



REPUBLIC OF KENYA



KENYA LAW
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**Kimochu & 2 others v Maina (Civil Appeal E054 of 2023)
[2025] KEHC 16061 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E054 OF 2023
KW KIARIE, J
NOVEMBER 7, 2025**

BETWEEN

DICKSON MBUGUA KIMOCHU 1ST APPELLANT

MARY WANJIKU MBUGUA 2ND APPELLANT

NIC BANK KENYA PLC 3RD APPELLANT

AND

NICHOLAS MUSILA MAINA RESPONDENT

(Being an appeal from the judgment and decree in the Kilungu Principal Magistrate's Court, PMCC No. E224 of 2022 by Hon. F. Makoyo (Principal Magistrate))

JUDGMENT

1. The appellants were the defendants in Kilungu Principal Magistrate's PMCC No. E224 of 2022. They were sued for a claim of general and special damages following a road traffic accident involving their motor vehicles, with registration numbers KCU 578L and GKB 844Q. As a result of the accident, the respondent sustained injuries. The respondent was awarded Kshs. 3550/= in special damages and Kshs. 1,400,000/= before factoring in contributory negligence.
2. The appellants were dissatisfied with the judgment and submitted this appeal through Mwangangi Nzisa & Associates Advocates. They raised the following grounds for appeal:
 - a. The learned magistrate erred and misdirected himself in law, principle and facts when he misapprehended and misunderstood the applicable principles and the law in assessing loss of earning capacity, thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.
 - b. The learned magistrate erred both in law and fact by awarding loss of earnings capacity at Kshs. 800,000/=.



- c. The learned magistrate erred in law and in making an award of Kshs. 600,000.00 general damages, which is inordinately high in view of the injuries sustained by the respondent.
 - d. The learned magistrate erred in law and fact by disregarding the appellant's submissions and judicial authorities on the quantum of damages, with the resultant miscarriage of justice to the appellant.
 - e. The learned trial court erred by failing to consider with a fair measure the submissions of the defendants in writing the judgment.
 - f. The learned trial court erred in the evaluation of evidence before it and disregarded an important element of the evidence, principles and practice, thus reaching an award on quantum so inordinately high in the circumstances.
3. The respondent opposed the appeals through Muthoni Theuri & Company Advocates. He argued that the appeal lacked merit.
 4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
 5. The parties entered into a liability agreement whereby the appellant was to bear 80%, while the respondent was to bear 20% contributory negligence. The learned trial magistrate remained focused on determining the quantum of damages.
 6. The appellant argued that the learned magistrate made an error in awarding excessive general damages and loss of earning capacity without considering the cited precedents. Before an appellate court can intervene in an award of damages, it must be satisfied that a wrong principle of law was applied, irrelevant factors were considered, relevant factors were omitted, or the award is inordinately low or high. These principles were established by the Privy Council in *Nance vs British Columbia Electric Railways Co. Ltd.* [1951] AC 601 on page 613, where it stated:

The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a wholly erroneous estimate of damages (*Flint vs Lovell* [1935] 1KB 354), as affirmed by the House of Lords in *Davis vs Powell Duffryn Associated Collieries Ltd.* [1941] AC 601.

7. There are factors to be considered before assessing the loss of earning capacity. The Court of Appeal in *Butler v Butler* [1984] (Chesoni ag.JA) KLR 225 stated:

Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* [1973] 2 Lloyd's Rep 40 at 42 (CA), but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering, including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of



the result of the injuries suffered in this case, I would not consider too excessive as to justify this court's interference. What a victim whose earning capacity is diminished through an accident loses is an interest which, if not saleable on the labour market, has an assessable value. It is, therefore, an economic loss of the same class as the "lost years", for which the wrongdoer should fairly compensate the victim. 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 heading of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if the damages are payable?

8. Dr Cyprianus Okoth Okere assessed the degree of permanent incapacity at 40%. The appellant in the trial court urged the court to disregard the award of any damages for loss of earning capacity. They supported their argument by pointing out that his earnings at the time of the accident had not been proven. In my view, this is flawed reasoning. If accepted, it would imply that a person's future employability should not be considered if they are unemployed at the time of the accident. I find the sum awarded to be fair, and I will not disturb it.
9. In the trial court, the appellant had proposed an award of Kshs. 500,000 for pain and suffering. The award by the learned trial magistrate is not excessive.
10. The conclusion of the foregoing analysis of the evidence is that the appeal lacks merit. The same is dismissed with costs.

DELIVERED AND SIGNED AT MAKUENI, THIS 7TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE

