



REPUBLIC OF KENYA



DOO (Person of Unsound Mind Suing Through Next of Friend JOO) v Form Mattress Limited (Civil Appeal E036 of 2025) [2026] KEHC 1144 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E036 OF 2025**

**A MABEYA, J
FEBRUARY 5, 2026**

BETWEEN

DOO (PERSON OF UNSOUND MIND SUING THROUGH NEXT OF FRIEND JOO) APPELLANT

AND

FORM MATTRESS LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. F. Rashid SPM delivered on the 21/01/2025 in Kisumu CMCC No. 463 of 2019, David Odhiambo Okumu (Person of unsound mind suing through next of friend) Jeremia Omuga Okumu v Form Mattress Limited)

JUDGMENT

1. The appellant filed the primary suit before the trial court vide a plaint dated 27/9/2019. He sought general damages as well as costs of the suit for injuries sustained following a road traffic accident that occurred on or about the 2/10//2016.
2. The respondent entered appearance and filed a statement of defence dated 29/11/2019 in which it denied the appellant's claim and pleaded contributory negligence on the appellant's part for occasioning the accident.
3. The matter proceeded to trial and by a judgment delivered on 21/1/2025, the trial court decreed: -
 - a. Liability 100% against the defendant.
 - b. General damages Kshs. 1,000,000/-
Special damages Kshs. 28,267/-
 - c. Net award Kshs. 1,028,267/-.
 - d. Costs of the suit and interest.



4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 13/02/2025 and raised four (4) grounds of appeal as follows: -
 - a. The learned trial magistrate erred in law and in fact in awarding the appellant general damages for pain, suffering and loss of amenities which were inordinately low and not commensurate with the injuries suffered by the appellant.
 - b. The learned trial magistrate erred in fact and in law by failing to award the appellant general damages for loss of earnings and loss of earning capacity.
 - c. The learned trial magistrate erred in law by failing to critically analyze the evidence and submissions on quantum together with the authorities submitted by the appellant consequently coming to a wrong conclusion on the award of quantum.
 - d. The learned trial magistrate erred in fact by failing to appreciate the degree, extent and long term effect of the appellant injuries thereby awarding damages which were too low/little in the circumstances.
5. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See *Selles & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123.
6. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect.”
7. Before the trial court, Jeremia Omuga Okumu testified as Pw1. He adopted his witness statement dated 27/9/2019 as his evidence in chief wherein he had stated, that he is the brother of the appellant and further that he did not witness the accident but received information of the same on the 2/10/2016. That he went to JOOTRH where he found the appellant admitted with injuries as pleaded in the plaint. That the appellant was released after 9 days in the hospital and that since his release, the appellant has been behaving like a mentally ill person. In cross-examination, Pw1 stated that the appellant was married with 3 children though he did not provide proof of the same.
8. Pw2, Christine Apondi testified that she knew the appellant prior to the accident and that she witnessed the said accident. She adopted her statement dated 20/1/2017 as her evidence in chief wherein she had stated that the appellant was crossing the road when he was hit by a lorry registration number KCC 880J that was being driven too fast and carelessly.
9. Pw3 No. XXXX PC Timothy Kipruto produced the abstract of the accident. He testified that he was not the investigating officer who had since retired from service.
10. Pw4 Philip Kilimo, a clinical officer at Kisumu County Hospital testified that he filled the appellant’s P3 form on 14/11/2016 after examining him. That the appellant was in fair general condition with injuries on the head, back of the head, bruises on the right head, left shoulder joint swollen and left knee joint. The appellant also had a surgical scar on the abdomen due to explorative laparotomy. That



he categorised the degree of injury as maim. In cross-examination, Pw4 opined that the appellant must have fully recovered as at the time of the trial.

11. Pw5 Prof. Were Okombo testified that he examined the appellant on the 21/9/2020 almost four years after the accident. That the appellant had sustained head injuries, bruises on the right shoulder, abdomen, right hand and left knee. That at the time of the examination, the appellant had not fully recovered and still complained of headache with pain in the neck, right shoulder, abdomen, right hand and knee.
12. That a CT scan of the hand showed displacement fracture and that the appellant had a surgical scar on the abdomen due to explorative laparotomy with bruises. That he concluded that the injuries sustained were soft tissue and bone injuries as the appellant had fully recovered.
13. Pw6 Dr. Opanga Godfrey, a doctor at JOOTRH Emergency and Accident department produced the various documents relating to the appellant when he was at the hospital following the accident.
14. Pw7 Faith Maina, a Psychiatrist Clinical Officer at Kisumu Referral Hospital testified that she saw the appellant on the 24/7/2024 when he was presented for mental assessment. That following her examination, she noticed that the appellant had poor cognitive functioning, was disoriented, had poor concentration and his judgement & memory was impaired. That she concluded that the appellant was of unstable mental status as of 3.45pm on 20/2/2024. At the end of this testimony the appellant closed his case. The respondent similarly closed its case without calling any witnesses.
15. From the foregoing, the grounds of appeal may be summarized into one, viz, ‘That the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on quantum and consequently came to a wrong conclusion by awarding damages that were too low’.
16. The appellants’ appeal is basically on quantum which he deems to be inordinately low. The general rule is that assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with an award of damages where it is inordinately high or low as to represent an erroneous estimate.
17. In *Butt v Khan* (1977) 1 KAR, the Court of Appeal held that: -

“ An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an 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.”
18. The injuries pleaded on record are as follows: -
 - a. Severe head injury on the occipital region.
 - b. Mental illness.
 - c. Raptured viscera.
 - d. Surgical scar on the abdomen.
 - e. Bruised right hand.
 - f. Bruised and swollen right shoulder.
 - g. Bruised left knee.



19. However, the medical evidence on record provided in the Discharge Summary from JOOTRH, P3 form, Operation notes & CT Scan produced as PExh 2, 5, 6, 8b, 9, 10 & 11 disclose provide for the aforementioned injuries save for mental illness.
20. The appellant impugned the judgment on the grounds that the quantum awarded was inordinately low as it failed to take into account the evidence on record specifically that as a result of the accident, the appellant developed mental illness. The law is clear that he who alleges must prove. Section 107 of [Evidence Act](#) defines the burden of proof.
21. Section 109 of the [Evidence Act](#) exemplifies the rule in section 107 to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court on the existence of any particular fact, is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
22. The question therefore is, did the appellant discharge the burden of proof that as a result of the subject accident he developed mental illness. Pw7, a psychiatrist testified that after examining the appellant she concluded that he was mentally unstable. That prior to her examination of the appellant, she was informed that the appellant had developed bizarre behaviour 3 months after being involved in a road accident. This testimony was not seriously challenged.
23. It must be noted that the respondent did not produce any evidence to challenge or controvert the appellant's case. In *Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002*, Lessit, J (as she was then) citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that: -

“Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
24. In the present case, the respondent never disputed the fact that the appellant developed mental illness. The expert evidence of Pw7 was neither challenged nor displaced. There was no alternative expert evidence to contradict that evidence. The Court is alive that when Pw5 examined the appellant four years after the accident, he did not notice any mental illness on the part of the appellant.
25. The trial court held in its judgement that the appellant failed to prove a direct link between the accident and the development of the mental illness. I am inclined to agree with the trial court that the appellant failed to adduce evidence of a direct link between the accident and the development of his mental illness.
26. The testimony of Pw7 though declaring the appellant mentally unstable, was contradicting of that of Pw5 who examined the appellant 4 years after the accident and did not raise any issue of mental illness on the part of the appellant.
27. Consequently, the proven injuries sustained by the appellant as a result of the accident from the record are those pleaded in his plaint dated 27/9/2019 save for mental illness.
28. In considering comparable awards, I have examined the decisions cited by both parties and find that those relied on by the appellants to be more comparable.



29. In *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR, the court confirmed an award of 850,000/= for head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations, blunt injury to the shoulders and blunt injury and bruises to both lower limbs.
30. In *Muteti Peter & another v veronica Mutua Masika* [2021] eKLR, the court confirmed an award of Kshs. 1,300,000/= for a fracture of the base of proximal phalanx of the right hand, linear fracture of the right parietal bone, linear fracture right temporal bone and partial opacification of the right mastoid air cells and the middle ear among others. The award was made in 2015.
31. Having regard to all these injuries I am of the considered opinion that an award of Kshs. 1,000,000/= was inordinately low in the circumstances. A proper award should be a sum of Kshs. 1,700,000/=. I therefore set aside the award of Kshs. 1,000,000/= and substitute with a sum of Kshs. 1,700,000/=.
32. In regard to the award on loss of earning capacity, the Court of Appeal in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691 (KLR) held: -
- “... In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages ...”
33. Similarly, in *SJ v Francesco Di Nello & another* [2015] KECA 606 (KLR), the Court of Appeal held: -
- “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 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 Llyod’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.”
34. I have gone through the exhibits produced by the appellant and there was no proof that the appellant was working. The appellant never pleaded in his Plaintiff that he earned as a businessman or in any way. Had the appellant proved that he earned prior to his accident, the award of loss of earning capacity would have been factored into the award on general damages. I therefore find that the trial court did not err in failing to award the appellant under this limb.
35. Consequently, the appeal is partially successful. I set aside the award by the trial court on general damages and substitute therefor with an award of Kshs. 1,700,000/-. The award of special damages remains undisturbed. Each party shall bear own costs.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY, 2026.

A. MABEYA, FCI Arb

JUDGE

