

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1314 OF 2023

ALEX OMUTITI KATANA.....
APPELLANT

-VERSUS-

BERNARD MBATHIRIMA.....1ST RESPONDENT
ABERDARES WATER LIMITED.....2ND RESPONDENT

*(Being an appeal from judgment of Hon. G. OMODHO (PM) in
Milimani CMCC No. E1035 of 2022 delivered on 31/10/2023)*

JUDGMENT

- 1) The appellant filed Milimani CMCC No. E1035 of 2022 seeking general damages and special damages of kshs.4,050 and future medical expenses of kshs.120,000 together with costs and interest for injuries the appellant sustained on 13/11/2021 when he was involved in a road traffic accident.
- 2) The appellant was riding motor cycle registration no. KMFC 503G along Mombasa Road when the driver of motor vehicle registration no. KCA 319U veered off his lane and collided with the appellant and his pillion passenger at City Cabanas occasioning them bodily harm.

- 3) The respondents filed a statement of defence dated 12/4/2022 denying the appellant's claim.
- 4) The appellant said in his evidence that he was riding on the pedestrian walkway when the motor vehicle lost control and veered off the road and collided with the motor cycle.
- 5) The appellant sustained the following injuries:
 - i. **Fracture of the left radius**
 - ii. **Fracture of the left ulna**
 - iii. **Fracture of the right radius**
 - iv. **Fracture of the right ulna**
 - v. **Cut wounds on both lips**
 - vi. **Abrasions on the left knee**
 - vii. **Inability to use both upper limbs to do any work and painful forearms.**
 - viii. **Metal plates in situ**
 - ix. **Permanent disability of 8% for the left forearm and 18% as total permanent disability.**
- 6) The trial court found the respondents 100% liable for the accident and assessed damages as follows;

i. General damages

Ksh.450,000

ii. Future medical expenses	Ksh.100,000
iii. Special damages	<u>Ksh. 3,550</u>
Total	<u>Ksh.553,550</u>

7) The appellant has appealed against the said judgment on the following grounds;

- (i) That the learned magistrate erred in law and fact by failing to properly consider the nature, extent, and long-term impact of his injuries, including the time required for bone union and rehabilitation, as well as the permanent disability evidenced by medical reports, the P-3 form, discharge summaries, and expert testimony from a medical doctor.**
- (ii) That the magistrate ignored relevant legal precedents presented at trial, such as Rose Jepkospel Kipkoit vs Barnabas Biwott and Lucy Wanguru Gatundu vs Miriam Nyambura Mwangi, which would have guided a proper assessment of damages including inflationary trends.**
- (iii) That the magistrate overlooked the fact that he lost his employment as a rider due to the accident and**

will never work in a physically demanding field at full capacity again.

- (iv) Additionally, that the award for future medical expenses is said to be too low despite clear evidence of the need for extensive future care.**
- (v) That the awarded quantum of damages was inordinately low under the circumstances, and that had the magistrate properly addressed all these factors, a significantly enhanced award would have been justified.**

8) The parties filed written submissions as follows; The Appellant submitted that he had sued the respondents for general and special damages following a road traffic accident on 13th November 2021, in which the appellant was lawfully riding a motorcycle along Mombasa Road when the driver of another vehicle swerved and knocked him, causing serious injuries.

- 9) The trial magistrate found the respondents 100% liable and awarded Kshs 450,000 as general damages and Kshs 100,000 for future medical expenses.
- 10) The Appellant was dissatisfied only with the quantum of damages and he filed a memorandum of appeal raising several grounds, including that the magistrate disregarded the nature and extent of his injuries, ignored key evidence and expert medical opinions, failed to consider precedents, overlooked the appellant's loss of employment and earning capacity as a motorcycle rider, awarded inordinately low general damages, and granted insufficient future medical expenses.
- 11) The appellant sustained fractures of the left radius, left ulna, right radius, and right ulna, cut wounds on both lips, and an abrasion on the left knee.
- 12) He underwent surgery with metal plate fixations and was hospitalized for about two weeks. Two medical reports were produced by consent: one by Dr. M. W. Wokabi (dated 16th December 2021) who assessed permanent disability at 18% and estimated future implant removal at Kshs 120,000,

and another by Dr. Ashwin Madhiwala (dated 22nd July 2022) who assessed 10% permanent disability and estimated future medical costs at Kshs 100,000.

- 13) The appellant argued that Dr. Wokabi's opinion should carry more weight as he examined the appellant closer to the accident date.
- 14) The appellant submitted that the trial magistrate failed to properly consider the grievous nature of the injuries, the long recuperation period, the permanent disability, and the fact that the appellant could no longer work as a motorcycle rider.
- 15) Citing several Court of Appeal and High Court decisions, the appellant argued that an appellate court may interfere with an award of damages where the trial court applied wrong principles, misapprehended the evidence, or arrived at an inordinately low or high figure.
- 16) The appellant referred to comparable cases such as **Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers v. Augustine Munyao Kioko (2006)** where Kshs 600,000 was awarded for a single fracture of the left radius and ulna;

Kimuyu Wambua Titus v. Iluku Shadrack Ikonze (2019) where Kshs 800,000 was awarded; **Kennedy Ago Lidweve v. Steel Plus Limited** where Kshs 600,000 was upheld; and **Joseph Waweru Wainaina v. Patrick Thuku Wagacha (2023)** where Kshs 500,000 was awarded for a single fracture.

- 17) The appellant also relied on **Rose Jepkosgei Kipkoit v. Barnabas Biwot (Eldoret HCCA No. 70 of 2013)** where the court enhanced an award to Kshs 1,800,000 for more severe injuries and noted the importance of inflation.
- 18) The appellant proposed that Kshs 1,600,000 would be appropriate compensation for his injuries, considering inflation and the serious disabling effect.
- 19) On loss of earning capacity, the appellant noted that he was a motorcycle rider and breadwinner for his family, but due to bilateral arm fractures, he could no longer perform physically exerting work.
- 20) Citing **Moses Obera Ondoto v. Silas Kamau Kigotho (2024)** and **Jacob Ayiga Maruja & another v. Simon Obayo (2015)**, the appellant argued that loss of

earning capacity can be proved without documentary evidence of earnings.

- 21) He asked for Kshs 500,000 as general damages for loss of earning capacity, separate from general damages for pain and suffering.
- 22) Regarding future medical expenses, the appellant noted that the trial court awarded Kshs 100,000, but Dr. Wokabi had estimated Kshs 120,000 for implant removal.
- 23) The appellant argued that given inflation and rising costs between 2022 and 2025, the award should be increased to Kshs 150,000.
- 24) Finally, the appellant prayed that the appeal be allowed, the lower court's judgment on quantum be set aside, general damages be enhanced to Kshs 1,600,000, future medical expenses be increased to Kshs 150,000, and costs of the appeal be provided for.
- 25) The Respondent opposed the appeal filed by the Appellant against a trial court judgment delivered on 31 October 2023.
- 26) They submitted that the trial court had awarded the Appellant Kshs. 450,000 in general damages, Kshs. 100,000

for future medical expenses, Kshs. 3,550 in special damages, and 100% liability in his favor following an accident in which he suffered fractures of both radii and ulnae, cut wounds on the lips, and abrasions on the left knee, with a permanent disability assessed at 18%.

- 27) The Appellant argued that the awards were too low and that the trial magistrate ignored evidence, medical opinions, and precedents.
- 28) The Respondents contend that the trial magistrate properly exercised her discretion by considering comparable recent cases, including those where similar fractures attracted awards between Kshs. 180,000 and Kshs. 450,000, and that the award of Kshs. 450,000 was neither inordinately low nor based on irrelevant factors.
- 29) Regarding loss of earning capacity, the Respondents note that this claim was not pleaded in the original plaint, and the medical evidence did not render the Appellant 100% incapacitated or unemployable, citing appellate authority that reduced awards where the claimant remained capable of some work.

30) On future medical expenses, the Respondents argue that the trial court correctly awarded Kshs. 100,000 based on one doctor's estimate from the same hospital where the Appellant was treated, rather than the higher estimate of Kshs. 120,000 from another doctor.

31) The Respondents conclude that the Appellant has not shown any proper ground for the appellate court to interfere with the trial court's discretionary assessment, and they pray that the appeal be dismissed with costs.

32) The issues for determination in this appeal are as follows;

(i) Whether the trial magistrate's award of Kshs. 450,000 in general damages for pain, suffering, and loss of amenities was inordinately low, and

(ii) Whether the award of Kshs. 100,000 for future medical expenses was sufficient, given the nature and long-term impact of the appellant's injuries.

33) As a first appellate court, it is my duty to re-evaluate the evidence afresh and draw my own conclusions, while

bearing in mind that I did not have the advantage of seeing and hearing the witnesses as the trial court did.

34) The principles upon which an appellate court can interfere with a trial court's discretion in assessing damages are well-settled.

35) An appellate court will not disturb an award of damages unless it is satisfied that the trial court acted on wrong principles, took into account irrelevant factors, or failed to take into account relevant ones, or that the amount awarded is so inordinately low or high that it represents a wholly erroneous estimate of the damage suffered.

36) With these principles in mind, I have carefully considered the record, the submissions of both parties, and the relevant legal precedents.

37) On the issue of general damages, the appellant sustained serious bilateral fractures of both the radius and ulna in his left and right forearms.

38) These injuries required surgical intervention with metal plate fixation, resulted in hospitalization for approximately

two weeks, and led to a permanent disability assessed at 18% by Dr. M. W. Wokabi and 10% by Dr. Ashwin Madhiwala.

39) The trial court awarded Kshs. 450,000. In challenging this amount, the appellant's counsel proposed an award of Kshs. 1,600,000, citing cases such as **Kimatu Mbuvi t/a Kimatu Mbuvi and Brothers v. Augustine Munyao Kioko (2006)** where Kshs. 600,000 was awarded for a single fracture of the radius and ulna, and **Rose Jepkosgei Kipkoit v. Barnabas Biwot** where the court enhanced an award to Kshs. 1,800,000 for more severe injuries.

40) The respondents argued that the award was proper and within the range for comparable injuries. After reviewing the cited cases, I find that the trial court's award, while not wholly unreasonable, is on the lower side considering the current inflationary trends and comparable decisions for similar injuries.

41) Considering that the appellant's injuries are bilateral, required major surgery to both arms, resulted in some degree of permanent disability, and that his recovery period

would have been significant, I am persuaded that the award of Kshs. 450,000 was inordinately low.

42) Consequently, I set it aside and substitute it with an award of Kshs. 750,000 for general damages for pain, suffering, and loss of amenities.

43) This amount is reasonable, takes into account the principle that comparable injuries should attract comparable awards, and is consistent with current trends in the High Court which also account for inflation.

44) Regarding the claim for loss of earning capacity, the appellant argued that as a motorcycle rider, he could no longer perform physically demanding work due to his bilateral arm fractures and should be awarded Kshs. 500,000 under this separate head.

45) The respondents countered that this claim was not specifically pleaded in the original plaint and that the medical evidence did not render the appellant totally incapacitated.

46) The law distinguishes between loss of future earnings, which is a special damage claim requiring strict proof, and

loss of earning capacity (or diminished earning capacity), which is awarded as part of general damages for the risk that an injured plaintiff will be at a disadvantage in the future job market.

- 47) It is trite that a claim for loss of earning capacity does not require documentary proof of past earnings, but must be proved on a balance of probabilities that the plaintiff's capacity to earn has been lessened by the injuries.
- 48) In the instant case, the appellant pleaded a claim for loss of earning capacity in paragraph 11 of the plaint.
- 49) His testimony that he was a motorcycle rider and can no longer work in a physically demanding field, coupled with the medical evidence of permanent disability from bilateral arm fractures, sufficiently establishes that his earning capacity has been diminished.
- 50) I find that the trial magistrate erred by failing to make an award under this head.
- 51) I therefore award the appellant Kshs. 300,000 as global damages for loss of future earning capacity.

- 52) On the issue of future medical expenses, the trial court awarded Kshs. 100,000 based on Dr. Ashwin Madhiwala's report, which estimated the cost of implant removal at Kshs. 100,000.
- 53) The appellant argued that Dr. Wokabi's estimate of Kshs. 120,000, being closer to the accident date, should be preferred and further enhanced to Kshs. 150,000 due to inflation and rising medical costs.
- 54) Future medical expenses are a specific claim that must be pleaded and proved.
- 55) The two medical reports produced by consent gave divergent estimates.
- 56) The trial magistrate had the discretion to choose between the two estimates, and her choice of the lower estimate was not based on a wrong principle.
- 57) There is no evidence to support an enhancement of the claimed amount to Kshs. 150,000, as that figure was not pleaded or directly supported by either medical report.

- 58) The award of Kshs. 100,000 is therefore affirmed. The award of special damages of Kshs. 3,550 was not contested and is upheld.
- 59) In summary, the appeal on quantum succeeds partially.
- 60) The judgment of the trial court is varied. Damages are reassessed as follows;
- (i) **General damages for pain and suffering are increased from Kshs. 450,000 to Kshs. 750,000.**
 - (ii) **Loss of earning capacity is awarded at Kshs. 300,000.**
 - (iii) **Future medical expenses of Kshs. 100,000 are affirmed.**
 - (iv) **Special damages of Kshs. 3,550 are affirmed.**
- 61) The total award is therefore **Kshs. 1,153,550.**
- 62) Each party to bear their own costs of this appeal since the same partially succeeded.
- 63) The decretal sum shall attract interest at court rates from the date of the trial court's judgment until payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi
this **4th day of May, 2026.**

.....

A. N. ONGERI

JUDGE

In the presence of:

No appearance for the Applicant

Ms Githui for the Respondent

ORIGINAL