



REPUBLIC OF KENYA



**Kalaine v Solai Matt Stores Limited (Civil Appeal E687 of 2021)
[2025] KEHC 16114 (KLR) (Civ) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16114 (KLR)

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

CIVIL

CIVIL APPEAL E687 OF 2021

AN ONGERI, J

NOVEMBER 7, 2025

BETWEEN

TABITHA KARAMBU KALAINÉ APPELLANT

AND

SOLAI MAT'T STORES LIMITED RESPONDENT

*(Being an appeal from the Judgment of Hon. Judith Omollo (RM)
in Milimani CMCC No. 3793 of 2019 delivered on 4th June 2021)*

JUDGMENT

1. The Appellant filed Milimani CMCC No. E3793 of 2019 vide plaint dated 24th May 2019 seeking general damages for pain and suffering, special damages of Kshs. 3,530/= and damages for loss of amenities and reduced earning capacity together with costs and interest.
2. The course of action arose on 28th May 2016 when the Appellant was lawfully boarding as a fare passenger in motor vehicle registration No. KBK 456Z when the said motor vehicle collided with motor vehicle registration No. KCA 799E, Isuzu lorry.
3. The Respondent did not enter appearance or file a defence and the court entered interlocutory judgment in default of appearance and defence on 10th December 2019.
4. The case proceeded for formal proof on 31st March 2021.
5. The Appellant's evidence was that on 28th May 2016, the Appellant was travelling in motor vehicle registration No. KBK 456Z as a fare paying passenger.
6. Upon reaching Marurui along the Northern By-Pass, the Respondent's motor vehicle registration No. KCS 799E Isuzu lorry which was coming from the opposite direction suddenly lost control and



swerved to the side of motor vehicle registration number KBK 456Z and the Appellant was seriously injured.

7. The Appellant sustained the following injuries:-
 - i. Cut wound on the scalp.
 - ii. Deep cut wound on the elbow.
 - iii. Fracture of the femur.
 - iv. Partial tear on the left patellar tendon.
 - v. Deep serious thrombosis during skeletal fraction at Kenyatta National Hospital.
8. The Doctor noted the following:-
 - i. That the Appellant had pain on the left lower limb on exertion.
 - ii. Stiffness on the left knee that she cannot run but can walk for a short time.
 - iii. 15% permanent degree of incapacity at the left lower limb.
 - iv. Scars on the left lower limb.
9. The trial court assessed damages as follows:-
 - i. Liability 100%.
 - ii. General damages for pain and suffering Kshs.700,000/=
 - iii. Special damages Kshs. 3,550/=
 - iv. Future medical costs Kshs. 250,000/=Total Kshs. 953,550/=
10. The Appellant has appealed against the said award on the following grounds:-
 - i. The Learned Magistrate erred in law and in fact in finding that the Plaintiff was entitled to general damages of Kshs. 700,000/= which is on the lower side in view of the injuries sustained by the Plaintiff.
 - ii. The Learned Magistrate erred in law and fact by failing to consider the period of time the Appellant spent in hospital in arriving at the quantum for general damages.
 - iii. The Learned Magistrate erred in law and fact in finding that the Appellant was not entitled to loss of future earnings yet the same was uncontroverted.
 - iv. The Learned Magistrate erred in law and fact by failing by awarding the Appellant special damages of Kshs. 3,550/= against the panoply of evidence and receipts.
 - v. The Learned Magistrate erred in law and fact by failing to consider the Appellants submissions and authorities therein on quantum thereby arriving at an erroneous figure on quantum.
11. The appellant submitted that the cause of action herein arises from a road accident that occurred on 28/5/2016 between the appellant while on board motor vehicle registration number KBK 456Z as a fare paying passenger and the respondent's motor vehicle KCA 799E Isuzu lorry truck.



12. The appellant after the accident was pulled from the vehicle wreckage by passers-by and taken to Neema Hospital opposite Safari Park. That she later visited Guru Nanak Hospital where the doctors administered first aid and performed an x-ray which revealed that she had a fractured hip bone. The appellant was on the same day taken to Kenyatta National Hospital where she was admitted for 11 months.
13. Dr. G.K Mwaura, opined that the appellant sustained a Cut wound on the scalp; Deep cut wound on the elbow; Fracture left femur; Partial tear on the left patellar tendon and a Deep venous thrombosis during skeletal fraction at Kenyatta hospital.
14. The doctor also noted that the appellant sustained Pain on the left lower limb on exertion; Stiffness on the left knee. He ascertained the degree of permanent incapacity at 15%.
15. It was consequently the appellants submission that the award of Kshs 700,000 was inordinately low and urged this court to substitute it Kshs. 2,500,000. In support she cited Dennis Nyamweno Openda v. Anwarali & Brothers Limited & Another [2015] eKLR where the plaintiff was awarded general damages of Kshs 1,800,00 for multiple fracture which include fracture of the left clavicle, fracture right humerus and unstable multiple fractures of the pelvic bones.
16. On the award for loss of future earning the appellant submitted that the same was prayed for and in support of the same she testified that at the time of occurrence of the accident, she worked at AIDS Healthcare Foundation (AHF) in Parklands as a VCT counsellor earning a daily income of Kshs. 2000/ for 5 days a week. She testified that her work involved visiting various informal settlement areas within Nairobi County counselling and testing patients for the HIV/AIDS virus.
17. The appellant further testified that as a result of the accident, she was totally incapacitated and could not continue with her work. She further testified that her ability to compete in the labour market was vitiated as a result of the said accident.
18. The report by the medical doctor indicated that the appellant suffered a permanent incapacity of 15%. The medical doctor noted that the appellant could not run but only stand and walk for short distances. The appellant could not continue with this line of work as a result of the accident.
19. the appellant testified that she was 43 years of age. That she should have been able to fully work at least to the general retirement age of 60 years if not longer. She therefore submitted a multiplier of 17 years.
20. On the wages the appellant gave evidence that she used to earn daily wages of Kshs 2,000 and worked for 5 days a week at Aids Healthcare Foundation (AIF). Since the appellant did not provide any payslip, she submitted the base amount of Kshs. 20,000 as her monthly income. she indicated an amount of Kshs 4,080,000 as sufficient which amount was made as follows: Kshs 20,000 x 12 months x 17years = Kshs 4,080.000.
21. On special damages the appellant submitted that it is trite law that special damages must be specifically pleaded and proved. The appellant herein pleaded for special damages totaling Kshs. 155,870 made up as follows: Medical report Kshs, 3000/-; Motor vehicle Search Kshs. 550 and medical expenses of Kshs. 152,320.
22. The trial court noted that some of the receipts presented were faint and that the court not ascertain the medical expenses incurred by the appellant as some of the expenses appeared to have been paid by an organization.



23. The appellant submitted that the learned magistrate should in view of the above realization, have proceeded to deliver partial judgment and request the appellant to clear receipts in support of her special damages.
24. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court and subject it to fresh scrutiny and draw its own conclusions, while bearing in mind that it did not have the opportunity to see or hear the witnesses testify.
25. This principle was aptly stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the court held that an appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.
26. The issues for determination in this appeal are as follows:-
 - i. Whether the award of general damages for pain and suffering is too low.
 - ii. Whether the court erred in not awarding damages for loss of future earning capacity.
 - iii. Whether the Appellant proved the special damages pleaded.
27. Turning to the issues for determination, the first is whether the award of general damages for pain and suffering of Kshs. 700,000 was inordinately low.
28. The Appellant sustained significant injuries, including a cut wound on the scalp, a deep cut wound on the elbow, a fracture of the femur, a partial tear on the left patellar tendon, and deep venous thrombosis during skeletal traction.
29. The medical report by Dr. G.K. Mwaura further noted that she experiences pain on the left lower limb on exertion, stiffness on the left knee preventing her from running and limiting her to walking for only short periods, and assessed a 15% permanent degree of incapacity.
30. The Appellant was also hospitalized for a period of 11 months. In assessing damages for personal injuries, the court must strive to award compensation that is commensurate with the injury sustained, taking into account previous comparable awards, while acknowledging that no two cases are entirely alike.
31. The correct principle is that the award must be within the limits set by previous, similar cases, but not an exact uniformity. The Appellant has urged this court to rely on the case of *Dennis Nyamweno Openda v Anwarali & Brothers Limited & Another* [2015] eKLR, where an award of Kshs. 1,800,000 was upheld for multiple fractures including an unstable multiple fracture of the pelvic bones.
32. While the injuries in that case were severe, the injuries sustained by the present Appellant, particularly the fracture of the femur and the resulting 15% permanent incapacity coupled with the prolonged hospitalization, were indeed serious.
33. However, an award of Kshs. 2,500,000 as proposed by the Appellant appears excessive. Considering the nature of the injuries and the cited precedent, this court finds that the award of Kshs. 700,000 by the learned Magistrate was manifestly low and does not reflect the current trends and the severity of the Appellant's condition.
34. A more appropriate award, in the circumstances, would be Kshs. 1,200,000.
35. On the second issue, the Appellant contends that the trial court erred in failing to award damages for loss of future earning capacity.



36. It is crucial to distinguish between "loss of future earnings" and "loss of earning capacity." Loss of future earnings is a special damage claim for a real, assessable loss of income which a plaintiff would have earned but for the accident, and must be specifically pleaded and strictly proved.
37. Loss of earning capacity, on the other hand, is a general damage claim for the loss of the ability to earn money in the future, which is compensated as part of general damages.
38. The Appellant pleaded for "damages for loss of amenities and reduced earning capacity." Her evidence was that she worked as a VCT counsellor, a job involving movement in informal settlements, and that she could no longer perform this work due to her injuries.
39. The medical report confirmed a 15% permanent incapacity and limitations in her mobility.
40. The trial court made no award under this head. The authorities are clear that where a plaintiff's capacity to work and compete in the labour market is impaired, an award for loss of earning capacity is justified.
41. Upon considering the Appellant's testimony and the medical evidence, which was uncontroverted, this court finds that the Appellant proved that her capacity to work as a VCT counsellor or in any other job requiring physical mobility was significantly compromised.
42. The learned Magistrate therefore erred in not making an award under this head. Considering the 15% permanent incapacity, her age (43 years at the time), and the nature of her previous work, a global award of Kshs. 800,000 for loss of earning capacity is fair and reasonable.
43. Regarding the third issue on special damages, the law is trite that they must not only be specifically pleaded but also strictly proved. The Appellant pleaded for Kshs. 155,870, comprising a medical report (Kshs. 3,000), a motor vehicle search (Kshs. 550), and medical expenses (Kshs. 152,320).
44. The trial court awarded only Kshs. 3,550, noting that some receipts were faint and that some expenses appeared to have been paid by an organization.
45. The Appellant's submission that the court should have requested clearer receipts is without merit. The burden of proof rests squarely on the party claiming special damages, and it is not for the court to seek evidence on their behalf.
46. The Appellant failed to discharge this burden by producing legible and unequivocal proof of payment for the medical expenses. The award of Kshs. 3,550, which presumably covers the medical report and search, was therefore proper and is hereby upheld.
47. Consequently, the appeal partially succeeds. The judgment of the lower court is set aside and substituted with an award as follows:
 - (i) General damages for pain, suffering and loss of amenities: Kshs. 1,200,000.
 - (ii) Loss of earning capacity: Kshs. 800,000.
 - (iii) Special damages: Kshs. 3,550.
 - (iv) Future medical costs: Kshs. 250,000.The total award is therefore Kshs. 2,253,550.
48. Judgment be and is hereby entered in favour of the Appellant against the Respondent in the sum Kshs. 2,253,550 with costs and interest from the date of the judgment in the lower court until payment in full.



49. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2025 VIRTUALLY VIA MT
AT VOI HIGH COURT.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Millicent/Mabishi

.....for the Appellant

.....for the Respondent

