motor vehicle registration number KBB 136Z in the manner in which he drove and controlled the said motor vehicle causing it to collide with motor vehicle KCF 587R.
4. When the suit came up for pre-trial directions parties recorded a consent on liability in the ratio of 90:10 in favour of the Respondent. Thereafter, the question of awardable damages was to be disposed of by way of documents filed by the respective parties, of which, were adduced by consent. In its judgment, the Court awarded damages in favour of the Respondent as hereunder: -

General Damages – Kshs. 3,500,000.00/-

Loss of Earning Capacity – Kshs. 2,000,000.00/-

Future Medical Expenses – Kshs. 650,000.00/-

Special Damages – Kshs. 8,550.00/-

Total Kshs. 6,158,550.00/-

Less 10% contribution – Kshs. 615,855.00/-

Grand Total Kshs. 5,542,695.00/-

Plus, cost of the suit & interest at Court rates.

5. Aggrieved with the outcome, the Appellants preferred the instant appeal challenging the finding by the lower Court on quantum of premised on the following grounds in its memorandum of appeal as itemized hereunder -:

- “ 1) That the learned Honourable Magistrate erred in law and fact in awarding the Respondent general damages for pain suffering and loss of amenities of KES 3,500,000.00 which was excessive considering the injuries sustained by the Plaintiff.
- 2) That the learned Honourable Magistrate erred in law and fact in awarding the Respondent KES 2,000,000.00 as damages for loss of earning capacity which had not been pleaded and particularized in the Plaint as required by rules of pleadings.
- 3) That the learned Honourable Magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 650,000.00 which was excessive and based on two (2) medical reports that were contradictory.
- 4) That the learned Honourable Magistrate erred in law and fact in failing to give reasons for preferring the Medical legal report of Dr. Wakobi over that one of Dr. Okoth Okere which was earlier in time and therefore arriving at wrong awards in respect of General Damages for paid suffering, loss of earning capacity and future medical expenses.



- 5) That the learned Honourable Magistrate erred in law and fact in disregarding the medical evidence by Dr. Wakobi thereby arriving failing to consider conventional awards in cases of excessive assessment of damages.
 - 6) That the Learned Honourable Magistrate erred in awarding sums in respect of damages which was inordinately high and was excessive in the circumstances occasioning a miscarriage of justice.
 - 7) That the Honourable Learned Magistrate erred in law and fact in ilar nature.”
6. Directions were taken before this Court on disposal of the appeal by way of written submissions. Both parties duly complied. That said, the Court has duly considered the memorandum of appeal, record of appeal, supplementary record of appeal, further supplementary record of appeal and the rival submissions. To the forestated end, the Court postulates that the issues for determination concern:-
- i. Whether this trial Court award on damages ought to be disturbed?
 - ii. Who ought to bear the costs of the appeal?

Whether this trial Court award on damages ought to be disturbed?

7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in the of-cited decision in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the singular issue of whether the trial Court’s award on damages was justified.
8. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties’ respective cases before the trial Court. See Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court had earlier in its judgment outlined the gist of the respective parties’ pleadings, as such it serves no purpose restating the same at this juncture. Thus, in order to contextualize the appeal and the key issues advanced for purposes of determination by this Court, it would be apposite to quote in extenso the relevant facets of the impugned judgment.
9. The trial Court after re-stating the evidence tendered before it, addressed itself as follows on the issues of quantum -;

“General Damages

The parties through their respective advocates filed written submission which I have carefully considered. The plaintiff relies on two medical reports one by Dr. Cyprianus Okoth Okere and the other by Dr. Washington Wokabi. The treatment notes.....

The Plaintiff received treatment at Nairobi Women’s Hospital as explained in Dr. Omwenga’s medical report. The plaintiff was later examined by Dr. Okere and Dr. Wokabi and each of them prepared a medical report. According to Dr. Wokabi the plaintiff’s right leg was shortened by 6cm. X rays showed advanced arthritis of the joint as at the date of the examination. At the time.....



The plaintiff was further examined by Dr. Wambugu P.M upon referral by the defendants. However, Dr. Wambugu's medical report was never filed by the defendant and the Court has therefore not had the opportunity to look at it.

Counsel for the plaintiff proposed 15,000,000/- while the defendant did not file submissions.

.....

I have considered a number of decided cases which involved injuries comparable to those which the plaintiff herein sustained. I will proceed to set out some of the said decisions.

.....

I have carefully considered the medical evidence, written submission by both counsel as well as the applicable case law. I have also considered the effluxion of time since the above decisions were rendered as well as the inflationary trend of our economy. Taking all the above factors into consideration, it is my finding that the sum of Kshs. 3,500,000/= would be reasonable for paid, suffering and loss of amenities.

Future medical expenses

The plaintiff pleaded Kshs. 650,000/- future medical expenses as recommended by Dr. Wokabi and Dr. Okere in their respective medical reports for hip joint replacement and removal of the metal implants. The claim is well founded and has been sufficiently proved. I do hereby allow it as pleaded and proved.

Damages for loss of earning capacity

The plaintiff herein is a minor who suffered 40% permanent incapacity. Though the minor was not working and or earning an income at the time of the accident, he will no doubt be limited in his future ability to earn.....In the circumstance of this case, the Court is satisfied that a global award of Kshs. 2,000,000/= would suffice under this head.

Special damages

The plaintiff pleaded and proved special damages Kshs. 8,550/=, which I hereby allow.....

In addition, I award the plaintiff the costs of the sit plus interest at Court rate”

10. With the above in mind, regarding the trial Court's role in assessing quantum of damages, it is useful at the outset to restate the applicable principles on assessment of damages. The exhortation by the English court in *Lim Poh Choo v Health Authority* (1978) 1 ALL ER 332 as echoed by Potter, J.A in *Tayab v Kinany* (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Shepherd* (1964) AC 326, at page 345 stated as follows-;

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added).

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] KECA 528 (KLR).



11. Meanwhile, the Court of Appeal in *S J v Francesco Di Nello & another* [2015] KECA 606 (KLR) observed that -;

“The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the *Ossuman Mohammed & Another vs. Saluro Bundi Mohamud*, CA 30/1997 (unreported) wherein the following passage, in the case of *Kigaragari vs. Aya* (1982 – 1988), KAR 768 is employed;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage.” (emphasis added).

12. Whereas on appeal, regarding the Appellants challenge on awarded damages it was held in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“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”.

13. In *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another* (No 2) [1985] KECA 137 (KLR), it was held that:-

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also *Butt v Khan* (1981)KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu* Civil Appeal No. 284 of 2001; (2004)eKLR.”

14. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that “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 in the first instance”. That said, as earlier captured herein, apposite to the issues, are the pleadings. The Respondent particularized his injuries at paragraph 6 in the Plaintiff to constitute ...

- a. Head injury comprising of loss of consciousness, laceration of the left forehead, fracture of the maxillary complex & fracture of the right zygomatic bone;
- b. Major pelvic injury comprising of fracture dislocation of socket of the right hip joint (acetabulum),
- c. Rapture of right patella tendon
- d. Recurrent headaches
- e. Recurrent pain on left side of the face



- f. Recurrent pain on the right hip joint
 - g. Recurrent pain on right pelvic region
 - h. Recurrent pain on right pelvic region
 - i. Cannot bend, walk fast or run
 - j. Cannot extend the right knee hence cannot kick, kneel or squat &
 - k. 40% permanent disability.
15. Having set out the Respondent’s pleadings, notably Dr. Cyprianus Okoth Okere’s medical report on the Respondent dated 24/02/2020, which was adduced into evidence by consent, particularized the injuries as constituting “fracture dislocation of the right hip (acetabulum), fracture of the right maxilla & deep cut on the right face scalp”. His final opinion and prognosis on the Respondent was to the effect that “He sustained fractures of the right maxilla and right acetabulum and deep cuts on the scalp and face. The injuries can be classified as grievous harm. The implants may be removed in future at a cost of about 20,000 Kshs. The right hip joint may develop an osteoarthritis in future”
16. The subsequent medical report was adduced by consent by the Respondent and prepared by Dr. Wokabi on 19/03/2020 particularized the injuries as constituting “Head injuries comprising of loss of consciousness, laceration of the left forehead, fracture of the maxillary complex & fracture of the right zygomatic bone; Major pelvic injury comprising of fracture dislocation of socket of the right hip joint (acetabulum); Rapture of right patella tendon; the fracture of the facial bones was treated by fixing metal implants; the fracture of the right acetabulum was operated on and fixed with metal plates and screws; the right knee was immobilized; & the Respondent is walking with the aid of crutches” His final opinion and prognosis on the Respondent was to the effect that “He suffered pain from the fractures of the facial bones that he sustained. He also suffered pain after the surgery to fix the implants. The fractures of the facial bones will unite fully on their own, they will not confer any long-term problems. The metal implant that were used to fix will not require to be removed. They will remain and not cause any complications. Most pain was felt from the fractures of the socket of the right hip joint. He also suffered pain after the surgery to fix metal implants. Clinically he has a very stiff semi flexed right hip due to development of advanced arthritis on these specific areas. As he is now and as a young person his physical activities will be very affected. He also suffered pain from the complete tear of the right patella. No repair to this torn tendon was carried out. Inability to extend the knee is conferring a lot of disability. Very soon he will also require surgery to undergo hip replacement surgery at a cost of Sh.450,000/= (four hundred thousand shillings). The condition of the right hip joint and right knee is conferring permanent disability of 40%. What he will require is an operation to replace the right patella tendon. Such surgery will Sh. 200,000 (two hundred thousand shillings) in a private medium cost hospital or nursing home.”
17. The earliest documentation on the Respondent’s injuries were treatment notes from Narok Hospital that were prepared on the same day the Respondent sustained his injuries. It captured the injuries as pleaded in the plaint with specificity being cut wound or lacerations on the Respondent face and specific fractures on the pelvic bone (ilium and ischium) with a referral for ORIF treatment being made.
18. It must be noted that the Respondent was subjected to a second medical examination, at the behest of the Appellants. As rightly noted by the trial Court, the said report was neither filed nor adduced into evidence before the trial Court as can be garnered from the record of appeal and proceedings. As such,



there was no basis for the trial Court to consider the said report as at rendering of its determination on damages.

19. However, on appeal the Appellants moved this Court to have the said second medical examination report by Dr. P.M. Wambugu dated 23/11/2020 introduced into evidence on appeal and to form part of the record. The said motion was allowed by Musyoka, J. in a ruling rendered on 24/04/2024, to wit, the said medical report by Dr. P.M. Wambugu now forms part of the record before this court, on appeal.
20. That said, Dr. P.M. Wambugu medical report on the Respondent dated 23/11/2020, which was the most recent medical evidence on the Respondent, particularized the injuries as constituting “multiple pelvic fractures with right acetabulum anterior and posterior columns involvement, fracture left zygomatic bone, facial laceration wounds & mild head injury”.
21. It is noted that the latter medical report was prepared some seventeen (17) months after the accident. On his part, his final opinion, prognosis and attendant sequela on the Respondent was to the effect that the Respondent’s “injuries are consistent with those due to blunt trauma as may have occurred during the said accident. He sustained skeletal and soft tissue injuries as detailed above. The fractures have united. There is residual avascular necrosis head of right femur. He will benefit from total hip joint replacement surgery to improve his mobility. The estimated all-inclusive costs of above procedure is Kshs. 350,000/= in a medium private institution. In terms of function, I would award him 15% as the degree of permanent incapacitation.”
22. Thus, from the foregoing, the most significant injury suffered by the Respondent based on medical evidence was the fracture of the acetabulum and fracture to the zygomatic bone (cheek bone), which as at 23/11/2020, Dr. Wambugu P.M prognosis was that the latter had united, caused the Respondent significant pain and discomfort however left him with attendant sequela and incapacitation of 15%.
23. With the above in reserve, as important as consistency in awards for similar injuries might be, this Court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the Court’s duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The Appellants complaint before this Court is that the trial Court’s award on general damages was excessive, not conventional in comparison to cases with similar injuries. Therefore, the award ought to be set aside or substituted.

General Damages.

24. Before the trial Court and in sustenance of the award of Kshs. 3,500,000/- in general damages, the Respondent relied on the decision in -; Rukia Mugoyia v Johnson Juma Ogutu & Another [2007] KEHC 1566 (KLR) wherein the claimant sustained Wedge compression, fracture dislocation at C4, C5; facial paralysis both upper and lower limbs, loss of stool control and loss of sensation from the naval region downwards & permanent incapacitation of 100%, in which the Court awarded Kshs. 12,462,000/- in general damage for pain and suffering; and the decision in Samuel Ochieng Muga v Transmara Sugar Company [2018] KEELRC 2081 (KLR) wherein the claimant broke the spinal cord in the accident and currently uses a lumbar corset. He also broke the left hip joint, dislocated the left knee joint, injured his rib cage and broke his pelvic bone. His left leg is disabled and swollen from infection and he is not able to walk & permanent incapacitation of 80%, to wit, the Court awarded Kshs. 12,000,000/- in general damage for pain and suffering.
25. On the part of the Appellants, from the record of proceedings, they failed to file submissions before the trial Court. And even efforts to have the decision of the trial Court set aside for purposes of having their submissions considered were thwarted by the learned Magistrate vide a ruling delivered post judgment.



Therefore, for all intents and purposes the trial Court did not have a yardstick availed by the Appellants towards the question of awardable damages.

26. The latter brings to mind the exhortation of the late Ochieng, J. (as he then was) in *Sila Tiren & another v Simon Ombati Omiambo* [2014] KEHC 6641 (KLR), of which I concur with, wherein he observed that;

“None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”

27. However, before this Court, on appeal, the Appellants have urged this Court to disturb the award on general damages and substitute it with an award of Kshs. 1,000,000/- meanwhile have proceeded to rely on authorities that the trial Court did not have the benefit of, in contravention of the exhortation of the late Ochieng, J. (as he then was) in *Sila Tiren* (supra).
28. While I appreciate that the learned Magistrate in his decision expended some industry in analysing the question of awardable damage by considering the medical evidence, the Respondent’s submission, he went on to cite decisions of this Court on purported comparable awards and injuries sustained by the Respondent. The trial Court correctly noted that the decisions relied on by the Respondent were with respect to much more severe and not even remotely comparable injuries to those sustained by the Respondent in this case. I agree with the said finding.
29. That said, the learned Magistrate went ahead to capture the decisions in -; *Michael Maina Gitonga v Serah Njuguna* [2012] KEHC 3803 (KLR) wherein the claimant sustained multiple fracture of the pelvis; dislocation of the right hip with displaced fracture of the right acetabulum; comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau; & soft tissue injuries of the chest & varied assessment of permanent incapacitation of by various doctors at 50%, 18% & 20% respectively. The Court awarded Kshs. 1,500,000/- in general damage for pain and suffering; and
30. The decision in *John Kibicho Thirima v Emmanuel Parsmei Mkoitoko* [2016] KEHC 238 (KLR) wherein the claimant sustained multiple fractures of ribs of the 2nd to 5th ribs of the chest, fracture of the right ulna bone, displaced and comminuted fracture of the right mandible, fracture of right superior & inferior pubic ramus of the pelvis bone, fracture of the left scapula, fracture of left superior pubic ramus of the pubic bone, multiple lacerations & cut wounds on the right forearm & both legs, cut wounds on the head, contusion of the chest, blood loss and physical & psychological pains with permanent incapacitation of 35%. The Court awarded Kshs. 1,800,000/- in general damage for pain and suffering; and
31. *Peace Kemuma Nyang’era v Michael Thuo & another* [2014] KEHC 659 (KLR) wherein the claimant fracture of the sacrum bone – lowest back bone spine, fracture of the right superior pubic ramus of the pubic bone – right hip bone, fracture of the right ischium bone part of the pelvis – lower part as



one sits down, haematoma on both thighs & haematoma in the lumbar - sacral – lower part of spine between the 2 buttocks with permanent incapacitation of 45%. The Court awarded Kshs. 2,500,000/- in general damage for pain and suffering; *Joseph Kahinda Maina v Evans Kamau Mwaura & 2 others* [2014] KEHC 1772 (KLR) wherein the claimant sustained head injury (cerebral concussion), fracture of 6 teeth, injury to the right chest wall causing pneumothorax (air in the chest cavity), fracture of the pelvis (displaced fracture of the right superior and inferior pubic rami), diastasis of the right sacro-iliac joint, fracture of the right acetabulum (hip joint) and injury to the right knee resulting in tear of the lateral meniscus. The Court awarded Kshs. 2,400,000/- in general damage for pain and suffering; as well as;

32. *Florence Hare Mkaha v Pwani Tawaka L Mini Coach & Another*, as well [2012] KEHC 2840 (KLR) wherein the claimant sustained concussion for 3 days, fractures of Right superior and inferior ramus of pubis, fracture of ischium, fracture left Acetabulum, fracture Lateral condyle of femur, dislocation left knee with torn collateral ligament; skin grafting surgery on left leg, and left leg shortened by 4 cm. The Court awarded Kshs. 2,400,000/- in general damage for pain and suffering.
33. From the medical evidence presented before the trial Court, the Respondent's injuries seemed moderately severe and left him with residual incapacitation. Thus, having reviewed the authorities cited by Respondent before the lower Court and those cited by the learned Magistrate, it must be appreciated that the same were not on all fours similar to the injuries sustained by the Respondent in this matter. As rightly noted, the authorities relied on by the Respondent have no semblance whatsoever to the injuries sustained by the Respondent whereas authorities relied on by the trial Court equally appear to enumerate slightly severe injuries on the backdrop of the fact that the most significant injuries sustained by the Respondent constituted laceration to the face, fracture acetabulum and fracture to the zygomatic bone (cheek bone) with an average permanent incapacitation of 28% premised on the medical reports adduced into evidence.
34. Ultimately, it appears from my own review of the material presented before the trial Court and comparisons with authorities cited, that the Appellants complaint with regards to the award on damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available, though the Respondent must have endured much pain in the period of morbidity with attendant sequela.
35. Comparing the Respondent's injuries with the earlier captured decisions and adjusting for severity and inflationary trends, the Court is persuaded to disturb the award by the trial Court by decreasing it from the sum of Kshs. 3,500,000/- to the sum of Kshs. 2,500,000/- on the premise of the persuasive decision in *Dhokia Transporters Limited v Azere* [2024] KEHC 7090 (KLR) wherein the claimant sustained blunt injury to the right eye, posterior dislocation of the left hip joint, fracture acetabulum and fracture of the left inferior ramus, to wit on appeal the trial Court award was reduced to Kshs. 2,000,000/-.
36. Loss of earning capacity, while calling to aid the decision in *Mumias Sugar Company Limited v Francis Wanalo* [2007] KECA 485 (KLR), the Respondent urged the Court to maintain the award of Kshs. 2,000,000/- awarded by the trial Court. Notably, the said decision was equally cited by the learned Magistrate. The Appellants have contended that the claim for loss of earning capacity was not pleaded however an ex facie review of the plaint the same was duly pleaded as one of the reliefs sought. That said, as to whether the award was inordinately high or excessive in the circumstance, the question of lost earning capacity as pleaded by the Respondent, the distinction between lost earnings and diminished



earning capacity is now settled. The Court of Appeal in *S J v Francesco Di Nello* (supra) while making the distinction stated that: -

“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. This was the position enunciated in *FAIRLEY V JOHN THOMSON LTD* [1973] 2 LLOYD’S LAW REPORTS 40 at pg.

14. Wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

37. The Court proceeded to state that: -

“The correct position as in the *Fairley* case (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* CA No. 251 of 1996 as hereunder:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved.”

In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and *Chesoni Ag. JA* (as he then was) said:

“Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

38. Based on the dicta in *Francesco Di Nello* (supra) this is a claim that can be awarded separately or under the head of general damages if the Court finds that the claimant’s earning capacity had diminished owing to injuries sustained. What must be specifically pleaded is a claim for lost income. Here, it is not in doubt that the Respondent was injured while was still a minor and partially incapacitated. The medical reports of Dr. Okere, Dr. Wokabi’s and Dr. Wambugu quantified the degree of permanent incapacitation of the Respondent at 40% and 15% respectively. The Court of Appeal in *Mumias Sugar Co. Ltd* (supra) restated the findings in *Butler v Butler* (1984) KLR 225. In that case, a Plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The court stated:

“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 plaintiff is employed is to compensate the plaintiff for the risk that the disability has



exposed him of either losing his 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 the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

39. My understanding is that an award under this header may be assessed by way of a multiplier method or a global award. In this case, the Respondent was a minor when he sustained his injuries. A fact duly noted by the trial Court. It is therefore difficult to apply a multiplier model here. Saliently, the Respondent’s incapacitation was partial meanwhile the trial Court offered no industry as to how it arrived at the award it did. Therefore, doing my best, applying my mind to the degree of incapacity and prognosis in the medical report, I am persuaded to disturb the award by the trial Court under this head by decreasing it from the sum of Kshs. 2,000,000/- to the sum of Kshs. 1,300,000/-.

Further Medical Expenses

40. On the claim of future medical expenses of Kshs. 650,000/- for corrective surgery of the hip and right patella tendon, the trial Court awarded the same as pleaded without expending much effort analyzing the medical report of Dr. Okere that was before him. Confoundingly, Dr. Okere’s medical report proposed an award of Kshs. 20,000/- for removal of metal implants whereas Dr. Wokabi’s medical report proposed an award of Kshs.450,000/- and Kshs. 200,000/- for a hip joint replacement and right patella tendon replacement. No metal implant removal was advised. Dr. P.M Wambugu’s medical report on his part proposed an award of Kshs. 350,000/- for a hip joint replacement however did not advise on whether the Respondent required a right patella tendon replacement or metal implant removal however noted that an x-ray of the right knee was normal.

Thus, applying my mind to the medical evidence, I am equally persuaded to disturb the award under this head by decreasing it from the sum of Kshs. 650,000/- to the sum of Kshs. 400,000/-.

41. On special damages, no contest on the same was advanced therefore I will maintain the same as awarded.
42. In the end, the trial Court’s award is disturbed to the extend appearing here below:-

General Damages – Kshs. 2,500,000.00/-
Loss of Earning Capacity – Kshs. 1,300,000.00/-
Future Medical Expenses – Kshs. 400,000.00/-
Special Damages – Kshs. 8,550.00/-
Total Kshs. 4,208,550.00/-
Less 10% contribution – Kshs. 420,855/-
Grand Total – Kshs. 3,787,695/-

43. The Respondent will have costs of the suit in the lower Court and interest at Court rates on the above awards from the date of the trial court judgment.

On the appeal, each party shall bear own costs.



Orders Accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER, 2025.

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JANET MULWA

JUDGE

