



REPUBLIC OF KENYA



**Haile v Lembcoakiya (Civil Appeal E030 of 2025)
[2026] KEHC 4059 (KLR) (Civ) (19 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CIVIL
CIVIL APPEAL E030 OF 2025
SC CHIRCHIR, J
MARCH 19, 2026**

BETWEEN

KORA WOLDE HAILE APPELLANT

AND

AGNESS NTIPAYON LEMBCOAKIYA RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate's Court at Isiolo in
CMCC No. E055 of 2023 delivered on 20th May 2025 by Hon. L. Mutai, (CM))*

JUDGMENT

1. The Respondent sued the Appellant herein before the trial court seeking for damages for injuries sustained as a result of a road accident which occurred on 28th September 2023 along the Isiolo-Marsabit Road. The Respondent, then a pedestrian, was hit by motor vehicle registration number KBW 242Z, owned by the Appellant.
2. The trial court, found the Appellant fully liable for the accident and awarded the Respondent an aggregate sum of Kshs. 3,143,550/=, in damages, made up of general damages for Kshs. 2,000,000/=, future medical expenses at Kshs. 1,140,000/=, and Special damages of Kshs. 3,550/=.

Memorandum of Appeal

3. The Appellant was aggrieved by the award on damages, and proffered this appeal. He has presented the following grounds.
 - a) The learned magistrate erred in law and fact by awarding inordinately high general damages(sic) for future medical expenses at ksh. 1,140,000 to the respondent as the same



was not pleaded and proved as required by law constituting a miscarriage of justice in the circumstances of the case.

- b). The learned magistrate erred in fact and in law by failing to consider comparative and persuasive on quantum hence arriving at an erroneous decision.
- c). The learned Magistrate erred in law and fact by awarding an exorbitant sum as general damages considering the magnitude of the injuries sustained by the respondent.
- d). That the learned magistrate's judgment on future medical expenses was wholly not supported by evidence (especially the Appellant's medical report) tendered in court by the parties.

The cross- appeal

4. The Respondent filed a cross- Appeal dated 5/8/2025, in which he has set out the following grounds:
 - a). The learned magistrate erred in law and fact by failing to award damages for diminished earning capacity despite uncontroverted evidence of permanent disability and diminished ability to engage in gainful activities.
 - b). The learned Magistrate erred by failing to award damages incurred and proved , or in the alternative erred by disregarding some receipts and documentation presented by the Respondent without justifiable cause.
5. The Appeal was heard by way of written submissions .

Appellant's submissions

6. The Appellant argues that the award of Kshs. 1,140,000/= for future medical expenses was neither pleaded nor proved as required by law. It is argued that a medical reports are not pleadings, and that the issue was only raised in the submissions.
7. .He further argues that the trial court misapprehended the medical evidence by relying on an outdated report by Dr. G.K. Mwaura while ignoring a more recent report by Dr. John K. Macharia. The Appellant has relied on the case of Butt vs Khan (1981) where the court held that where medical Reports differ, , the court should place more weight on the one which reflect the plaintiff's current state of health.
8. On general damages for pain and suffering , it is submitted that the award of Kshs. 2,000,000/= was exorbitant, and ought not to have gone above ksh. 1,000,000. In this regard the Appellant has cited a number of Authorities where the award for similar injuries are between ksh. 400,000 and ksh. 7000,000.It is further submitted that there was no proof to support the claim for loss of earning capacity, as the respondent failed to demonstrate how her injuries has affected her ability to earn.

The Respondent's submissions

9. It is the respondent's submissions that future medical expenses were pleaded and proved, and thus the award was valid. On general damages it is submitted that past awards for similar injuries range between 1.2 million to 2.5 million. This court is urged to uphold the lower court award, therefore.
10. On the cross- Appeal , the respondent has argued that the loss of diminished earning capacity was proved as there was evidence that the respondent sustained disability of up to 50 %; that the fact of amputation reduced her capacity to perform manual work. It is submitted that this head of damages is awarded where there is evidence that the plaintiff's ability to earn income has been compromised. The



respondent argues that what is being compensated is the earning power and not the actual earnings lost. In this regard the respondent has relied on the case of Mumias sugar company Ltd vs Francis Wanalo (2007) e KLR , Butler vs Butler (1984) KLR 225, and Easy coach Ltd Omondi .The respondent proposes an award of ksh. 1,000,000 under this head.

Analysis and Determination

11. This being a first appeal, this court is under a duty to review the evidence , re-evaluate it and arrive at its own independent findings. In the case of *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* EA 123, the court set out the above duty by stating as follows:

“ 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 allowance in this regard”.

12. The Appeal and cross- Appeal are on damages only , and I have identified the following issues for determination :

- a. Whether the award for future medical expenses was specifically pleaded and proved.
- b. Whether the award of general damages for pain and suffering was excessive or inadequate.
- c. Whether the Respondent is entitled to damages for diminished earning capacity
- d. Whether the award on special damages was correct.

13. It is trite law that assessment of damages is an act of discretion by the trial court ,and an Appellate court can only interfere with the said discretion under certain conditions. In the case of *Butt v Khan* KLR 349, the guiding principle was stated as follows:

“ An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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”.

Whether damages for future medical expenses was duly pleaded and proved

14. In the instant case, the trial court awarded Kshs. 1,140,000/= for future medical expenses. The Appellant’s case is that this head of damages was neither pleaded nor proved. The Appellant has relied on the court’s decision in the case of *Tracom Limited & Another v Hassan Mohamed Adan* (2009) eKLR, where the Court of Appeal held:

“ We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it.”

15. On perusal of the plaint, the respondent did not plead for costs of future treatment, but in her prayers it is one of the reliefs sought. It is trite law that parties are bound by their pleadings and courts can only decide on issues brought before it by the parties. However there is an exception to the rule. The exception was addressed in the case of *Odd Jobs v Mubia* [1970] EA 476 where the court held that: -



“Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the Court for decision.....”

16. Further clarity was given by the court of Appeal in the case of Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR where the court expressed itself as follows-“The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v. Mubea [1970] 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001; and Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410.”
17. In the present case two medical reports, prepared by the respondent’s and Appellant’s doctor respectively, were produced without calling the makers of the documents. These two reports therefore form part of the evidence. There is consensus among the two doctors that the respondent needed a prosthetic limb , with the only variation being the estimated costs of the prothesis.
18. It is therefore evident that the necessity for the artificial limb was presented by both parties to the court through the respective medical reports. Although the trial court did not address itself to the question of whether this claim was properly pleaded, on the basis of the above cited decisions, the award , on principle, was proper.
19. The next issue is on the amount of the actual award. The Appellant has contested the amount awarded, arguing that Dr. Macharia’s estimate of ksh. 150,000 was more practical, as it was more recent assessment. However the of Butt vs khan (supra) relied on by the Appellant refers to the complainant’s state of health, as it is expected that whatever injuries were sustained by a person keep on improving with time. It has no bearing to determining the cost of a medical equipment. To the contrary, as a matter of common notoriety, costs of items keep increasing with time.
20. Nevertheless, none of the doctors was called to appear in court and defend their estimates. I have noted that in opting to rely on the respondent’s doctor’s estimate the court did not justify its decision. I would, in the circumstances of this case take the average of the two proposals and arrive at an estimate of ksh. 225,000 as the cost of the prosthetic limb. In taking this approach, the court acknowledges the fact that the courts routinely rely on the estimates given by doctors in determining the cost of medical equipment, as part of expert knowledge .
21. The frequency of change of the prosthetic limb is not contested and the estimate of the life expectancy placed at 60 years has not been taken up as an issue in this Appeal. Therefore under this head the damages will work out as follows: $(19/5 \times \text{ksh. } 225,000) = \text{ksh. } 885,000$

Whether the award of general damages for pain and suffering was excessive or inadequate

22. There is no contest on the injuries sustained;- the respondent suffered fractures of tibia and fibula leading to the amputation of the leg above the knee. In Kurawa Industries Limited v Dama Kiti & another (2017) eKLR, it was observed: “The scenario given by the above awards show that damages for amputation of one’s leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million”. I associate myself with the aforesaid observation. The court then went ahead and awarded Kshs.2 million . That was on 26.6.2015. In Crown Bus services Ltd and 2 others v BM(Minor) suing through his mother and next friend (2020)KEHC1817(KLR) the court awarded 2,500,000/= for leg.



of amenities for a child aged 7 years for amputation of the right court awarded 2million for pain and pain and suffering and loss

Similarly, in the case of CM (a minor suing through mother and next friend MN) v Joseph Mwangangi Maina(2018) the child aged 4 years who suffered amputation above the knee.

pain and suffering and loss of amenities for a

23. I have considered the Authorities relied on by the Appellant. They range between ksh. 400,000 and ksh. 800,000, and the decisions were made between the year 2009 and 2017. Given the inflationary trends since 2017, I find that the award of Kshs. 2,000,000/= by the trial court was reasonable. It is hereby upheld.

The cross- Appeal

Whether the Respondent is entitled to damages for diminished earning capacity

24. In declining to award this head of damages, the trial court reasoned that the respondent had failed to prove that she was in business prior to the injury. In arriving at this decision, the trial magistrate, oddly, went against the finding of the court in the case of Mumias Sugar Company Limited v Francis Wanalo (2007) eKLR which she had relied on. This is what the court had to say in Mumias case (supra) “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... is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or... his diminution of chances of getting an alternative job in the labour market... 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”. (Emphasis added).
25. Thus diminished earning capacity is awarded even to a claimant who may not have been engaged in any gainful work at the time of the injury. In demanding for prove of earnings therefore, the trial court erred in principle.
26. The Appellant has argued that there was no evidence that the Respondent could no longer work. This submission is factually wrong. In paragraph 2 of her written statement she stated: “ Up to then I was a business woman making at least ksh. 30,000 per month. As a result of the injuries I have been unable to work and am permanently incapacitated” . Further the doctors’ assessment of 50% disability corroborated her evidence . There was therefore sufficient proof of diminished ability to work or to be gainfully employed in the future.
27. The guiding principle when it comes to assessment of damages is that comparable injuries should attract similar awards. Also the prevailing trend in assessment of damages for diminished earning capacity is to make global awards. In Nyatogo v Mini Bakeries Limited (2023) eKLR, where Kshs. 800,000/= was awarded as loss of earnings , where the claimant had sustained same degree of disability. In Solomon Muriithi Manyarah v SMK (Minor suing through her next friend AKK) [2021] KEHC 5874 (KLR) the high court upheld the lower court award of ksh. 1,500,000 under this head. Am persuaded by the above stated decisions. I consider a global award of ksh. 1, 500,000 a fair compensation for the respondent’s diminished earning capacity.

Special damages

28. Special damages must be specifically pleaded and strictly proved. That is the principle of law. In Hahn v Singh (1985) KLR 716 the court set out the principle as follows: “Special damages must not



only be specifically claimed but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act”.

29. The Respondent pleaded ksh. 153,550 but the court awarded ksh. 3,550. The respondent has faulted the trial court for failing to award the entire amount. I have perused the record, and I do not see any receipts or documents adding up to the amount demanded by the respondent. There are taxi receipts on record, but no evidence was led to relate the said receipts to the case before court. It is apparent that the respondent submitted documents to the court and left the court to ‘figure out’ or assume that it was related to the case. He who alleges must take up the duty to prove. (see section 109 of the [Evidence Act](#)).The finding of the trial court is upheld.
30. In the end, the Appeal and cross- Appeal both partially succeed, and I hereby proceed to make orders as follows :
- a). The award of general damages of Kshs. 2,000,000/= is upheld.
 - b). The award for future medical expenses is hereby set aside and substituted with ksh. 880,000.
 - c). The Respondent is awarded ksh. 1,500,000 as damages for diminished earning capacity.
 - d). The Appeal against the award on special damages is dismissed.
 - e). Interest shall accrue at court rates from the date of Judgment at the trial court
 - f). Each party to meet their own costs on the Appeal and cross- Appeal.

DATED , SIGNED AND DELIVERED AT ISIOLO THIS 19TH DAY OF MARCH 2026.

S. CHIRCHIR

JUDGE.

