

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. E041 OF 2024

JULIUS KIMATHI NTHIGA.....APPELLANT

VERSUS

MARK ONE EXPRESS LIMITED.....1ST RESPONDENT

ERIC NYAGA.....2ND RESPONDENT

JUDGEMENT

1. This Appeal arises from the judgment of Hon. O.W Kinyua- Resident Magistrate in Chuka CMCC No. E200 of 2022 delivered on 25th November 2024. By way of an amended plaint dated 15th November 2023, the Plaintiff (the Appellant herein) had sued the Respondents for damages arising out of a traffic accident.

2. The Plaintiff's case was that on or about 30th June 2022 while he was lawfully travelling as a

passenger in motor vehicle registration number KCS 488M along Chuka- Embu Road at Kirubia area when the 2nd Defendant and/or the 1st and 2nd Defendant's respective employee, servant, agent and/or authorised driver so negligently and carelessly drove and/or controlled motor vehicle registration number KCS 488M that he caused and/or permitted the same to lose control, veer off its lane and violently collide with motor vehicle registration number KCR 592F in consequence the Plaintiff sustained injuries.

3. The Defendants filed a statement of Defence denying that they were the beneficial owners/users or controllers of Motor vehicle registration number KCS 488M. They also denied the occurrence of the accident and pleaded the doctrine of *volenti non fit injuria* and averred that if indeed the accident occurred it was solely and/or substantially contributed to by the Plaintiff.

4. The matter proceeded for trial with three witnesses testifying for the Plaintiff while the Defendants did not call any witnesses.

5. Judgment was entered in favour of the Plaintiff in the following terms: -

- i. Liability 100%
- ii. General damages for pain and suffering and loss of amenities Kshs. 500,000
- iii. General damages for diminished/reduced earning capacity- Nil
- iv. Special damages Kshs. 22,316
- v. Interest on general damages from the date of judgment.

6. Aggrieved with the judgment, the Appellant lodged the present Appeal vide the Memorandum of Appeal dated 26th November 2024 on the following grounds:-

- i. That the learned magistrate erred in law and in fact in awarding general damages for pain

and suffering of Kshs. 500,000 which is manifestly and inordinately low bearing in mind the injuries sustained by the Appellant.

- ii. That the learned magistrate misdirected himself in law and in fact by not awarding general damages for diminished earning capacity bearing in mind the extent of incapacitation sustained by the Appellant.
- iii. That the learned magistrate misdirected himself in law and in fact by failing to appreciate the evidence adduced by the Appellant that gave rise to an inference that the nature of injuries sustained are serious and grave to attract a higher award.
- iv. That the learned magistrate misdirected himself in law and fact by failing to appreciate the uncontroverted evidence by the Appellant and the doctor adduced during trial on 3rd June 2024.

- v. That the learned magistrate erred in law and in fact in disregarding evidence and failing to give reasons thereof.
- vi. That the learned magistrate erred in law and in facts by considering irrelevant facts that led to an erroneous decision.
- vii. That the learned magistrate erred in law and in fact by failing to appreciate the Appellant's submissions and authorities attached thereto in respect to awards granted by other judicial officers in cases where victims with similar injuries with the Appellant have been granted.
- viii. The learned magistrate erred in law and in fact by failing to be guided by the general principle in assessing damages which is similar injuries should attract similar award and also taking into consideration the peculiar nature of the injuries in each case, effect of inflation in the value of money and the sequel of injuries.

7. The Appellant prayed that the Appeal be allowed and the award for general damages and diminished earning capacity be set aside and substituted with a higher sum plus the costs of the Appeal.

8. My duty as the first appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in the case of **Kiilu & Another-v-Republic (2005) 1 KLR 174** where the Court of Appeal stated: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight

conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."



Submissions

9. The Appeal was canvassed by way of written submissions as directed by the court. The Appellant filed written submissions dated 9th May 2025. The Respondents did not file their

submissions despite being granted time extension by the court.

10. The Appellant submitted on quantum. It was his case that he sustained tenderness on the occipital region of the head, tenderness on the chest, bruises on the right arm on the upper medial aspect and near wrist joint, multiple bruises on the right shoulder lateral and medial aspect, bruises on the left leg, blunt injury to the hip, major head injury that consisted of loss of consciousness, fluid accumulation at the back of the brain originating from the inner brain (arachnoid cyst), total blindness of the left eye and permanent incapacity of about 30%. He submitted that an award of Kshs. 2,000,000 for general damages for pain, suffering and loss of amenities was reasonable in the circumstances. He relied on the case of **Eberege Tea Factory Co. Ltd & Another v Sabina Moraa (Suing through the next friend and uncle**

Robert Ondieki Oganga [2012] eKLR where the Respondent sustained a cut wound on the head, cerebral concussion, bruises on both hands and on the legs and the high court upheld the award of Kshs. 1,750,000.

11. He also cited the case of **Geoffrey Njogu Mwangi v Francis Mbugua Gichia & Another [2015] eKLR** where the Plaintiff sustained major head injuries which led to loss of consciousness, loss of teeth, multiple deep lacerations on the left side of the neck, fracture of the femur and injury to the urethral passage and the court awarded Kshs. 2,000,000 as general damages. Further, the Appellant cited the case of **Gerald Musungu Otwani (Suing as through father and next friend Ferdinand Emmanuel Otwani) v Iqbal Mohamed Hussein Mombasa HCCC No. 250 of 2003** where the Plaintiff suffered head injury, multiple facial, arm and leg bruises and a scalp

laceration and the court awarded Kshs. 2,500,000 for pain and suffering and loss of amenities.

12. It was the Appellant's further submission that he was entitled to damages for diminished earning capacity for reason that he sustained 30% permanent incapacity. He stated he was a security officer at Rileys Falcon Security earning Kshs. 16,245 a month and could no longer work as a result of the accident. He relied on the case of **Jacob Ayiga Maruja & Francis Karani v Simeon Obayo [2005] eKLR** for his proposition that production of documents was not the only way to prove earnings.

Analysis and determination

13. From the grounds of appeal and submissions filed, the following issues arise for determination:

- i. Whether the award of Kshs. 500,000 was inordinately low for general damages.

- ii. Whether the trial court erred in declining to award damages for diminished earning capacity.

14. The Appellant (then Plaintiff) tendered evidence on his injuries. Dr. Wokabi testified and produced a medical report dated 5th September 2023 which established that the Appellant sustained the following injuries:

- i. Tenderness on the occipital region of the head
- ii. Tenderness on the chest
- iii. Bruises on the right arm (upper medial aspect and near the wrist joint)
- iv. Multiple bruises on the right shoulder (lateral and medial aspects)
- v. Bruises on the left leg
- vi. Blunt injury to the hip

- vii. Major head injury with loss of consciousness
 - viii. Fluid accumulation at the back of the brain (arachnoid cyst)
 - ix. Total blindness of the left eye
 - x. Permanent incapacity assessed at 30%
15. The medical evidence was unchallenged and uncontroverted, as the Respondents did not tender a contrary medical opinion.
16. An appellate court will only interfere with an award of damages where it is shown that the trial court took into account irrelevant factors, failed to take into account relevant factors or awarded damages that are so inordinately low or high as to represent an erroneous estimate.

These principles were stated in **Butt v Khan [1981] KLR 349**, and reaffirmed in **Gitobu**

**Imanyara & 2 Others v Attorney General
[2016] eKLR.**

17. The trial court in its findings observed that the Plaintiff needed to tender more evidence to prove that the blindness was caused by the accident and that the evidence tendered by Dr. Wokabi was opinion evidence and not necessarily binding on the court.

18. I have looked at the Medical Report dated 5th September 2023 and also the Medical Reports from Kenyatta National Hospital where the Appellant underwent eye surgery which resulted in permanent blindness to his left eye. From the material before me, I find it safe to reach a conclusion that the blindness was a result of the accident. It was not disputed that the Appellant suffered head injury and had fluid accumulation at the back of the brain. The Respondent did not

produce any evidence or a medical report to contravene the Appellant's evidence nor did they disagree with the Appellant's evidence. I therefore find no basis for the trial court's finding that the blindness was not as a result of the accident. I am persuaded that the Appellant and his witnesses proved the injuries on a balance of probabilities.

19. It is my finding therefore Appellant that the Appellant suffered serious injuries, including permanent loss of vision in one eye and documented brain injury, resulting in permanent incapacity of 30%.

20. I have looked at comparable authorities. The awards range from Kshs.1,500,000 to 2,000,000 for injuries similar to these suffered by he Appellant
Comparable authorities demonstrate that awards for similar injuries are significantly higher than the amount awarded by the trial court.

21. Guided by the principle that similar injuries should attract comparable awards, and considering inflation and the gravity of the injuries herein, I find that the award of **Kshs. 500,000** was manifestly and inordinately low.
22. I accordingly set it aside and substitute it with an award of **Kshs. 1,500,000** for general damages for pain, suffering and loss of amenities.
23. As regards damages for diminished earning capacity, the trial court declined to award damages under this head, citing lack of documentary proof of income that the Appellant did not call the maker of the payslip to testify.
24. It is settled law that damages for diminished earning capacity are compensatory, not strictly special damages, and need not be proved with mathematical precision. In **Mumias Sugar**

Company Ltd vs Francis Wanalo [2007] 2 KLR

74, the Court of Appeal stated as follows: -

“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.”

25. The Appellant testified that he was 33 years old at the time of the accident and was employed as a security officer with Riley Falcon Security earning Kshs. 16,245 per month, and that due to the injuries sustained particularly total blindness in one eye and brain injury he is unable to continue

working. This evidence was not rebutted. The record shows that he attempted to produce his payslips but the Defendant's counsel objected citing Section 67 of the Evidence Act. It appears that thereafter they were unable to produce the maker of the document as they closed their case without producing them.

26. Further, the medical report confirmed 30% permanent incapacity, which undoubtedly affects the Appellant's competitiveness and productivity in the labour market. In **Mumias Sugar Company Ltd v Francis Wanalo [2022] eKLR**, the Court emphasized that diminished earning capacity may be awarded as a global sum, especially where exact earnings cannot be ascertained.

27. Taking into account the Appellant's age, nature of employment, degree of permanent incapacity and the uncontroverted medical evidence, I find

that the trial court erred in declining to make any award under this head. I award the Appellant **Kshs. 500,000** as damages for diminished earning capacity.

28. In the result, the Appeal succeeds and the judgment of the trial court is set aside and the award varied as follows:-

a. General damages for pain, suffering and loss of amenities - Kshs.1,500,000.

b. Damages for diminished earning capacity- Ksh.500,000.

c. Special damages (as awarded) - Kshs.22,316

Total = Kshs.2,022,316

29. Interest on general damages shall run from the date of the judgment of the trial court, while interest on special damages shall run from the date of filing suit.

30. The Appellant is awarded the costs of the Appeal while costs and interests in the suit remain as awarded by the trial court.

Orders accordingly.

Judgement delivered, dated and signed at Chuka this 10th day of February, 2026.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in presence of Mr. Ndung'u for the Appellant and in the absence of Mr. Njuguna for the Respondent and (Muriuki Court Assistant.)