

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E059 OF 2025

LEVIS KIPKORIR KIRUI.....
.....APPELLANT

VERSUS

NAKURU GORGEOUS INVESTMENT LIMITED.....
.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A. Towett (PM) in Naivasha CMCC No. E640 of 2023 delivered on 18th June, 2025)

JUDGMENT

Background of the Appeal

1. By a Plaint dated 18th December 2023, the Appellant instituted suit against the Respondent and Equity Bank (K) Limited seeking general damages, special damages, future medical expenses, loss of income/earnings at Kshs. 25,000 per month (and/or minimum wage and/or such other sum as this Honourable Court may deem fit), together with costs of the suit and interest thereon.
2. The Appellant's case was that on 14th September 2023 at about 5:30 a.m., he was lawfully driving and/or was a lawful occupant aboard motor vehicle registration number KCV 151R along the Nairobi-Nakuru Road when the Respondent's driver/agent and/or servant negligently and carelessly drove motor vehicle registration number KDL 130J, lost control thereof, and collided with motor

vehicle registration number KCV 151R. As a consequence of the said collision, the Appellant sustained serious bodily injuries.

3. In a Statement of Defence dated 17th April 2024, the Respondent denied ownership of motor vehicle registration number KDL 130J, denied the occurrence of the accident, and further averred, in the alternative, that if the accident did occur, then it was wholly or substantially caused by the negligence of the Appellant. The Respondent particularized such negligence to include, inter alia, driving motor vehicle registration number KCV 151R at an excessive speed and encroaching onto the lawful lane of motor vehicle registration number KDL 130J.
4. In a Statement of Defence dated 5th April 2025, the 2nd Defendant, Equity Bank (K) Limited, averred that it was registered as a co-owner of motor vehicle registration number KDL 130J by virtue of having financed the purchase of the said motor vehicle by the Respondent. It further averred that at the time of the accident, the motor vehicle was under the control and/or management of the Respondent.
5. In a judgment delivered on 18th June 2025, the learned trial magistrate found the Respondent 100% liable for the accident. The court awarded the Appellant Kshs. 1,200,000/= as general damages for pain and suffering; Kshs. 173,130/= for loss of income; Kshs. 150,000/= for future medical expenses; and Kshs. 569,448/= as

special damages. The Appellant was also awarded costs of the suit and interest thereon.

6. The record shows that the suit against Equity Bank Limited, as the 2nd defendant, was withdrawn with no orders as to costs on the 29.05.2024
7. Aggrieved by the said decision, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 30th May 2025, primarily challenging the award and assessment of damages and thus seeking orders that the judgment and decree of the trial court be set aside; that this court reviews the award of general damages upwards; and that it further makes awards for physiotherapy, provision of a helper, and damages for diminished earning capacity. The Appellant further seeks that the costs of this appeal and those of the trial court be borne by the Respondent. The appeal questions not the finding on liability but rather the adequacy of the damages as awarded and assessed.
8. The appellant faults the judgment for four reasons: -

a) That the learned magistrate erred and misdirected herself in law, principle and facts when she misapprehended and misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that is so manifestly and inordinately low as to constitute an entirely

erroneous estimate of the damages in the circumstances of the case.

b) That the learned magistrate erred in law and fact by failing to critically consider and analyze the medical evidence tendered by the appellant with regard to the prayer for, physiotherapy, provision of a helper and diminished earning capacity.

c) That the learned magistrate erred in law and fact by failing to critically consider and analyze the medical evidence tendered by Dr Omuyoma and thus arrived at an erroneous finding that led to no award in respect of physiotherapy, provision of a helper and diminished earning capacity.

d) That the learned magistrate erred in law and fact by failing to critically consider and analyze the medical evidence tendered by Dr. Omuyoma and thus arrived at an erroneous finding that led to no award in respect to physiotherapy of the appellant which was to take at least two visit a week at Kshs. 3,000/- for every attending within a period of three years.

9. As directed by the court, the parties have canvassed the appeal by way of written submissions which the court has read and give all the due consideration in this decision. Just a summary of the submissions suffices for purposes of the judgment._

10. In the submissions, the Appellant contends that the award of damages by the trial court was inordinately low and calls for interference by this court.
11. He contends that an award of Kshs. 7,000,000/- would have been justifiable, considering that the appellant suffered; compound fracture of the right femur, comminuted fracture of the distal end of the right tibia, fracture of the mid-shaft of the right fibula, compound fracture of the left tibia and fibula, fractured pelvis, blunt head injury resulting in mild head trauma, deep lacerations on the left and right ankle joints, multiple lacerations on the right wrist joint, and fractures of the 8th and 9th right ribs. He further avers that he suffered residual injuries, including an inability to walk without a wheelchair, intermittent chest pain, and back pain, and that a medical assessment determined a 40% permanent disability.
12. To support his claim for an award of Kshs. 7,000,000/-, the Appellant refers the court to the decision in **Benard Mutisya Wambua v Swaleh Hashil Naivasha HCCC No. 28 of 2016 [2017] eKLR**, where the court awarded Kshs. 6,500,000/- to a plaintiff who had sustained fractures to the right collarbone, right hand metacarpals, complete paralysis of the right limb, dislocation of the right shoulder, compound fractures of the right tibia and fibula, and a fractured left femur.
13. The Appellant also relies on **Margaret Wothaya Kirweya & Another v James Muchai Muchiri [2020] eKLR**, in which a

plaintiff who suffered a fracture of the right femur (intertrochanteric fracture), fracture of the right fibula, and permanent incapacitation of 30% was awarded Kshs. 5,000,000/- for pain and suffering.

14. Other decisions cited by the Appellant, where plaintiffs were awarded general damages ranging between Kshs. 3,500,000/- and Kshs. 5,000,000/- for comparable injuries, include: **Ngumbi v Maina (Civil Appeal No. 30 of 2021) [2023] KEHC (KLR), Forwarding Company Limited & Another v Kisilu; Gladwell (Third Party) Civil Appeal No. 344 of 2018 [2022] KECA 96 (KLR), Samwel Kebati Osoro v Mohamed Antuly & Another [2019] eKLR, Gichuhi v Nzuve & Another (Civil Appeal No. E1055 of 2022) [2024] KEHC 9290 (KLR), Maina v Kenya Wildlife Services; Kensilver Express Limited (Third Party) (Civil Case No. 370 of 2007) [2022] KEHC 3292 (KLR), and Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR**, among others.

15. The Appellant contends that the trial court, in making the award for general damages for pain and suffering, relied on case laws that bear no similarity in terms of the seriousness and extent of the injuries he sustained. He further argues that the trial court therefore applied incorrect principles, warranting interference by this court, as emphasized in **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR**.

16. The Appellant submits that he is entitled to damages for diminished earning capacity. He contends that such a claim need not be specifically pleaded and proved, citing **Nyatogo v Mini Bakeries Limited (Civil Appeal No. E38 of 2021) [2023] KEHC 1593 (KLR)**. He submits that he is entitled to an award under this head, having suffered a 40% disability that has affected his physical ability and functional capacity to earn or work.
17. He proposes a global award of Kshs. 1,000,000/- under this head, citing **Magdaline Nzilani Mutende v Kennedy Mutwii [2019] eKLR**, where an award of Kshs. 1,000,000/- was made to a plaintiff who suffered 50% incapacity; **Nyatogo v Mini Bakeries Limited (Civil Appeal No. E38 of 2021) [2023] KEHC 1593 (KLR)**, where an award of Kshs. 800,000/- was made to a plaintiff who suffered 15%-50% incapacity; and **John Kibicho Thirima v Emmanuel Parsimei Mkoitiko [2017]**, where an award of Kshs. 600,000/- was made to a plaintiff who suffered 35% incapacity. The Appellant contends that he pleaded loss of earning capacity, and that the trial court's finding to the contrary was erroneous.
18. Regarding the claim for physiotherapy and the provision of a helper, the Appellant argues that the learned trial magistrate erred in finding that these prayers were abandoned. He clarifies that what he abandoned were the travel receipts, radiology report, and wound management report. He further submits that the cost of physiotherapy is supported by medical evidence, which indicates

that he requires physiotherapy twice weekly for approximately three years at Kshs. 3,000/- per session. He asserts that during the period he will also require a helper. The Appellant calculates the damages under these heads as follows:

Physiotherapy: Kshs. 3,000 x 2 sessions x 156 weeks = Kshs. 936,000/-

Helper: Minimum wage Kshs. 731.50 per day x 365 days x 3 years = Kshs. 800,992/-

19. He submits that, at 32 years of age, his life has been drastically altered, and that an award of general damages should be seen as compensation to redress the financial losses resulting from a wrongful act.

Respondent's Submissions

20. On the claim for an award for the costs of a helper, the Respondent contends that this relief was neither pleaded nor proved. It argues that the Appellant merely amended his witness statement to indicate that he expended Kshs. 500/- per day for the services of a helper, without amending his Plaint.
21. The Respondent submits that, in the absence of evidence supporting this expense, the trial court was correct in declining to make an award under this head.
22. In support, the Respondent cites **Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited [2016] KEHC 3434 (KLR)**, where the court held that a claim for the hire of domestic

help was not proven in the absence of documentary evidence, and without such proof, the claim remained a mere assertion. The Respondent also refers to **Mwangi (suing as the Administrator of the Estate of Beatrice Njeri Kamau - deceased) v Ngige & Another [2023] KEHC 23311 (KLR)**, for the proposition that claims for nursing, domestic care, and future treatment are special damages which must be strictly pleaded and proved.

23. With respect to the trial court's alleged error in failing to award damages for diminished earning capacity, the Respondent contends that this relief was not pleaded in the Complaint, and that a party is bound by its pleadings, citing **Raila Amolo Odinga & Another v IRBC & 2 Others [2017] eKLR**. The Respondent further asserts that, according to the second medical report by Dr. Malik, the Appellant had made good recovery from the injuries sustained.

24. The Respondent further argues that a claim for diminished earning capacity, being a claim for special damages, requires proof that the injuries sustained are likely to cause a loss or diminution of earnings. He cites **Moeliker v Reyrolle & Co. Ltd [1977] 1 WLR 132**, which establishes that such a claim arises where the plaintiff faces a risk of losing employment in the future or is likely to be disadvantaged in obtaining another job of equal pay.

25. The Respondent claims that the Appellant did not prove that he was in any form of employment and, as a result of the alleged

amputation, failed to demonstrate that his life was adversely affected in terms of earning capacity.

26. As for the claim for physiotherapy, the Respondent submits that, being a special damage claim, it was neither pleaded nor proved. The Respondent adds that the Appellant had sought to abandon this claim, which he initially claimed under special damages at a cost of Kshs. 864,000/-, and had failed to substantiate it with receipts.

27. In view of the foregoing, the Respondent urges the court to find that the appeal lacks merit and to dismiss the same with costs.

Issues, Analysis and Determination

28. Having carefully considered the Record of Appeal and the rival submissions filed by the parties, the sole issue that arises for determination is, whether the award of damages made by the trial court was so law and inadequate as to warrant interference by this court.

29. The principles guiding appellate interference with awards of damages are now well settled. In **Butt v Khan [1981] KLR 349** and **Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727**, the Court of Appeal held that an appellate court will only interfere with an award of damages where the trial court acted on wrong principles, misapprehended the evidence, or made an award so inordinately

high or low as to represent an entirely erroneous estimate of the damages.

30. Further guidance was given in **William J. Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)** and **Ugenya Bus Service v Gachuki (1981-1986) KLR 567**, where it was emphasized that while awards must reflect the peculiar circumstances of each case, there ought to be reasonable consistency and uniformity with comparable decisions.

31. The Appellant challenges the award under four heads and on grounds that:

- a) General damages for pain and suffering as awarded is too low;
- b) Failure to award damages for diminished earning capacity was erroneous;
- c) Failure to award damages for the provision of a helper was erroneous; and
- d) Failure to award damages for the cost of physiotherapy was erroneous.

General Damages for Pain and Suffering

32. According to the medical report of Dr. Obed Omuyoma dated 15th December 2023, the Appellant sustained injuries described and enumerated as:-

- a) Compound fracture of the right femur;
- b) Comminuted fracture of the distal end of the right tibia;

- c) Fracture of the mid-shaft of the right fibula;
- d) Compound fracture of the left tibia and fibula;
- e) Fractured pelvis;
- f) Blunt head injury resulting in mild head injury;
- g) Deep cut wound on the left ankle joint;
- h) Deep cut wound on the right ankle joint;
- i) Multiple cut wounds on the right wrist joint; and
- j) Fractures of the right 8th and 9th ribs.

33. The doctor assessed permanent disability at 40%. Before the trial court, the Appellant proposed an award of Kshs 4,000,000/- as general damages, while the Respondent proposed Kshs 1,000,000/-. The trial court ultimately awarded Kshs. 1,200,000/-.

34. In arriving at its determination, the trial court considered several authorities cited by the parties but found that the injuries in those decisions were not comparable. It noted that the Appellant had relied on authorities involving more severe injuries, while the Respondent relied on authorities involving evidently less severe injuries.

35. The court has reviewed the authorities cited by the Appellant herein in proposing an award of Kshs. 7,000,000/- under this head. Some of the cases relied upon by the Appellant involved injuries such as complete paralysis, loss of limb, or extremely grave complications which are not directly comparable.

36. However, the court while appreciating its mandate to proceed by way of a retrial and that it has the discretion to assess damages without feeling constrained to agree with the rial court, considers the decision in **Sabina Nyakenya Mwanga v Patrick Kigoro & Another [2015] KEHC 1404 (KLR)**, to present comparable injuries. In that decision, the plaintiff demonstrate sustained multiple fractures including fractures of the arm, femur, patella, pelvis, and wrist, with permanent disability assessed at 42%. The court awarded Kshs. 3,000,000/- for loss of amenities.

37. Taking into account the nature and multiplicity of the injuries sustained by the Appellant herein, the assessed disability of 40%, the passage of time, and inflationary trends regarding the passage of ten years, the court finds that the award of Kshs. 1,200,000/- was inordinately low. The award for general damages for pain and suffering is accordingly set aside and substituted with Kshs. 3,500,000/.

Damages for Physiotherapy

38. The Court of Appeal in **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR, citing Kenya Bus Services Ltd v Gituma [2004] EA 91**, held that although future medical expenses are awarded under general damages, the need for such future treatment must be specifically pleaded before evidence can be led and an award made.

39. The claim for physiotherapy constitutes a claim for future medical expenses. The trial court awarded Kshs. 150,000/- as future medical expenses pursuant to a consent recorded by the parties. The court declined to award physiotherapy costs, noting that the claim had been abandoned by consent dated 29th January 2025.

40. The record confirms that on 29th January 2025, counsel for the Appellant, Mr. Koome, informed the court that the parties had agreed as follows:

“On future medical expenses, we settled on Dr. Malik’s assessment of Kshs. 150,000/-. Parties have agreed to abandon the claim for physiotherapy and car hire. Parties have agreed to have the court proceed to assess quantum.”

41. The legal effect of a consent order was addressed in **Kenya Commercial Bank Ltd v Specialised Engineering Company Ltd [1982] KLR 485**, where it was held that a consent order entered into by counsel is binding upon the parties and may only be set aside on grounds such as fraud, collusion, misrepresentation, or other vitiating factors.

42. No such vitiating factors have been demonstrated in this appeal. The court thus determines that claim for physiotherapy having been expressly abandoned by consent, the trial court had no basis to reconsider it was right in retaining and respecting the contract of the parties and therefore this court on appeal finds no

basis to interfere with the trial court's determination under the head.

Damages for Diminished Earning Capacity

43. The Appellant seeks damages for diminished earning capacity on the basis that his 40% disability has affected his ability to work.
44. In **Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR)**, the court clarified that diminished earning capacity need not be strictly pleaded as special damages. However, the claimant must demonstrate, through evidence, the impact of the injury on future earning ability.
45. The court therein stated that diminished earning capacity concerns the effect of the injury on future earnings prospects, as distinct from loss of earnings, which must be specifically pleaded and proved.
46. The Appellant testified that prior to the accident he was employed as a driver earning Kshs 25,000/- per month. However, he did not produce a driving license or any documentary evidence to demonstrate that he was licensed to drive commercial or heavy vehicles, nor did he produce proof of employment.
47. Because the medical evidence established extensive injuries with a permanent disability assessed at 40% and resulting in difficulty in walking, coupled with immobilization onto a wheelchair, the court entertains no doubt that during the period of inability to move, the appellant's ability and capacity to work and earn was

indubitably reduced. When so reduced, the tenets of justice and fairness demand that he be compensated by the tortfeasor. That the appellant failed to prove that he was engaged in a formal employment cannot be the only basis to decline to make an appropriate and just award.¹

48. In finding as it did that the award was not proved, the trial court erred. That error is now corrected with an order that there having been demonstration of temporary incapacity, the appellant is entitled to damages which the court awards as a global figure in the sum of Kshs 700,000/- for diminished earning capacity.

Damages for Provision of a Helper

49. The medical evidence assessed permanent disability at 40%. In **James Musyoka Nzeke v Kenya Power and Lighting Company Ltd, Makeni Civil Appeal No. 2 of 2019**, the court held that an award for domestic assistance is generally justified where a claimant is rendered wholly or substantially dependent.

50. Dr. Malik's report indicated that the Appellant had suffered temporary total incapacity following the accident, though improvement was noted over time. Initially wheelchair-bound, he was later ambulating with crutches.

51. Considering the degree of disability and the evidence of gradual improvement, this court finds that the need for domestic assistance for a limited period is reasonable. The reigning

¹ **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR**

Regulation of Wages (General) (Amendment) Order, 2024, prescribes a monthly wage for a general labourer in Nakuru at Kshs 16,113.75.

52. Because the immobilized state of the appellant is temporary, the court assesses the period of disability for a period of 18 years. Accordingly, the court assesses the award to work out as follows; Kshs. 16,113.75 × 18 months = Kshs. 290,047/- for the cost of paying a domestic help.

Disposition

53. In the result, the appeal succeeds to the extent that the award by the trial court is set aside, and in its place substitutes the following awards: -

a) The award of general damages for pain and suffering in the sum of 1,200,000 is set aside and substituted with Kshs. 3,500,000/-.

b) An award of Kshs 290,047/ is made for the provision of a helper.

c) The award of Kshs 700,000 for diminished earning capacity.

d) The Appellant shall have the costs of this appeal.

54. It is so ordered.

Dated, signed and delivered at Lodwar this 27th day of February 2026.

Patrick J O Otieno

Judge

Original