

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E129 OF 2023

FLORENCE CHEMUTAI TUMBO.....1ST
APPELLANT
IBRAHIM KIBOI2ND
APPELLANT
KINYUA MUIA3RD
APPELLANT

-VERSUS-

PAUL
MWANGIRESPONDENT
NGUGI

JUDGEMENT

1. The Appellants in the Memorandum of appeal dated 12/06/2023 have raised 5 grounds of appeal as follows:
 - a. THAT the Learned Magistrate erred in law and fact by awarding the Respondent an excessive amount of Kshs.900,000 for pain, suffering and loss of amenities.
 - b. THAT the Learned Magistrate erred in law and fact by awarding the Respondent an excessive amount of Kshs.1,100,000/= for loss of future earning capacity yet the same was not pleaded and proved.
 - c. THAT the Learned Magistrate erred in law and fact by in finding the Appellants 100% liable for the accident.
 - d. THAT the Learned magistrate erred in law and fact by failing to consider the Appellants written submissions.
 - e. THAT the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
2. It is proposed to ask the court for orders that the appeal be allowed as a consequence whereof, the judgment made by the earned Magistrate on 17th May, 2023 be set aside; in the alternative that this honourable court be pleased to assess downwards the quantum of damages that may be awarded to the Respondent, the Respondent does pay the costs of this

appeal and the costs in the lower court and for such further relief as may appear just to the honourable court.

3. A perusal at the grounds of appeal raised in the Memorandum of Appeal, the Appellants do not seem to be contesting liability. I will therefore not belabour on the issue of liability.
4. I will thus proceed to consider whether the trial magistrate erred in law and fact in awarding excessive amount of Kshs.900,000 for pain, suffering and loss of amenities and in awarding Kshs.1,100,000/= for loss of future earning capacity yet the same was not pleaded and proved.
5. The Respondent is said to have sustained the following injuries:
 - a) **Fracture of the right proximal tibia**
 - b) **Fracture of the left distal femur**
 - c) **Fracture of the right proximal fibula**
 - d) **Pain in the right leg**
 - e) **Pain on the left upper leg**
 - f) **An inability to perform a heavy duty**
 - g) **An inability to walk fast and run**
 - h) **60% permanent incapacity**
6. The Respondent produced a medical report by Dr. Cyprion Okoth Okere dated 4/7/2018 and a P3 form which confirmed that he sustained the injuries pleaded.
7. In awarding Kshs.900,000/= as general damage for pain, suffering and loss of amenities, the trial magistrate stated that, cognizant of the fact that no two cases are similar, taking into account comparable awards and inflationary trends, she would in the circumstances of this case award the Respondent the said amount. Lest she appear as though she plucked the figure from abacus, she was guided by the principles governing assessment of damages as espoused in **Cecilia Mwangi & Anor v Ruth Mwangi CA** stated that:-

“But money cannot renew a physical frame that has been buffered and shattered. All the Judges and courts can do is to award sums which must be regarded as giving reasonable compensation.... in the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as

possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awardable are to a considerable extent conventional”

8. In view of the above, the trial magistrate referred to the decision in the case of **Joseph Mwangi v Joyce Mwole (2018) eKLR** where the Plaintiff suffered injuries of fractured right femur, compound fracture right tibia fibula, shortening right and episodic pain right thigh with inability to walk without support and the court awarded Kshs.700,000/= as general damages. Also, the case of **Pauline Gesare Onami v Samuel Changamure & Anor (2017) eKLR** where the Plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the appellate court upheld the trial court’s award of Kshs.600,000/=.
9. As regards the Respondent’s claim for loss of future earning capacity, the trial magistrate observed that, it was the evidence of the Respondent that prior to the accident he was working as a driver and was earning Kshs.21,000/= per month. That as a result of the accident he suffered permanent incapacity of 60%. That whereas the Respondent did not avail proof of his employment, his evidence that he was gainfully employed by M/S P J Flowers Co. Ltd was not refuted by the Appellants. The Appellants did not disapprove the Respondent’s evidence that he was a driver and he was in fact driving the motor vehicle registration number KAJ 553J at the time of the accident.
10. The trial magistrate observed that it is important to note that the loss of earnings and future earnings are two distinct concepts. The distinction was clearly brought out in the case of **SJ v Francesco Di Nello & Anor (2015) eKLR** where the Court of Appeal held that:-

*“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 LLOYD’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.”

11. A claim for loss of earning capacity is therefore compensable. She relied on **William J Butter v Maura Kathleen Butter (1984) eKLR** where it was held:-

“A Plaintiff’s loss of earning capacity occurs whereas a result of an in of an injury, his chances in future of any work in the labour market or work as was paid before the accident are lessened by his injury. The English Court of Appeal made an award under this head in Asheroff v Curtin (1971)1 WLR and by now it is not a new principle in that jurisdiction”

12. In the end, the trial magistrate found that the Respondent proved on a balance of probability that he was working as a driver. The trial magistrate then stated that given the nature of the Respondent’s injuries, his earning capacity as a driver was no doubt diminished and she awarded Kshs.1,100,00/= under this head.
13. The Respondent pleaded and proved special damages of Kshs.33,490 which was awarded. The Appellants have not contested this award.

Analysis and Determination

14. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in **Selle & another v Associated Motor Boat Co. Ltd.& others and in Peters v Sunday Post Limited [1968] E.A 123. (1958) E.A page 424.**
15. There can be no doubt that the Respondent sustained such injuries as to reduce to the extent of 60% his earning capacity. That was clear from his

doctor's report. What remains then is the issue of assessing the amount of damages to be awarded. As evidenced in the case of **CECILIA MWANGI** (supra) cited by the trial Magistrate, once a case is found proved on a balance of probability, which I find was proved in the case before the trial court. The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to suggest any formula for determination of the extent to which a Plaintiff would be handicapped by his disability if he is thrown on the open labour market - see **Brown L.J's** judgment in the case of **MOELIKER V REUROLL & CO. LTD [1977] ICLR 132**.

16. In the present case the Respondent was only 49 years old when the accident that rendered him to suffer permanent incapacity of 60% happened. He lost his ability to continue being a driver and hence had to stop being employed as such. He lost his employment of a full limped life, and no doubt diminished his capacity to earn.
17. The Respondent is entitled to general damages as pleaded under paragraph 9 of the Plaint and proved in his oral evidence and the medical evidence.
18. I am alive to the fact that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR** thus:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".

19. The extent to which an appellate court can interfere with a trial court's assessment of general damages, the principles are well established. In **SALIM ZEIN AND ANOTHER V ROSE MULEE MUTUA Civil Appeal No. 147 of 1994** it was held thus:-

“The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage.”

20. I have considered that the judgement was delivered in the year 2023. The decisions relied upon by the trial magistrate were made between 2017 and 2018. Taking into account the passage of time and inflation rate, I find the awards to be adequate and relevant to the matter under appeal. The authorities are of help in the present circumstances. Guided by the said authorities and on my analysis and the cited authorities hereinabove, I find no reason to disturb the trial Magistrate’s award in general damages of Kshs.900,000 for pain, suffering and loss of amenities and the Kshs.1,100,000/= for loss of future earning capacity which are upheld.
21. The Respondent pleaded and proved special damages of Kshs.33,490 which were not contested by the Appellants. The same are affirmed.
22. The upshot is that the appeal lacks merit and is dismissed with costs.

JUDGMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 12TH FEBRUARY 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 12TH FEBRUARY 2026