



REPUBLIC OF KENYA



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EWM (Minor Suing through Next Friend MKW) v Sammy & 2 others (Civil Case E078 of 2022) [2025] KEMC 258 (KLR) (8 October 2025) (Judgment)

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**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E078 OF 2022
YA SHIKANDA, SPM
OCTOBER 8, 2025**

BETWEEN

EWM (MINOR SUING THROUGH NEXT FRIEND MKW) PLAINTIFF

AND

FREDRICK SAMMY 1ST DEFENDANT

KIMANTHI MUTUKU 2ND DEFENDANT

ALEX KYALO KIIO 3RD DEFENDANT

JUDGMENT

The Claim

1. EWM (hereinafter referred to as the plaintiff) filed this suit on 8/6/2022 vide a plaint dated 6/6/2022. The plaintiff sued Fredrick Sammy, Kimanthi Mutuku and Alex Kyalo Kiiio (hereinafter referred to as the 1st, 2nd and 3rd defendants respectively) on account of a road traffic accident that allegedly occurred on 26/8/2021 along Siembeni-Katulani Murram road. The plaintiff averred that on the material day she was lawfully standing off the said road when the 3rd defendant so carelessly and negligently rode, managed and/or controlled motor cycle registration number KMFT 162B that he lost control and permitted the same to violently knock down the plaintiff in consequence whereof the plaintiff sustained severe injuries, loss and damage.
2. The 1st and 2nd defendants were sued as the beneficial owners, users, possessors and the ones in control of motor cycle registration number KMFT 162B whereas the 3rd defendant was sued as the driver/rider thereof. The plaintiff relied on the doctrine of Res ipsa loquitur and pleaded several particulars of negligence against the 3rd defendant. I will not reproduce the particulars of negligence as the parties recorded a consent on liability. The plaintiff averred that as a result of the accident, she sustained injuries and suffered loss and damage. The particulars of the injuries were listed in the plaint. The plaintiff further averred that as a result of the accident, she sustained incapacitating injuries and thus can no



longer engage effectively in any economic venture and her ability to compete effectively in the labour market was severely curtailed. The plaintiff thus prayed for judgment against the defendants jointly and severally for:

1. General damages for pain, suffering and loss of amenities;
2. Special damages of Ksh. 92,600/=;
3. General damages for diminished/reduced earning capacity;
4. Costs of this suit;
5. Interest on the above.

The Defendants' Defence

3. The defendants entered appearance and filed a written joint statement of defence on 4/7/2022. The defendants averred that the plaintiff's suit was fatal, inept, incompetent, ambiguous and does not sufficiently disclose the material particulars. The defendants invited strict proof that they were the owners and driver respectively of motor cycle registration number KMFT 162B as well as the fact of the occurrence of the accident. The defendants denied all the particulars of negligence attributed to the 3rd defendant and averred in the alternative that if the accident occurred, then the same was solely caused or substantially contributed to by the negligent acts of the plaintiff, her parents and/or guardians. The defendants pleaded several particulars of negligence on the part of the plaintiff's parents or guardians as well as on the part of the plaintiff.
4. The defendants denied the applicability of the doctrine of Res ipsa loquitur, denied that the plaintiff sustained severe bodily injuries and denied that the plaintiff was entitled to damages. The defendants further averred in the alternative that if the accident occurred, it was inevitable despite all reasonable measures, skills and steps the rider of motor cycle registration number KMFT 162B took to avert the occurrence of the accident and the said rider ought not to be blamed for what could not be reasonably avoided. The defendants prayed that the plaintiff's suit be dismissed with costs or that a substantial finding of contributory negligence be entered against the plaintiff and/or her parent/guardian.

Consent On Liability

5. On 16/6/2025, the parties recorded a consent in which liability was apportioned at 15% against the plaintiff and 85% against the defendants. The consent was adopted as an order of the court.

The Evidence

The Plaintiff's Case

6. At the hearing of the Plaintiff's case, only her next friend testified. The next friend adopted his statement filed in court as part of his testimony and produced several documents in evidence. Since there is a consent on liability, it is unnecessary to reproduce the next friend's testimony on the events related to how the accident occurred. The next friend testified that following the accident, the plaintiff sustained severe injuries. He further testified that the child had healed although she was weak.

The Defence Case

7. The defendants did not call any witness but was granted leave to file a medical report which would be their only evidence.



Main Issues For Determination

8. In my opinion, the main issues for determination are as follows:
 - i. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;
 - ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
 - iii. Who should bear the costs of this suit?

The Plaintiff's Submissions

9. On quantum, the plaintiff submitted a sum of Ksh. 3,000,000/= in general damages for pain, suffering and loss of amenities relied on the following authorities:
 - a. Majid v Toza [2023] KEHC 20487 (KLR);
 - b. Holistic Educational Trust v Mulatya alias Musau Mulatya Samsom & another [2024] KEHC 3787 (KLR);
 - c. Weddy Kendi Kabira & Grace Muthoni Kobia v VM alias VM (A minor suing through her next friend and mother IKH [2021] eKLR.
10. For special damages, the plaintiff urged the court to award Ksh. 92,600/= as pleaded. The plaintiff also prayed for costs and interest.

The Defendant's Submissions

11. The defendant also filed written submissions. On quantum, the defendant submitted an award of Ksh. 350,000/= in general damages for pain, suffering and loss of amenities. The defendant relied on the following authorities:
 1. Wachira & another v Gechore & another [2024] KEHC 1814 (KLR);
 2. Ouma v East African Sea Foods Ltd [2024] KEHC 7231 (KLR);
 3. Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR.
12. On special damages, the defendant submitted that they should be awarded if specifically pleaded and strictly proved.

Analysis And Determination

13. I have carefully considered the evidence on record and given due regard to the submissions made by the parties as well as the authorities relied upon.

Quantum

14. The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:
 - i. Depressed comminuted fracture of the skull on the left parietal bone with contusional intercerebral bleeding;
 - ii. Oblique fracture of the right mastoid bone disrupting the right ossicular chain;
 - iii. Cut wound on the left leg;



- iv. Blunt injury to the head;
 - v. Minimal right haemastoiditis.
- 1.5 Dr. Jacks Nthanga assessed permanent disability at 15%. The injuries were classified as grievous harm. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the consent on liability, the plaintiff is thus entitled to damages as against the defendants.
16. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in *West (HI) and Sons Ltd v Shepherd* [1964] AC 326 where Lord Morris said:
- “But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, 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 it still must be that amounts which are awarded are to a considerable extent conventional”.
17. I am also guided by Lord Denning's decision in *Kim Pho Choo v Camden & Islington Area Health Authority*, [1979] 1, ALL ER 332 which was adopted in the case of *Nancy Oseko v Board of Governors Masai Girls High School* [2011] eKLR where Wendoh, J stated that:
- “In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.”
18. The Court of Appeal in *Southern Engineering Company Ltd v Musingi Mutia* [1985] KLR 730 held that:
- “It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same,



either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

19. The following principles are germane in assessing damages for personal injury claims:
- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
 - ii. The award should be commensurate to the injuries suffered;
 - iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
 - iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
 - v. Awards should not be inordinately too high or too low.
20. Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

21. I have considered the injuries sustained by the plaintiff. The plaintiff suffered injuries which were classified as grievous harm. In my opinion, the authorities relied upon by the plaintiff are in respect of injuries that were more severe than but comparable to those of the plaintiff herein. The authorities relied upon by the defendants were in respect of less severe injuries. On my part, I have further considered the following authorities:

1. Kiliungu v Kananga alias Jeremiah Kirema [2023] KEHC 27212 (KLR)

The plaintiff and respondent in the appeal sustained loss of consciousness, depressed left sided parietal skull fracture, linear un-displaced second vertebrae (cervical) fracture, liver injury with a capsular hematoma and pains over the chest and lower limbs. On appeal, an award of Ksh. 900,000/= was made on 20/12/2023.

2. Kyoga Hauliers (K) & another v Philip Mahiu Nyingi [2017] KEHC 8143 (KLR)

The plaintiff and respondent in the appeal sustained a comminuted depressed fracture of the skull at the occipital bone, intracerebral haemotome right occipital area, deep cut wound on the right occipital region, soft tissue injuries right ankle joint and severe soft tissue right



22. Given the nature of the injuries sustained by the plaintiff herein, whose permanent disability was assessed at 15% and the age of some of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 1,200,000/= in general damages would suffice. I award the same.

Special Damages

23. The plaintiff pleaded special damages as follows:

- a. Treatment and medical expenses.....Ksh. 86,600/=
 - b. Medical report (Dr. Wokabi).....Ksh. 3,000/=
 - c. Medical report (Dr. Jacks Nthanga).....Ksh. 3,000/=
- Total.....Ksh. 92,600/=

24. It is trite law that special damages must be specifically pleaded and strictly proved. In *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* the court said: -

“It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded”

25. In *Ouma v Nairobi City Council* [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J’s Judgment on page 532 and 533 in *Ratcliffe v Evans* [1832] 2Q.B. 524 an English leading case on pleading and proof of damage:

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

26. The proved medical expenses amount to Ksh. 85,500/=. The charge for the medical report was sufficiently proven. Consequently, I award special damages to the tune of Ksh.91, 500/=

Damages for diminished/reduced earning capacity

27. The plaintiff pleaded these damages but did not submit on the same. In the authority of *William J Butler v Maura Kathleen Butler* [1984] KECA 34 (KLR), the Court of Appeal 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. The English Court of Appeal made an award under this head in *Ashcroft v Curtin* [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction.....It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way:

‘... compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.’- Lord Denning MR in *Fairley v John Thompson (Design and Contracting Division) Ltd* [1973] 2 Lloyd’s Rep 40, 42 (CA).



These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were ‘plucked from the air’. Later, in England, damages under this head had to be separately quantified: *Jefford v Goe* [1970] 2 QB 130, and no interest is recoverable on them: *Clark v Rotax Aircraft Equipment Ltd* [1975] 1 WLR 1570. (Emphasis supplied)

28. In the case of *Tile & Carpet Center Warehouse v Okello* [2022] KECA 5 (KLR), the Court of Appeal held that loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. The court further rejected the argument that it was improper for the lower court to award damages for loss of earning capacity which damages were neither pleaded nor prayed for. In as much as it is not mandatory to specifically plead for such damages, there must be a basis for the award.
29. In *Mumias Sugar Company Limited v Francis Wanalo* [2007] KECA 485 (KLR), the Court of Appeal held:

“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 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 trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. 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 factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.” (Emphasis supplied)
30. The medical report by Dr. Jacks Nthanga indicates that at the time of examination on 26/11/2021, the plaintiff had healed but the doctor was of the opinion that the head injuries may result in convulsions on and off in future. Dr. W.M. Wokabi examined the plaintiff on 24/2/2022 and expressed his opinion that due to the tender age of the plaintiff, there was a great potential for her to heal more. The doctor stated that chances of her developing epilepsy later in life were high. When the next friend testified on 16/6/2025, he stated that the child had healed save that her right hand was weak and experienced headaches. It was not stated that she had developed epilepsy. No further medical examination was done after 24/2/2022 and there is no medical report to confirm that the plaintiff’s hand is so weak such that she could not lift a jug full of water.
31. The plaintiff was 8 years old at the time of accident. There is no medical evidence to show that she could not be able to work in future following the injuries. I do not think it would be prudent to consider the plaintiff’s earning capacity at that age. There would be no basis at all.
32. 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. In my view, it would be preposterous to make such an award, given the age of the plaintiff at the time of accident. No wonder the plaintiff did not submit on the same. Consequently, the prayer for damages for diminished earning capacity is dismissed.



DISPOSITION

33. In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendants. Consequently, I make the following awards:

1. General damages for pain, suffering and loss of amenities.....Ksh. 1,200,000/=
 2. Special damages..... sh. 91,500/=
- Total.....Ksh. 1,291,500/=
- Less 15% contribution..... Ksh. 193,725/=
- Balance due to the plaintiff..... Ksh. 1,097,775/=

34. The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the *Civil Procedure Act* which provides that:

- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

35. In the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others* [2018] eKLR, the court stated that:

First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.

Second, Under Section 26(1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:

- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
- b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of *Omunyokol Akol Johnson v Attorney General* (CIVIL APPEAL NO.6 of 2012, UGSC 4 (8th April 2015) stated in part, as follows:

It is well settled that the award of interest is in the discretion of the court.
The determination of the rate of interest is also in the discretion of the court.
I think it is also trite law that for special damages the interest is awarded



from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment.” (Emphasis supplied)

36. From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR). Consequently, interest on general damages shall accrue at court rates from the date of judgment/decre until payment in full and on special damages, from the date of filing suit to the date of judgment/decre.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 8TH DAY OF OCTOBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

