

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CORAM: R. MWONGO, J.**  
**CIVIL APPEAL NO. E016 OF 2025**

**FELISTA WANGITHI WANJOHI..... APPELLANT**

**-VERSUS-**

**ASHFORD MUTUGI MURUNGI.....RESPONDENT**

*(Appeal arising from the decision of Hon. C.K. Kisiangani in Runyenjes MCCC No. E016  
of 2024 delivered on 13<sup>th</sup> February 2025)*

**JUDGMENT**

**The Appeal**

1. Through a memorandum of appeal dated 21<sup>st</sup> February 2025, the appellant seeks orders that:
  - 1) The instant Appeal be allowed.
  - 2) The Judgment and Decree of the trial court on quantum of damages be set aside and substituted with a fair and just award commensurate with the injuries sustained by the Appellant being Kshs.1,500,000/= for pain suffering and loss of amenities;
  - 3) The Appellant be awarded loss of income of Kshs.191,400/= as pleaded in the plaint or in the alternative, a global sum applying the minimum wage principle;
  - 4) The Appellant be awarded loss of earning capacity using the global sum approach;
  - 5) The costs of this Appeal and primary suit be borne by the Respondent.
2. The appeal is premised on the grounds that:
  - 1) The Learned Magistrate erred in law and fact by awarding an inordinately and manifestly low sum of Kshs.450,000/= as general damages for pain, suffering, and loss of amenities that no reasonable Court would award, given the severity and permanency of the Appellant's injuries as evident in the medical report on record dated 25<sup>th</sup> July, 2023;
  - 2) The Learned trial Magistrate erred in law and in principle by failing to appreciate the nature magnitude, and extent of the injuries sustained by the

Appellant herein, thereby awarding general damages that is not commensurate with the seriousness of the Appellant's injuries;

- 3) The learned Magistrate erred in law and in principle by acting on wrong principles falling to take into consideration matters she ought to have considered (Including comparable authorities, the nature, severity, and extent of the injuries sustained, the degree of permanent incapacity, and the inflationary trends) and thereby arriving at a wrong result in terms of guarding her judicial discretion in the assessment and award of general damages for pain and suffering and loss of amenities;
- 4) The Learned Magistrate erred in law and fact by declining to award loss of Income on the basis that the Appellant, who was engaged in a hawking business failed to provide documentary proof of earnings by falling to apply the principle of a global sum under the minimum wage regulation for a casual laborer;
- 5) The trial Magistrate erred in law and fact by failing to award the Appellant herein damages for loss of earning capacity and conflating the same with loss of income despite the two having been separately pleaded in the plaint dated 15<sup>th</sup> August 2023 and in spite of the medical doctor having assessed the permanent degree of incapacity of the Appellant at 15%;
- 6) The Learned Magistrate erred in law and fact by unfairly penalizing the Appellant for the failure to file her written submissions overlooking the weight of the uncontroverted oral and documentary evidence tendered during trial and disproportionately relying on the respondent's proposed low quantum of Kshs.350.000/- which is inordinately low as to represent an entirely erroneous estimate given the nature and extent of the injuries suffered by the appellant;
- 7) The learned Magistrate erred in law and in fact by misdirecting herself in failing to appreciate that despite the Appellant's failure to file submissions on quantum of damages, the general award of general damages for fractures of the femurs generally ranges from Kshs.850,000/= to Kshs.1,500,000/=, based on comparative case law authorities;
- 8) The Learned Magistrate erred in law and fact by failing to properly analyze and/or evaluate the totality of the evidence on record. leading to a manifestly

unjust, low and erroneous award that does not sufficiently compensate the Appellant for the pain and suffering and loss suffered and which is not consistent with comparable awards for the same injuries suffered by the Appellant herein; and

- 9) The Learned Magistrate erred in law and principle by misdirecting herself in erroneously relying on an inapplicable and incomparable case of **Francis Ochieng & Another v. Alice Kajimba (2015) eKLR** as a guidance for the award of general damages, thereby failing to appreciate that whereas in the Appellant's case before her the Appellant suffered a grievous injury consisting of, *inter alia*, a distal fracture of the femur in the case relied upon, the victim has suffered multiple soft tissue injuries without any fracture.

### **Background of the case in the trial Court**

3. The appellant through a plaint dated 15<sup>th</sup> August 2023, sought judgment against the respondent for general damages, special damages of Kshs.152,429/=, future medical expenses of Kshs.275,000/=, loss of income of Kshs.191,400/=, loss of earning capacity, costs of the suit and interest.
4. The appellant alleged that on 30<sup>th</sup> October 2022, the respondent drove his motor vehicle registration number KCP 097E so negligently that it caused an accident when it violently collided head-on with the motor cycle she was onboard as a pillion passenger. That as a result, the appellant suffered an open comminuted distal fracture on the left femur. She stated that she recovered but has residual injuries as detailed in paragraph 7 of the plaint.
5. The respondent filed a statement of defense in which he denied any liability and stated that the rider of the motor cycle on which the appellant was a passenger was to blame for the accident. That the motor cycle is unidentified, uninsured and was being ridden in a careless manner. That the appellant voluntarily assumed the risk of injury by boarding the motor cycle whose rider failed to observe traffic rules.

### **The hearing in the trial Court**

6. PW1 was the appellant who stated that she blamed the respondent for the accident since his motor vehicle hit the motor cycle she was travelling on, head on. That following the accident, she suffered injuries and incurred a cost of

Kshs.152,429/= and that she required future treatment at extra cost. She obtained a police abstract from the police station and produced it as evidence.

7. She also stated that the injuries sustained have hindered her productivity as a 19-year-old hawker in Embu town as she was earning Kshs.600/= daily. She stated that she has since lost capacity to earn as she had not been able to walk properly following the accident. On cross-examination, she stated that a metal plate was fitted on her femur as part of treatment. That she had to pay some of the medical expenses since she was not insured. Since the accident, she has not been able to work and she has resorted to selling wares from her house.
8. The respondent did not testify or call any witnesses. There is no indication in the trial Court file that the parties filed submissions.

### **Findings of the Trial Court**

9. The parties reached a consent on liability at the ratio of 90%:10% in favour of the appellant against the respondent. The trial court adopted this consent as its finding on liability. The trial court analyzed the evidence adduced and assessed damages as follows:
  - 1) General damages for pain and suffering-Kshs.450,000/=
  - 2) Special damages-Kshs.77,900/=
  - 3) Future medical expenses-Kshs.275,000/=

### **Parties Submissions on the appeal**

10. The appellant, in her submissions, challenged the awards of damages by the trial court as being inordinately low. She relied on the cases of **Francis Ochieng & another v Alice Kajimba [2015] KEHC 4703 (KLR)**, **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] KECA 528 (KLR)**, **Polyline W. Kinura alias Roselyne Muthui Katee -vs- Ochero Kibra & 3 Others Nakuru HCCC No. 237 of 2009** and **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)**.
11. She argued that the trial court erred by failing to award her damages for loss of income. That under this head, the trial court should have assessed an award based on the minimum wage even though the earnings were not proved. For this argument, she relied on the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)**.

12. She further argued that she should also have been awarded damages for loss of earning capacity because as a result of the injuries sustained from the accident, her capacity to earn diminished. For this, she relied on the cases of **SJ v Francesco Dinello & Another (2015) eKLR**, **Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR)**, **Alpharama Limited v Joseph Kariuki Cebron [2017] KEHC 1818 (KLR)**, **Jacaranda Bodaboda Operators & another v Nyasero [2022] KEHC 13030 (KLR)** and **Mumias Sugar Company Limited v Francis Wanalo [2007] KECA 485 (KLR)**. She placed further reliance on section 27 of the Civil Procedure Act for her claim for costs.
13. The respondent argued that he submitted to the trial magistrate that an award of Kshs.350,000/= was sufficient as damages for pain and suffering and he relied on the cases of **Reamic Investment Limited v Joaz Amenity Samuel [2021] KEHC 7483 (KLR)** and **Simon Kimote v Agro Solutions Limited [2021] KEHC 9645 (KLR)**. He still relied on the same authorities in this appeal as he urged the court to uphold the findings of the trial court in that regard.
14. He argued that this being an appeal, this court should be reluctant to interfere with the findings of the trial court which are based on discretion. He relied on the cases of **Lukenya Ranching v Kavoloto [1970] E.A. 414** and **Henry Hidaya Ilanga v Manyema Manyoka [1961] EA 713**. He submitted that the award of damages was based on correct principles of law and that only the awardable damages were awarded. He also relied on **SJ v Francesco Dinello & Another (supra)** and **Douglas Kalafa Ombeva v David Ngama [2013] KECA 538 (KLR)** and argued that there was no basis for awarding the damages for loss of earnings and loss of earning capacity.

### **Issue for Determination**

15. The issue for determination is whether the trial court should have awarded damages for loss of earnings and loss of earning capacity.

### **Analysis and Determination**

16. As a first appellate court, it is the duty of this court to examine afresh the evidence adduced before the trial court. This was held in the case of **Coghlan v. Cumberland (1898) 1 Ch. 704**, where the English Court of Appeal stated as follows:

***"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."***

17. The appellant, through the plaint, claimed for general damages, special damages of Kshs.152,429/=, future medical expenses of Kshs.275,000/=, loss of income of Kshs.191,400/=, loss of earning capacity, costs of the suit and interest. The trial court awarded her Kshs.450,000/= as general damages for pain and suffering, Kshs.77,900/= as special damages, Kshs.275,000/= as future medical expenses and costs of the suit and interest.
18. The appellant stated that following the accident, she suffered an open comminuted distal fracture on the left femur. She was treated but still has residual injuries which are as follows:
- a) She complains of pain- left knee on exertion;
  - b) She cannot run;
  - c) She cannot lift objects;
  - d) She sustained grievous harm injuries;
  - e) She developed surgical site infection and still on treatment;
  - f) There are discharge wounds sinuses-surgical site;
  - g) Left knee joint stiffness;
  - h) Left lower limb shortened by about 2cm;

i) Permanent incapacity assessed at 15%.

19. The medical report produced as evidence showed that the appellant suffered a 15% permanent disability as a result of the injuries suffered from the accident. The respondent neither controverted this evidence, nor did he subject the applicant to a second medical examination. The appellant stated that since she was a hawker, she was completely unable to return to her income earning work which involves walking around selling her wares. This is why she prayed for damages for loss of income of KShs.191,400/= and loss of earning capacity.

20. In **S J v Francesco Di Nello & another (supra)**, the Court of Appeal distinguished loss of future earnings and loss of earning capacity thus;

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

21. The assessment of damages under these 2 separate heads must depend first, on the proof of earnings. Loss of income/loss of future earnings has been interpreted to mean that it is a special kind of damages that should be specifically pleaded and strictly proved. In this case, it was specifically pleaded but it was not proved. In the case of **Nyatogo v Mini Bakeries Limited (supra)** the court stated:

***“In claiming loss of future earnings, the appellant also appears to have limited it to the period from April 2017 to date filing of the suit but he also failed to compute with exactitude the amount of loss he was seeking being a special damage. In my view, the pleading was imprecise and incomplete as a special damage claim and could not therefore be properly determined considering the form and manner it was pleaded.”***

22. The appellant stated that she made Kshs.600/= from her hawking business every day. She did not indicate what her hawking business was, or avail even an Mpesa statement showing transactions. Thus, she did not prove these earnings and so

the trial court found no basis for awarding loss of earnings. Upon perusal of the proceedings and the evidence, there is no proof of the said earnings. It is insufficient to merely allege that you were earning a certain amount. Therefore, there is no basis for awarding loss of income as pleaded by the appellant.

23. For loss of earning capacity, this is assessed based on the effect of the injuries on the appellant's earning capacity and it is awarded as general damages. The injuries left her with 15% disability and she stated that she has not been able to go about her business normally since the accident. As stated by the Court of Appeal in the case of **J v Francesco Di Nello & another (supra)**, damages for loss of earning capacity are to be assessed as general damages, either separately or combined with other general damages.

24. As earlier stated herein, the appellant's earnings are unclear and unspecified. However, it can be taken as uncontroverted that she was earning an income from her hawking business which, since the accident that left her with a 15% disability, she cannot continue with normally. On this basis, the appellant is entitled to general damages under this head. In **Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & another [2018] KEHC 543 (KLR)** the court held:

***“....damages under this heading are awarded where it is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered....The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula in assessing damages for lost and diminished earning capacity provided the judge takes into account the relevant factors....”***

25. In this case, it is my view that the award of damages for loss of earning capacity should be assessed separately. The Court of Appeal in **Mumias Sugar Company Limited v Francis Wanalo [2007] KECA 485 (KLR)** held as follows:

***“...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 added]***

26. Given that there is no specific proof of the amount of earnings, a global sum approach is most appropriate, and the amount of Kshs.500,000/= is adequate. As a comparative, in the case of **Charles Kiplang’at Koech v Benard Ng’etich [2021] KEHC 4609 (KLR)**, the court found that the appellant was a bodaboda rider who claimed that he was earning Kshs.500/= daily but he did not prove these earnings. As a result of the accident, he suffered 15% disability. The court awarded him a composite award of Kshs.500,000/= as damages for loss of earning capacity.

27. For general damages for pain and suffering, the trial court awarded Kshs.450,000/= Some comparable awards are the following:

- 1) In **Alex Wanjala v Pwani Oil Products Limited & Another (2019) eKLR**, the appellant sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur. The court awarded Kshs.600,000 for general damages.
- 2) In **Philip Mwago v Lilian Njeri Thuo (2019) eKLR** the plaintiff suffered a fracture of the left humerus with 8% permanent disability, and was awarded Kshs.500,000/=.
- 3) In **Michael Maina Gitonga v Serah Njuguna [2012] eKLR**, the plaintiff suffered multiple fractures 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. The Court awarded Kshs.1,500,000/= as general damages.
- 4) In **Waroi Elly v Catherine Mueni Mwangangi [2020] KEHC 5551 (KLR)**, the court awarded Kshs.600,000/= for pain and suffering and loss of amenities to a plaintiff who suffered 15% disability from the injuries sustained from a road traffic accident.

28. Given the gravity of the injuries in the comparable cases above, and the age of the cases, the award of the trial court is just in the circumstances.

29. As for special damages, the amount awarded was the amount proved through the receipts produced, hence it will remain undisturbed.

### **Disposition**

30. In light of the foregoing discussion, I am of the considered view that the appeal succeeds partially. I therefore make the following orders:

- 1) The findings of the trial court on liability are upheld at 90%:10% as against the respondent;
- 2) The findings of the trial court on damages are upheld save for an addition of general damages for loss of earning capacity which is now assessed at Kshs.500,000/=
- 3) In the circumstances herein, half of the costs of this appeal are awarded to the appellant;
- 4) All monetary awards shall be subjected to interest at court rates until payment in full.

31. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 21<sup>st</sup> day of January, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Mrs. Maina holding brief for Masudi for Respondent
2. No Representation for Ogunga for Appellant
3. Francis Munyao - Court Assistant