

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E050 OF 2024**

**BETWEEN**

**THE BOARD OF MANAGEMENT KAMUWONGO MIXED  
DAY SECONDARY SCHOOL.....1<sup>ST</sup>**

**APPELLANT**

**JOHN MWANTHI MWANZIA.....2<sup>ND</sup>**

**APPELLANT**

**AND**

**ROSEMARY MWIKALI MWANZIA.....**

**RESPONDENT**

*(Being an appeal from the judgment of Hon. P. Wechuli  
(Principal Magistrate) delivered in PMCC No. E087 of 2023 at  
Kathimani Law Courts)*

**JUDGMENT**

**Background**

1. This appeal arises from the judgment delivered in 2<sup>nd</sup> April 2022 in Kithimani PMCC No. E087 of 2023 where the trial court apportioned liability in the ratio of 80:20 in favor of the respondents as against the appellants. The court awarded the respondent a sum of Ksh.4,060,000 as general and special damages subject to the apportionment of liability.

2. Dissatisfied with the decision, the appellant filed a memorandum of appeal raising 6 grounds reproduced verbatim as follows;

- a. That the Honorable Learned Trial magistrate erred in law in entering judgment in favor of the respondents whereas the same failed to prove his claim to the required standard.
- b. That the Honourable Learned Trial Magistrate erred in law and in fact in the assessment of damages payable.
- c. That the Honourable Trial Magistrate erred in law and fact in awarding the respondents ksh.4,060,000/- as damages which award was too excessive in the circumstances.
- d. That the Honourable Learned Trial Magistrate erred in law and in fact in failing to accord due regard to the appellants' submissions and authorities and authorities on quantum and applicable principles for assessment of damages in similar circumstances.
- e. That the Honourable Learned Trial magistrate erred in law and fact in relying on extraneous evidence on arriving at the decision on quantum.
- f. That the Honourable Learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching to an erroneous decision.

3. For these reasons, the appellants prayed that the appeal be allowed, the award on quantum be reconsidered downwards,

the trial court's judgment be set aside and costs of the appeal be awarded to them.

4. The appeal was canvassed by way of written submissions as summarized below;

### **Appellants' Submissions**

5. The appellants urged this court to award general damages of Kshs. 400,000.00. They faulted the trial court for failing to consider the authorities cited, contending that the injuries in **Francis Mwangi Maina v Kyalo Ngumbi and RAM Hardware Suppliers Limited [2014] eKLR**, **Simon Kimote v Agro Solutions Limited [2021]Eklr** and **Michael Muthini Musyoka v Hellen Chemutai Korir James Rono [2024] eKLR** are comparable to those sustained by the respondent. They therefore invite the court to rely on these precedents.
6. On loss of earning capacity, the appellants argued that the respondent did not demonstrate any deformities that could diminish her ability to earn, noting that no medical evidence was presented to support such a claim. They urge the court to disregard this prayer.
7. The appellants further contend that the trial court erred in awarding Kshs. 160,000/= as special damages, since the respondent only proved Kshs. 61,000/= through receipts filed.
8. In conclusion, the appellants ask this court to set aside the trial court's judgment on quantum and reassess the general damages payable to the respondent.

## **Respondent's Submissions**

9. The respondent opposed the appeal. She submitted that the appellants failed to rebut her evidence, which therefore remained uncontroverted. She urged this court to uphold the trial court's findings on pain and suffering, noting that they were reasonable, lawful, and justifiable. She emphasized that she sustained severe injuries while pregnant and argued that the award of Kshs. 4,060,000/= was not excessive given the gravity of the injuries. She further contended that damages are a matter of judicial discretion and should not be interfered with since trial court carefully considered the circumstances of the case, the prevailing economic conditions, and the relevant law before awarding the damages.
10. On loss of earning capacity, the respondent explained that the accident caused the loss of her son, husband, father-in-law, and mother-in-law, in addition to leaving her physically and mentally injured. She was forced to undergo a caesarean section and continues to fend for her child. She added that she relies on crutches for mobility and is unable to resume her daily work activities. In support, she cited **Emmanuel Mutai v China Road and Bridge Corporation MSA HCC No. 200 of 2007 (UR)**, where the court awarded Kshs. 800,000/=. She further stated that due to her physical injuries, she is unable to resume her business activities, and the trial

court rightly awarded damages for loss of earning capacity.

11. She also urged this court to award Kshs. 500,000/= in future medical costs for the removal of implants in her leg. She justified this claim by pointing to the cost of similar medical procedures in the country, inflation, and the risk of developing osteoarthritis. She explained that she continues to undergo physiotherapy and walks with difficulty.
12. On special damages, the respondent maintained that she specifically pleaded and proved them through receipts produced. She adduced medical receipts totalling Kshs. 157,000 and a medical report costing Kshs. 3,000, thereby justifying the award.
13. In conclusion, the respondent prayed that the appeal be dismissed with costs, as it lacks merit.

### **Analysis and Determination**

14. This Court is duty bound to re-evaluate the evidence presented before the trial court and reach its own independent conclusions.

In ***Paramount Bank Limited v First National Bank Limited & 2 others [2023] KECA 1424 (KLR)*** it was held *inter alia* that:-“

**...A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final**

**court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion...”**

15. I have considered the submissions, examined the record of appeal, and analyzed the applicable law. This appeal arises from a personal injury claim. From the proceedings, liability was apportioned by consent in the ratio of 80:20 on 23rd November 2023, and that consent was adopted as an order of the court. Liability is therefore not in dispute. The appellants are solely aggrieved by the awards on quantum.

16. In determining whether the award was sound, just and lawful, this court shall be guided by the decision of the Court of Appeal in the case of **Ken Odondi & 2 others vs. James Okoth Omburah T/A Okoth Omburah & Company advocates** [2013] KECA 252 (KLR) which set out the parameters for interference with awards on quantum by stating;

***“We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this***

***court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."***

**i. General damages**

17. On the award of general damages, the trial court considered the medical report by Dr. Mbugua dated 8th May 2023 and the P3 form, which established that the respondent sustained the following injuries: a depressed medial plateau fracture requiring admission for knee arthroscopy from 1st to 2nd November 2022; a deep cut wound on the face; and a fracture of the proximal fibula. Dr. Kioko's report further noted fractures of the metacarpal bones. The injuries were classified as grievous harm. The trial court cited several comparable authorities and took into account the prevailing inflationary trends. It also noted that the respondent underwent treatment at various hospital facilities on multiple occasions. On this basis, the court awarded Kshs. 3,000,000.00 as general damages.

18. I have considered the authorities cited by the appellants in this appeal. In ***Francis Mwangi Maina vs. Kyalo Ngumbi and Ram Hardware Suppliers Limited*** [2024]

eKLR, the appellant, who suffered bruises to the head, neck, upper limbs, a cut wound to the right leg, and a fracture of the left ankle, was awarded Kshs. 400,000.00. In **Simon Kimote vs. Agro Solutions Limited** [2021] eKLR, the appellant sustained a femoral fracture, tibia plateau fracture, blunt head injury, and blunt neck injury, and was awarded Kshs. 350,000.00. In **Michael Muthini Musyoka vs. Hellen Chemutai Korir James Rono** [2024] eKLR, the appellant suffered multiple blunt injuries, fractures of the tibia and fibula, blood loss, soft tissue injuries, psychological trauma, and permanent deformity of the lower limb, and was awarded Kshs. 450,000.00.

19. In my view, the authorities cited by the appellants are not comparable to the present case. The respondent sustained more severe and complex injuries, including a depressed medial plateau fracture, fractures of the fibula and metacarpal bones, and a deep facial wound. Importantly, she was pregnant at the time of the accident, which necessitated delivery by caesarean section due to the knee injury. These circumstances elevate the gravity of her suffering well beyond the injuries in the authorities relied upon by the appellants. The awards proposed by the appellants are therefore inordinately low and fail to reflect the severity of the respondent's condition.

20. The trial court, on the other hand, relied on authorities such as **Alex Wachira Njagua v Gathuthi Tea Factory & Another [2010] eKLR, Dorcas Wangithi Nderi v**

**Samuel Kiburu Mwaura & Another [2015] eKLR, Frankline Chilibasi Spii v Kirangi Liston [2017] eKLR, and Zipporah Nangila v Eldoret Express Limited & 2 Others [2016] eKLR.** While acknowledging that these authorities were decided some years back, the court properly adjusted for inflation and economic realities.

21. I find that the reasoning of the trial court was sound, well anchored in law, and appropriately tailored to the circumstances of this case. Consequently, I see no basis to interfere with the award of Kshs. 3,000,000.00 in general damages. The appeal on this ground therefore fail.

**ii. Loss of earning capacity**

22. The appellants challenged the award of Kshs 900,000/= for loss of earning capacity arguing that the respondent did not prove how the injuries sustained limited her ability to earn income.

23. The respondent, however, pleaded diminished earning capacity. The court in **Beatrice Anyango Okoth vs. Rift Valley Railways (Kenya)Limited & another** [2018] eKLR held that damages under this head are awarded where it is proved that, owing to the injury suffered, the plaintiff's chances of securing employment comparable to what they held before the injury are diminished. The court further noted that a global award may be made, as there is no fixed formula

for assessing damages under this head, provided the judge considers the relevant factors.

24. The court in ***Mumias Sugar Company Ltd v Wanalo [2007] KECA 485 (KLR)*** stated;

***“ 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 respondent testified that prior to the accident she assisted her husband in delivering food items, which provided her with income and supported her daily chores. She stated that since the accident she has lost this capacity, is dependent on family members, and experiences difficulty walking, particularly when climbing stairs.

26. However, beyond the general assertion that she could not resume work, the respondent did not provide evidence demonstrating the extent to which her business was affected or proving that she was incapable of continuing her previous occupation.

27. In ***Thathi v Munene & 3 Others*** [2025] KEHC 14196, the court awarded Kshs. 450,000.00 for diminished capacity

where the respondent suffered 30% permanent disability. In **Nyatogo v Mini Bakeries Limited [2023] KEHC 1593 (KLR)**, a global sum of Kshs. 800,000.00 was awarded for disability ranging between 15%-50%. In **Njogu v Nyaga [2024] KEHC 1876 (KLR)**, the court awarded Kshs. 900,000.00 where the victim suffered 80% disability. In the present case, there was no medical evidence indicating permanent incapacity or quantified disability.

28. Upon re-evaluating the evidence, this court finds that the material placed before the trial court was insufficient to justify an award under this head. Consequently, this court sets aside the award for loss of earning capacity.

**iii. Special Damages**

29. The appellants further challenged the award of Kshs.160,000/= as special damages on the ground that only Kshs.61,000/= was proved through receipts.

30. It is firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded. The Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985]** KLR 716, at P. 717, and 721 held: ***“Special damages must not only be specifically claimed (pleaded) 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. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”***

31. In the present case, while the respondent pleaded special damages, the documentary evidence produced in support of the claim fell short of the amount awarded. The receipts filed only proved Kshs. 61,000/=, yet the trial court awarded Kshs. 160,000/=
32. Accordingly, this court finds that the trial court erred in awarding special damages beyond what was proved. The award of Kshs. 160,000/= is therefore set aside and substituted with Kshs. 61,000/=, being the amount strictly proved by receipts.

**iv. Future medical expenses**

33. The respondent urged this court to award Kshs.500,000/= for future medical expenses to cater for the removal of the implants inserted in her leg during treatment.
34. The trial court declined to make any award under this head noting that there was no evidence indication the necessity of future treatment, operation or the cost thereof.
35. The law regarding future medical expenses is settled. Such expenses must be specifically pleaded and proved.
36. In ***Tracom Limited & Another v Hassan Mohamed Adan [2009] eKLR***, the Court of Appeal held that ***a 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.***

37. Similarly, in *Kenya Bus Services Ltd v Gituma [2004] 1 EA 91*, the Court of Appeal stated;

***“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded.”***

38. Upon perusing the record of appeal, this court notes that although the respondent sustained fractures which were treated through medical surgery with metal implants, no medical evidence was produced recommending a future procedure for removal of the implants or indicating the estimated cost of such a procedure.

39. In the absence of such evidence, the trial magistrate cannot be faulted for declining to award damages under this head. This court therefore find no reason to interfere with the finding of the trial court on this issue and the claim for future medical expenses is declined.

40. Accordingly, having appraised the evidence afresh, I find that the appellants have established their case. The appeal partly succeeds as follows;

a. General damages Kshs.3,000,000/=

b. Special damages Kshs.61,000/=

c. Diminished earning capacity Nil

d. Less 20% liability

Total Kshs.2,448,800/=

e. Since the appeal partially succeeds each party to bear its own costs of the appeal.

It is so ordered.

Dated, signed and delivered at Machakos this 9<sup>th</sup> day of April, 2026

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant