

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NUMBER E127 OF 2023

MARK KIOGORA GATOBU.....
.....APPELLANT

VERSUS

JULIUS MURERWA.....
.....RESPONDENT

(Appeal against judgment and decree on quantum from the Judgment of Hon.D.W.Nyambu, Chief Magistrate delivered on 18th July,2023 in Meru CMCC No. E287 of 2021)

JUDGMENT

1. This Appeal arises from a judgment and decree entered in the aforesaid suit whereby the Respondent sued the Appellant for both general and special damages in respect of a road traffic accident in which he sustained personal injuries.
2. The Respondent alleged that on or about 15th September,2020, he was he was lawfully walking at

Mariara along Meru-Nkubu Road when the Appellant or his employee or authorized driver negligently drove and or controlled Motor Vehicle Registration No. KAG 330G as a result of which it lost control, veered off the road and violently knocked him down.

3. The Appellant denied the entire claim by the Respondent vide his defence dated 13th August, 2021. In the alternative the Appellant averred that if any accident occurred, which was denied, then the same was caused by or substantially contributed by the negligence of the Respondent.
4. The claim was fully defended and the trial magistrate entered judgment in favour of the Respondent against the Appellant as follows: -

Liability - **80% against the Appellant**

- a. General Damages- Ksh. 3,500,000/=
- b. Loss of Earning capacity Kshs. 600,000/=
- c. Future Medical Expenses Kshs. 400,000/=
- d. Special damages of Kshs. 61,800/=

Subtotal- **Ksh.4,561,800/=**

Less 20% contribution- **Ksh.912,360/=**

Total Ksh.**3,649,440/=**

e. Costs and Interests.

5. The Appellant is aggrieved with the judgment of the Learned Trial Magistrate on both liability and quantum and he lodged this appeal on 10th August,2023 setting out the following grounds of appeal:

- a) That the Learned Trial Magistrate erred in law and fact by apportioning liability in the ratio of 80% against the Appellant and 20% against the Respondent despite overwhelming and unchallenged evidence that the Respondent was wholly or substantially to blame for the accident.
- b) That the Learned Trial Magistrate erred in law and fact by awarding general damages in the sum of Ksh. 3.5 million which award is inordinately excessive in the circumstances of this matter.
- c) That the Learned Trial Magistrate erred in law and fact by awarding for loss of earning capacity in the sum of Ksh. 600,000/- without any or any

sufficient evidence or proof to support such an award.

d) That the Learned Trial Magistrate erred in law and fact by awarding damages for cost of future medical expenses in the sum of Ksh. 400,000/- without any or any sufficient prove to warrant the award and without any explanation or rationalization for the award.

e) That the Judgement and decree of the learned trial magistrate is against the law and weight of evidence on record.

6. The appellant urged this court to set aside the trial court's finding on liability and to make its own findings, discount to a reasonable minimum the trial court's award on general damages, loss of earning capacity and future medical expenses and award him the costs of this Appeal and in the trial court.

7. The appeal was canvassed by way of written submissions. Both parties duly filed their respective submissions.

Appellant's Submissions

8. The Appellant submitted that liability should have been apportioned equally between the parties since the point of impact was not established with precision. To buttress his submissions, the Appellant relied on the cases of **Postal Corporation of Kenya & another v Dickens Munayi [2014] eKLR; Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR; P W v Peter Muriithi Ngari [2017] eKLR & Kenya Power & Lighting Co. Ltd v Mary Wambui Kiere [2020] eKLR.**

9. On general damages, the Appellant submitted that Ksh.1,500,000/- would suffice under this head. He placed reliance on the cases of: -

- **Joyce Moraa Oyaró v Hussein Dairy Ltd [2016] eKLR** where the court awarded Kshs 1,300,000/= for cerebral concussion, blunt injuries and bruises to forehead, deep cut to upper right maxilla, cut to right aspect of zygomatic process, blunt injury to anterior aspect of chest wall, cut wound to on right breast, deep cut wound on right shoulder, comminuted fracture to right humerus, lacerations to right forearm posteriorly, deep cut wound on left

leg to medial aspect, deep cut wound to posterior aspect of left leg lower 1/3, comminuted fracture on right leg that resulted in amputation, and pelvic fracture.

- **Nelson Njihia Kimani v. David Marwa & Anor.** [2017] eKLR where the plaintiff who suffered an amputation of lower right limb with 40% incapacity and was awarded Ksh.1,500,000/ as general damages.
- **Muinde v Yislam [2024] KEHC 8822 (KLR)** where the court set aside award of Ksh.800, 000/- and substituted it with Ksh. 1,500,000/- for the appellant who had sustained Amputation of the left upper limb above the elbow joint, Degloving injury on the anterior side of the arm, Abrasion injury on the forehead 5cm by 4cm, Loss of consciousness for six hours and Deep cut wound on the anterior left knee, 2cm by 1 cm.

10. With regard to damages for loss of earning capacity, the Appellant submitted that there was no evidence adduced to prove the Respondent was a farmer earning

Ksh.10,000/= per month. He argued that the award of Ksh.600, 000/- was inordinately high and urged this court to substitute the same with Ksh. 300,000/-. To bolster his submissions, he relied on the case of **Mbasu & another vs Swaka (Civil Appeal E061 of 2022) [2024] KEHC 2210** where the court upheld a global sum of Ksh.300,000/- under this head for a claimant who was a boda boda operator and a farmer.

11. Regarding the award for future medical expenses, the Appellant submitted that the same was neither pleaded nor proved to the required standard. He therefore urged this court to set aside the award on the same.

Respondent's Submissions

12. On liability, the respondent submitted that the Appellant admitted the accident occurred but blamed him for being drunk without adducing any proof to that effect. He thus urged this court not to disturb the trial court's findings on liability.
13. On general damages, the Respondent submitted that considering the injuries he sustained, the 70% degree of permanent disability and the doctor's recommendation

that he be registered as a person living with disability, the award ought not to be disturbed. In support of his submissions, he relied on the case of **Abdi Werdi Abdulahi v James Royo Mungatia & Another (2019) eKLR**, where the court awarded the plaintiff Kshs 3,500,000/= following the amputation of his right lower limb.

14. In regard to future medical expenses, the Respondent submitted that he established through the medical report, that he would require Kshs 400,000/= for future treatment.
15. On loss of earning capacity, the Respondent submitted that his evidence that he was a farmer earning Kshs 10,000/= per month was uncontroverted. He contended that, as a result of the injuries sustained, he would be unable to resume farming, notwithstanding the prosthetic leg. He thus supported the trial court's award under this head and relied on the case of **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR** to buttress his submissions.
16. The Respondent prayed for the costs of the appeal.

Analysis & Determination

17. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

18. In **Gitobu Imanyara & 2 others vs Attorney General [2016]** eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

19. In **Peters vs Sunday Post Ltd [1958] EA 424**, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

20. With the above in mind, I will now proceed to determine the Appeal.

21. The pertinent issues for determination are;

a) Whether the trial court erred in its finding on liability;

b) Whether the quantum for general damages and Loss of earnings awarded by the trial court was manifestly excessive &

c) Whether the trial court erred in awarding future medical expenses

22. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of

Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

23. It was the evidence of the plaintiff that he was walking along Meru-Nkubu road on the pedestrian path when the aforementioned subject motor vehicle veered off the road and knocked him down.
24. On cross examination he stated that he did not know how the accident happened or the point of impact and that he just found himself at the hospital without a leg.
25. The investigating officer on his part stated that the subject motor vehicle was coming from Nkubu heading towards Meru and that the Respondent was hit on the left side of

the road facing Nkubu Direction. He said that following the accident, the Appellant was charged with careless driving and fined Ksh.15, 000/-.

26. On cross examination he said that according to the police abstract, the matter was still pending under the investigation.

27. The Appellant's driver, Nicolus Mwita, adopted his witness statement as his evidence in chief wherein he stated that on the material date, he was driving the subject motor vehicle from Meru towards Nkubu. As he approached Mariara River, about 200 meters from the bridge, he saw a Nissan vehicle coming from the opposite direction at high speed and without keeping to its lane. He slowed down. At the same time, he saw pedestrian, who appeared intoxicated, on the side of the road who on noticing the speeding motor vehicle and in an attempt to avoid being hit, staggered into his lane. He applied the emergency brake and swerved off the road to avoid hitting him but the time was too short and unfortunately ended up hitting him on his lane.

28. On cross examination, he confirmed that he had no proof that the Respondent was drunk.
29. It is trite that a pedestrian has a duty to take care of his own safety while crossing or walking on a road and to have due regard for other road users including motor vehicles and regard of the Highway Code (**See C.A 608 Julius Omollo Chanda & Another -vs- Samson Nyaga Kinyua**).
30. Equally, a person who is driving a vehicle is under a duty of care to other road users. The vehicle can be a lethal weapon and due care is expected of the driver who is in control thereof. In **Onyancha (Suing as the Personal representative and legal administrator of the Estate of Beatrice Kerubo Nyakundi alias Kwamboka (Deceased)) v Makini [2022] KEHC 9826 (KLR)** the court opined that: -

“The liability between a driver of a Motor Vehicle and a pedestrian cannot be equated unless it is so crystal clear that a pedestrian put himself or herself in a position that a driver could not be anticipated such as when a

pedestrian jumps into a road on a suicide mission."

31. The trial court found the appellant's evidence credible, since it was the only account of how the accident occurred and doubted that the respondent's assertion of being off the road, reasoning that if that was true the point of impact would not have been on the road.
32. Indeed, the investigating officer stated that the point of impact was on the left side of the road. He did not specify if it was on the road or off the road. I therefore concur with the trial court's reasoning to the extent that the Respondent's version that he was hit off the road was questionable. However, the Appellant's version was also questionable because if his driver truly swerved to avoid the oncoming vehicle as stated in his witness statement, the logical expectation was that the vehicle would not have left the road. His statement that he hit the respondent implicitly indicated that he was travelling at a high speed and was unable to effectively control his vehicle.

33. It is also noted that the appellant's driver was charged with the offence of careless driving and was convicted and fined.
34. While a defendant who has been convicted of such an offence is not barred from raising a defence of contributory negligence on the part of the plaintiff.
35. Looking at the circumstances of the case, I find that the trial court was correct to apportion liability, but not to the extent that it did. If the respondent was on the road, instead of off it, then he ought to have borne a higher degree of contribution. On that basis I set aside the trial magistrate's finding on liability and apportion the same at 50%-50%.
36. On the question of damages, it is trite law that an appellate court would not interfere with the trial courts' discretion on this issue unless it finds that the trial court applied wrong principles in arriving at the finding, or that the award is inordinately high or low. This position was reiterated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini**

vs A M. Lubia and olive Lubia (1985) 1 KAR 727. The court held that;

“.... 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 court are well settled. 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 the damages....”

37. The same Court in **Odinga Jackton Ouma vs Moureen Achieng Odera [2016] eKLR** stated that- ***“comparable injuries should attract comparable awards”***

38. The Respondent pleaded that he sustained the following injuries: -

- Right Gustilo II fibula fracture

- Exsanguinating left lower limb degloving injury with Gustilo III distal tibiofibular shaft fracture
- Amputation of the left lower limb from the knee.

39. Dr. K. Kioga, who examined the Respondent, confirmed he sustained the pleaded injuries and assessed the degree of permanent disability at 70%.

40. The injuries sustained by claimants in the cases cited by the parties herein were almost similar compared to those by the Respondent herein.

41. In arriving at an award of Ksh3,500,000/=, the learned trial magistrate was guided by the case of **Abdi Werdi Abdulahi v James Royo Mungatia & Another (supra)**

42. In the case of **Kurawa Industries Ltd v Dama Kiti & Another**, [2017] eKLR, court posited as follows:

“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. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to

be excessive. It is within the amounts awarded for similar injuries. There is the case of Samuel Musinga Mwatete v Taz freighters Ltd & Another, Mombasa HCC No. 230 of 2009 where Kshs.1.5 million was awarded in 2012. The case of Patrick Mbatha Kyengo was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of Cosmas Mutiso Mwema (supra)

43. Taking into account passage of time and inflationary trends, I opine that the amount awarded by the trial court was not manifestly excessive, was reasonable and commensurate with the nature of injuries sustained by the Respondent. The award under this head is upheld.

44. I will now turn to the other award of damages.

45. In **Mumias Sugar Company Ltd vs Francis Wanalo (2007) eKLR** case, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in **Butler vs Butler (1984) KLR 225**, where, a plaintiff

who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The Court of Appeal stated:

“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 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 the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

46. The principles regarding such an award were also stated in **SJ vs Franscesco Di Nello & Another (2005) eKLR**, where the Court of Appeal held as follows:

“Claims under the leads of loss of future earning capacity are discretionary 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 in earnings 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”

47. In regards to the methods for quantifying loss of earnings capacity the court in **Patrick Chupson vs Everlin Eucal Smith & another (2013) JMCA Morrison** JA stated that:-

“Therefore, once the Judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the Court.”

48. The respondent stated that he was a farmer. Farming is a physically demanding activity. Given his present physical condition, it is evident that he cannot continue this work. Consequently, his earning capacity has been materially diminished.

49. The trial court awarded Ksh.600, 000/= under this head using a global approach.

50. The Appellant posits that the above award was excessive and proposes Ksh.300, 000/=

51. In the case of **Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose [2021] eKLR** the court awarded Kshs 551,580/= where the plaintiff suffered 75% disability and was earning Kshs 9,193/= and was 5 years away from

retirement. In the case of **Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR)** the court awarded a global sum of Kshs 800,000/= as general damages for loss of earnings where the plaintiff suffered between 15%-50% disability in awarding damages herein.

52. Considering the Respondent herein suffered a permanent disability of 70%, I find that the global sum of Kshs 600,000/= awarded by the trial court was modest and fair. The same is upheld.

53. Future medical expenses as special damages should be pleaded and proved. In the case of, **Tracom Limited & Another v Hassan Mohamed Adan Civil Appeal Number 106 of 2006**, the Court of Appeal stated:-

“We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount. It will be as indeed the exact amount of that future expenses will depend on several other matters such as the

place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require”

54. The Respondent pleaded for future medical expenses which was the cost of prosthetics and produced medical report which pegged the same at Kshs.400, 000/=. No other medical report was produced to controvert this position. I thus uphold the trial court’s finding on the same.

55. In the upshot, I find that the appeal partly succeeds, but only on the question of liability, which is apportioned at 50%-50% as between the appellant and the respondent. The awards on damages are upheld.

56. Each party shall bear its own costs on this appeal.

57. It is so ordered.

**Dated, signed and delivered at Meru this 28th day of
April, 2026.**

**H. M. NYAGA,
JUDGE.**

In the presence of;

Court assistant - Munene

Mr. Kariuki for appellant

Mr. Kaumbi for respondent