

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT THIKA  
CIVIL APPEAL NUMBER E314 OF 2024

ELIZABETH WACERA WAWERU.....APPELLANT

-VERSUS-

CLARENCE MWANGI MUNYIRI.....RESPONDENT  
*(Being an appeal from part of judgment and decree in Chief Magistrate's  
Court at Thika (O. Victor Asiyu PM) civil case number E240 of 2023 dated  
29-10-2024)*

**JUDGMENT**

This is an appeal on quantum only. The appellant was on 2-12-2022 involved in an accident with the respondent's motor vehicle registration number KCF 637Q. According to the pleadings and the medical documents produced in the trial court, the appellant sustained a compound fracture of the right tibia and fibular with a degloving injury of the leg which resulted to amputation of the leg below the knee for which she prayed for special damages of Kshs 1,003,192.00, general damages and costs of the suit.

After a full trial, the court found the respondent fully liable and proceeded to award the appellant a sum of Kshs 1,000,000.00 for general damages for pain and suffering and loss of amenities, Kshs 500,000.00 for future medical expenses and special damages of Kshs 155,290.00. The appellant was dissatisfied with the awards and raised six grounds of appeal which in summary complain that the general damages for pain and suffering were too low and deserving of disturbance and that the court should have awarded damages for loss of future earning capacity.

The court directed that this appeal be disposed of by way of written submissions. Despite several services, the respondent did not turn up or file any submissions. The appellant on the other hand filed submissions dated 6<sup>th</sup> August 2025 in which she has argued that the trial court's award on general damages for pain and suffering and loss of amenities was not commensurate with the nature and extent of injuries she suffered.

The appellant has also submitted that the trial court fell into an error when it failed to award her damages for loss of future earning capacity. She claims that having been a waitress in a hotel, the amputation of her leg had devastating effect in her future earning capacity. She has cited the case of *Mbasu & another v Swaka [2024] KEHC 2210 (KLR)*, and *Crown Bus Services Ltd & 2 others v BM (Minor Suing through his mother and Next Friend) [2020] eKLR*.

The appellant has submitted further that the fact that she was a young woman of 23 years with whole life ahead of her meant that she deserved a bigger award noting that she could no longer continue her work as a waitress. She blames the trial court for failing to distinguish general damages for pain and suffering and loss of amenities and damages for loss of future earning capacity. She proceeds to propose that this court considers awarding her Kshs 3,500,000.00 for pain and suffering and loss of amenities and Kshs 2,500,000.00 for loss of future earning capacity.

From the above submissions, I have formed opinion that the issues for determination are whether the trial court's award on general damages for pain and suffering and loss of amenities was too low and whether the appellant deserved an award on loss of future earning capacity and if so how much.

I have considered the submissions of the appellant and the record of appeal. It is an established principle of law that an appellate court should not disturb an award of damages of the trial court unless the trial court in assessing the damages took into consideration an irrelevant factor or failed to take into account a factor it should have considered. This is so because quantum of damages is always at the discretion of the trial court and unless the awards are demonstrated to be too high or too low so as to amount to disproportionate estimate when compared to other decided cases of similar nature, the trial court must enjoy the free hand in the assessment. This position was encapsulated in ***Simon Taveta v Mercy Mutitu Njeru [2014] KECA 755 (KLR)*** where the Court of Appeal held that;

*‘On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries.’*

And in restating the above principles, Honourable Justice Joel Ngugi stated in ***Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki [2018] KEHC 8799 (KLR)***, that;

*‘It is important to recall that I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:*

- i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or*
- ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.’*

I have looked at the judgments in the ***Ambusa*** and ***Crown*** case cited by the appellant. In the first case, the respondent sustained mingled right foot with compound fractures of the right tibia and fibula, cut wound on the knee and

below knee amputated of the right leg. In the second case, the victim suffered amputation of the right leg above the knee with disability assessed at 70 per cent. These two authorities involved amputation of the leg with some other injuries except that in the *Crown* case, the amputation was above the knee. I do acknowledge that it impossible to find different cases with all-fours similar injuries. All that a court should do is make comparison with matters as nearest as possible with the one under consideration.

In addition to the cases cited by the appellant, I have considered award in *John Kipkemboi & another v Morris Kedolo [2019] KEHC 8736 (KLR)* in which the appellant was awarded Kshs 2,500,000.00 for amputation of the left leg below the knee, chest injury, bruises on the shoulder, back and crush injury. In the case before me, the appellant sustained compound fracture of the right tibia and fibula with a degloving injury of the leg with permanent incapacity of the leg put at 100 per cent. She was admitted in Thika level 5 hospital from 2-12-2022 to 26-01-2023 and again in Kenyatta National Hospital from 27-01-2023 to 9-03-2023 which is a cumulative period of slightly over three months.

Having the above in mind, it is my considered view that the award of Kshs 1,000,000.00 for pain and suffering and loss of amenities was way below the conventional awards for cases of similar nature. Putting all factors into consideration I hereby enhance this head of damages to Kshs 2,500,000.00.

On the loss of future earning capacity, the appellant has asked for Kshs 1,500,000.00 but she has not in my view laid proper basis for the award. Loss of future earning capacity cannot be assessed on the basis of figures plucked from the air. In her testimony before the court, the appellant did not say anything concerning her previous earning capacity and how it was affected. Other than stating that she was on the date of the accident coming from Tango hotel, the

appellant did not tell the court what she used to do before the accident. Coming from a hotel is different from working in the hotel.

Even if I were to assume that the appellant was a waitress in a hotel, there is nothing on record to show that she could not perform the same duties especially after the replacement of the amputated leg with a prosthesis for which the court awarded Kshs 500,000.00 and which is not a subject of this appeal. There is no evidence that she was sacked or had difficulties looking for a similar job neither has the appellant demonstrated that she could not perform other income earning jobs. These are some of the bases that a claimant must establish to justify award of damages under this head. In ***Mumias Sugar Company Limited v Francis Wanalo [2007] KECA (KLR)*** the Court of Appeal held that;

*‘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.’*

I note that the appellant had in her prayers in the memorandum of appeal asked this court to award damages for future medical expences and rehabilitation costs. I note further that, the appellant has not made any submissions on these prayers perhaps because she discovered that they lacked basis. The trial court awarded damages for future medical expences as was proposed by the doctor despite the fact that, they were not pleaded. There is no demonstration of what is required for rehabilitation beyond the said future medical expences and I do not think I should spend time on this issue.

Based on the above analysis, this court finds that this appeal partially succeeds in terms of the following orders;

- a. The trial court's award on general damages for pain and suffering and loss of amenities is set aside and substituted for an award of Kshs 2,500,000.00.
- b. The prayers for damages for future earning capacity, future medical expenses and rehabilitation costs are disallowed.
- c. The appellant shall have the costs of this appeal.

Dated signed and delivered at Nairobi this 27<sup>th</sup> day of February 2026.

**B.M. MUSYOKI**  
**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of Miss Nafula holding brief for Mr. Ngaramba for the appellants and in absence of the respondent.