



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E212 OF 2024

STEPHEN MAINA KIMANI.....1ST

APPELLANT

SUSAN NYATHIRA MWAURA.....2ND

APPELANT

VERSUS

DENNIS MURILI WAFULA.....RESPONDENT

*(Appeal from the Judgment/Decree of Hon. B. Rugut Kipyegon PM on 29th
April, 2024 in Molo CMCC Number E101 of 2020)*

JUDGEMENT

1. This an appeal on quantum. The Respondent sued the Appellants in the Amended Plaintiff dated 12th July, 2021. The particulars are that on 14th July, 2020 the Respondent was a passenger aboard motor vehicle registration number KCW 481G when the Appellants and/or their duly authorized driver, negligently controlled motor vehicle registration number KAX 019P causing it to ram into the said motor vehicle registration number KCW 481G from the rear end where she sustained serious injuries.

2. The Appellants in their joint Statement of defence dated 19th July, 2022 denied the occurrence of the accident as well as the particulars of negligence. On a without prejudice basis, the Appellants blamed motor vehicle registration number KCW 481G for the accident.
3. On 16th March, 2023, the Court adopted the parties' consent on liability in favour of the Respondent at the ratio of 85:15.
4. **PW1 Dennis Murili Wafula** stated that he sustained 20% disability. He was working as a mechanic and a broker; in a day he could get Kshs 2000 to 3,500 per day. He again stated that he would make Kshs. 6,000 to 4,000 and worked six days a week. That after the accident he could not work as before and now supervise the work and need an assistant. The assistant organizes labourers and gets a commission. That he lost one eye, he uses spectacles that have 2 lenses and the must be aligned every year at the cost of Kshs 105,000.
5. In cross examination he confirmed that he had not produced any documents of his earnings though he was salaried. That he made Kshs. 3,000 to 4000. That Boniface was his employer thou he was no a witness. That he still goes to the optician and in 2022 he paid over Kshs. 50,000.
6. By the Judgement delivered on 25th April, the Court awarded:
 - a) Liability as agreed 80%:20% for the Plaintiff,
 - b) General Damages Kshs.5,000,000/=
 - c) Diminished earning capacity Kshs.1,520,000

d) Special Damages	Kshs.49,350
e) Grand Total	Kshs.6,201,350
f) Less 20% contribution	Kshs.4,961,080/=

7. Aggrieved by the said decision, by way of Memorandum of Appeal dated 20th September, 2024 the Appellant filed the instant appeal on the following grounds:

- i) That the Learned Trial Magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court as he had not proved his case on quantum on a balance of probability.**
- ii) That the Learned Trial Magistrate erred in law and fact in awarding the Respondent general damages for pain and suffering a sum of Kshs. 5,000,000/= and diminished earnings in the sum of Kshs 1,152,000/= which amounts were excessive thus leading to erroneous estimates of loss of damage suffered by the Respondent thereby making an exorbitant and oppressive award against the Appellants.**
- iii) That the Learned Trial Magistrate erred in law and fact by failing to take into account comparable reasonable awards thereby arriving at an erroneous estimate of the compensatory award leading to an excessive award. –**
- iv) That the learned trial Magistrate erred in law and fact in over relying on the Respondent's evidence most of which was speculative in nature thereby reaching an entirely erroneous finding.**

- v) **That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellants submissions and legal authorities relied upon in support to the Defence thereof hence arriving at an erroneous conclusion on the amounts on general damages for Pain and suffering and diminished earnings awarded to the Respondent.**
 - vi) **That the Learned Trial Magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing her mind to the circumstances of the case.**
 - vii) **That the Learned Trial Magistrate's decision, albeit a discretionary one, was plainly wrong.**
8. Whereof the Appellant prays that the Appeal be allowed, the judgment of the Trial Court be set aside and dismiss the Respondent's claim for general damages and/or at the very least substitute it with proper finding with the Respondent paying const sin the Trial Court and in this appeal.
9. The Appeal was heard by way of written submissions.

Appellant's Submissions

10. The Appellants in support of this appeal filed submissions dated 21st July, 2025 argued that the Trial Court totally misapprehended the nature of claim advanced by the Respondent and improperly evaluated the evidence adduced while completely ignoring the

submissions filed and thereby rendering a judgment that is totally untenable and not compensatory at all.

11. Regarding the award for pain and suffering, the Appellants and relied on ***Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR*** to submit that comparable injuries should be compensated by comparable awards. The Appellants also relied on ***Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR*** where the Court of Appeal laid down the principles to be considered when making an assessment of damages for personal injuries.
12. According to the Appellants the Respondent suffered a perforating injury to the left eye, fracture of the clavicle and minor soft tissue injuries. They thus propose that the sum of Kshs. 1,500,000 ought to be sufficient as general damages for pain, suffering and loss of amenities.
13. Further it was argued that the award was excessive and reliance was placed in ***Hillspark Investment Company Limited v Murimi [2022] KEHC 10622 (KLR)*** and in ***Shikuku v Magnum Engineering and General Contractors Limited & another [2021] eKLR*** to submit that the injured in these cases were awarded between Kshs. 1,500,000 and Kshs. 2,000,000 for injuries that were more severe. That the Trial Court's award was excessive.
14. On the issue of diminished earning capacity, the Appellants relied in ***Mumias Sugar Company Limited Vs. Francis Wanalo [2007] eKLR*** cited with approval in ***Abuga v Northern Rangeland Trust***

[2023] KEHC 23656 (KLR) to submit that damages for loss of earnings capacity is awarded as part of general damages to avoid duplicity.

15. It is further submitted that the Respondent is not entitled to any award of loss of future earning capacity as he had not been rendered totally incapacitated nor unemployable and can still engage in gainful employment despite his injuries.
16. On costs it is submitted that the Appellants have proven the Appeal meritorious and they should be awarded costs.

Respondent's Submissions

17. In opposing the Appeal, the Respondent in the submissions dated 27th October, 2025 submits that the Court properly evaluated all the evidence presented by both parties and rightly found that the Respondent had proved his case on a balance of probabilities.
18. That the award of Kshs. 5,000,000 for general damages was not excessive and was within the Court's discretion which reflected the gravity of the injuries, sustained the permanent nature and lasting impact on the Respondent's quality of life.
19. To emphasize that the award was consistent with judicial precedent and proportionate to the injuries sustained, the Respondent relied on ***James Wambua Kimila v Sinohydro Corporation Limited & another*** [2020] eKLR where the Honourable Judge on Appeal awarded Kshs. 6,000,000/= for general damages, for pain, suffering

and loss of amenities where the Plaintiff had sustained complete loss of vision of the left eye and multiple fractures and where permanent incapacity of the appellant was assessed at 50%.

20. Also, in the case of ***Terry Kanyua Marangu v Wells Fargo Limited [2014] eKLR***, where the Honourable Judge on Appeal awarded Kshs. 3,500,000/= for general damages where the Plaintiff had sustained orbital swelling with ecchymosis, Head injury, cut wounds on the left upper lip, left wrist joint and on the right lower limb pre-tibia region.
21. It was argued that the Trial Court considered relevant authorities and that the Trial Court's conclusions were firmly grounded on reliable evidence and cannot be termed speculative.
22. Regarding failure to consider submission, the Respondent submits that the Trial Court weighed the Appellants' arguments against the Respondent's evidence and submissions before rendering a reasoned and balanced decision.
23. The Respondent also argues that the authorities relied upon by the Trial Court were directly relevant and applicable.
24. On the issue of diminished earning capacity, it is submitted that the Respondent was 31 years old and engaged in manual mechanical work requiring both physical strength and proper vision, capacities now permanently diminished and that the Trial Court correctly found that the Respondent's future earning capacity had been significantly impaired and awarded.

Analysis and Determination

25. This being a first Appeal the Court is reminded of the principles established in **Selle vs. Associated Motor Boat Co. [1968] EA 123** to reevaluate the evidence afresh, draw its own conclusions but exercise caution since did not see the witnesses testify. See **Peters vs Sunday Post Limited [1958] EA 424**.
26. The Respondent at paragraph 10 of the Amended Paint prayed for:
As a result of the injuries herein, the Plaintiff's way of life or earning capacity has been greatly affected. As at the time of filing this suit, the Plaintiff is yet to resume his economic duties. Consequently, he has lost substantial use of amenities and will claim damages in respect of lost earnings or future earning capacity.
27. The issue of Loss of future earning capacity was addressed at paragraph 12 of the judgment wherein the trial Court stated that; ***“the award as opined thereto by the Plaintiff is fair and awardable”***. The Respondent had prayed for Kshs. 5,000,000.
28. In the final award, the Trial Court awarded the Respondent Kshs. 5,000,000 as general damages. The loss of future earning capacity was therefore awarded under the head of general damages.
29. As regards the claim for loss of earning capacity, the Trial Court applied the Regulation of Wages (General) Amendment Order, 2018 and adopted the multiplier approach. The Court calculated the award as follows: Kshs. 12,000 per month × 12 months × 24 years × ratio of

1/3 arriving at a total of Kshs. 1,152,000. The Court went ahead and warded the award as diminished earning capacity.

30. From paragraphs 15 to 20 of the judgment, it appears that the Court was making reference to a deceased party or was under the impression that the Respondent had passed away. In doing so, the Court relied on the authority of ***Naomi Nyambura Karanja (suing as the Administrators of the Estate of Simon Karanja Miringu (Deceased) v Zacharia Muteru Kadunga & another [2021] eKLR.*** This was a case involving a deceased individual and the award therein was made under the head of loss of dependency.
31. There was some confusion in the Trial Court's treatment of the claim for loss of earning capacity and future earning capacity or diminished earning capacity. Although the Respondent was alive and had testified, the Court proceeded to apply the multiplier approach in a manner akin to awards for loss of dependency. This created uncertainty as to whether the Court properly appreciated the nature of the injuries sustained or the heads under which the awards were made.
32. In ***William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)*** Kneller JA defined loss of earning capacity and stated:

“A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in Ashcroft v

Curtin [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction.”

33. Further the learned judge stated: -

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in Fairely vs John Thompson (Design & Contracting Division) Ltd [1973] 2 Lloyd’s Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

34. From the above authority, I agree with the Appellants that the award for diminished earning capacity is in the nature of general damages and is often classified with pain and suffering.

35. Now therefore I proceed to determine the appeal based on what the Respondent’s pleaded. The Respondent pleaded Lost earnings and future earning capacity.

36. In considering whether to disturb the award of damages, I am reminded that assessment of damages is an exercise of discretion and therefore should be considered judiciously to be satisfied that either that the Trial Court 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 damage. The Court of Appeal pronounced itself on these principles in ***Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] KECA 137 (KLR).***

Lost Earnings

37. Lost earnings are a form of compensation for income that has already been lost due to injury or can be specifically calculated. For example, if someone missed six months of work after an accident, the wages they would have earned in that period are lost earnings. Courts treat this as special damages which must be pleaded and proved.
38. The Respondent testified that he was a mechanic and was salaried though it was unclear whether he was making Kshs. 2,000 to 3,000 a day or Kshs 3,000 to 6,000.
39. In ***Jacaranda Bodaboda Operators & another v Nyasero [2023] KEHC 23806 (KLR)*** the Court at paragraph 30 stated that: -

“Diminished earning capacity is decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.”
40. In as much as the Respondent claimed to have been a mechanic and making between Kshs 2000 to 6000, there was nothing to show the

same. The Court is alive to the fact that individuals earning a living in the *Jua Kali* sector do not have proper paperwork and depend on their skill and the labour.

41. **Section 2 of the Insurance (Motor Vehicles Third Party Risks) Act** and the **Regulation of Wages Orders** applicable at the time address gaps where the income of a person cannot be quantified.
42. All the same, I have carefully considered the record and I find that there was no credible evidence placed before the Court to establish that the respondent was earning the amount claimed or to demonstrate the nature of the work he was engaged in at the material time.
43. Equally, there was no evidence to show that the Respondent would be precluded from resuming gainful employment in the future including being a mechanic or that his capacity to engage in such work had been permanently impaired.
44. He has also not aptly demonstrated the loss he incurred or the period he was incapacitated.
45. It is simply not enough to claim. If the Respondent had claimed to have been an electrician, was the Court obliged to believe him? I think not. To hold otherwise would be to substitute conjecture for proof which the law does not permit.
46. I am therefore constrained not make any award under this head.

Future Earning Capacity

47. This refers to the projected reduction in a person's ability to earn income over their lifetime due to long-term or permanent injury even if exact figures are not available. For instance, if an injury permanently limits someone's career options, they may be compensated for the diminished capacity to earn. Courts usually treat this as general damages.
48. The injuries the Respondent pleaded are, Loss, of sight on the left eye resulting from corneal perforation, Fracture of the left clavicle, Corneal perforation of the left eye and lacerations on the upper eye lid, Deep lacerations on the left zygomatic region, Deep cut wound on the right sagittal region, Soft tissue injuries of the left shoulder joint, Cut wound on the right hand arm, Soft tissue injuries of the right forearm and Soft tissue injuries of the legs
49. These injuries were disputed by the Appellants, who claimed that a second medical examination by **Dr. Malik** revealed less severe injuries noting that the fracture had already healed, thereby contradicting the report by **Dr. Kiambaa**. Upon perusal of the entire record, it is evident that the reports by Dr. Kiambaa and Dr. Malik, which may have offered differing views, are not on record. From the pleadings it appears Dr. Kiambaa apportioned incapacity at 40% while Dr. Malik apportioned it 30%.
50. Be that as it may, the Appellants' failure to annex all the relevant documents operates to benefit of the Respondent. It was incumbent upon them to demonstrate that the injuries pleaded were not accurate

and to establish that the second medical examination materially differed from the first one.

51. From the P3 report and the report by **Dr. Gichigo**, an ophthalmologist, it is evident that the Respondent suffered a corneal perforation of the left eye resulting in permanent loss of sight even after surgical intervention, a fracture of the left clavicle, lacerations on the face and hands, and soft tissue injuries on the limbs. Without an alternative medical assessment, the Court will proceed with the injuries pleaded.
52. In making its award, the Trial Court relied on the authorities presented by the Respondent noting that the injuries appeared similar. The first authority cited was ***James Wambua Kimila v Sinohydro Corporation Limited & another* [2020] eKLR (Civil Case No. 336 of 2014)** delivered on 14th May, 2020 by Justice C. W. Githua. The Respondent has attached the said decision where the Plaintiff was awarded Kshs. 6,000,000 for pain and suffering.
53. Interestingly, from the Kenya Law website there is a case of ***James Wambua Kimila vs Sinohydro Corporation Ltd & another KEHC 2463 (KLR) (Civil Case No. 336 of 2014)*** was delivered on 4th November, 2021 by Justice S. Chitembwe. The Plaintiff was awarded Kshs.2,500,000.
54. The case number, the parties and the injuries listed in both decisions are similar. The facts are almost similar and the summary of facts also almost similar but the finding on liability as well as on quantum,

the degree of incapacity is different. Be that is it may both decisions the Plaintiff suffered severe injuries including several compound and comminuted skull fractures, brain bleed, fracture of the left ankle an injury to the left eye among others and had been hospitalized.

55. The other authority relied upon was ***Terry Kanyua Marangu v Wells Fargo Limited [2014] KEHC 2290 (KLR)***, where the Plaintiff therein was awarded Kshs. 3,500,000 for suffered severe injuries including compound skull fracture, fractured teeth, brain trauma, skull defect, memory lapses visual impairment among others.
56. The injuries in these authorities were extremely severe and are not comparable to those sustained by the Respondent herein. The Plaintiffs in those cases underwent head surgeries, were admitted for extended periods in hospital, and were left with deformities and unsightly scars beyond the visual challenges. By relying on such authorities, the Trial Court equated the Respondent's injuries with far more grievous harm.
57. I have also noted the authorities cited by the Appellant ***Jalda Essa Diba T/A Diks Transporters & Another v Joseph Mbithi Isika [2013] eKLR*** and the case of ***Mercy Njoki v Tiny M Royal Co. & anor [2016] eKLR***. The injuries are almost similar where in the latter the Plaintiff was awarded Kshs. 300,000 for injuries of perforation of left eye with soft tissue injuries and an award of Kshs.300,000/= made save for the fact that the cases are old.

58. In the present case, I am guided by the following authorities noting that no accident results in the same injuries and further the assessment of damages cannot be expected to achieve mathematical precision:

- a) ***Glad Toto Apartment Limited v Mugasia [2025] KEELRC 3721 (KLR)*** injuries as corneal perforation, lens rapture and ureal prolapse which resulted to permanent blindness on the right eye. The injury was classified as maim with the degree of permanent incapacity of the right eye at 100%. And was awarded Kshs. 2,000,000
- b) In ***Peter Oduor Shikuku versus Magnum Engineering & General contractors Limited & Another (2021) eKLR*** the victims were awarded Kshs 2,000,000 for injuries of loss of one eye with 30% degree of permanent incapacity.
- c) In ***Kariuki v Shakombo [2024] KEHC 4432 (KLR)*** the Court on appeal upheld an award of Kshs. 1,700,000. The injuries sustained were a deep cut to the left eye brow involving conjunctiva, a deep cut to the left eye brow involving nasal bridge, Laceration of the eft eye brow, Blunt trauma to the left lower back and Posttraumatic loss of vision to the left eye with conjunctivitis.

59. In the premises, I am persuaded that the award made by the Trial Court was manifestly excessive. It does not reflect a judicious assessment warranting the exercise of discretion and interference by this Court.

Special Damages

60. Special damages must not only be specifically pleaded but must also be strictly proved. The law requires that a claimant set out the precise sums claimed in the pleadings and thereafter tender credible evidence in support.
61. The Appellant pleaded special damages of Kshs. 44,850 but the totals are actually Kshs. 48,400 the Court awarded Kshs. 49,350 the figure that was submitted by the Respondent. Obtaining the Police abstract and the P3 form expenses have not been proved.
62. In light of the foregoing, the award for Special Damages as granted by the Trial Court is hereby set aside and substituted with one of Kshs. 48,400.
63. Accordingly, the Appeal herein succeeds to the extent that;
- a) **The award of General Damages in the sum Kshs. 5,000,000 is set aside and substituted by an award of Kshs. 2,000,000.**
 - b) **The award for diminished earning capacity in the sum of Kshs 1,520,000 is hereby set aside.**
 - c) **The award of special damages in the sum Kshs. 49,350 is set-aside and substituted by an award of Kshs. 48,400**

Subtotal	Kshs. 2,048,400
Less 15% contribution	Kshs.307,260
Grand Total	Kshs. 1,741,140
 - d) **The Respondent shall have costs of the Appeal.**

It is so Ordered.

Signed, Delivered Virtually on Teams platform

On this 5th day of May, 2026

Mohochi S.M
JUDGE