



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYANDARUA

CIVIL APPEAL NO. E030 OF 2025

BETWEEN

DOUGLAS NYABUTO OGECHI..... APPELLANT

AND

JOHN NJEHIA NDUNG’U RESPONDENT

(Being an appeal from the judgment and decree in the Engineer Senior Principal Magistrate’s Court, SPMCC No. E070 of 2023 by Hon. E. Wanjala – Principal Magistrate.)

JUDGMENT

1. Douglas Nyabuto Ogechi, the appellant, was the defendant in the Engineer Senior Principal Magistrate’s SPMCC No. E070 of 2023. The respondent had sued for general and special damages following a road traffic accident involving motor vehicle KCK 667. He was a pedestrian along the Nairobi-Naivasha road. As a result of the accident, he sustained injuries. The learned trial magistrate held the appellant 80% liable, while the respondent was to shoulder 20% contributory negligence. The respondent was awarded Kshs. 3,603,625.60.00 in general damages before factoring in the contribution.
2. The appellant was dissatisfied with the judgment and appealed through Muchui & Company Advocates. He raised the following grounds for appeal:
 - a) The learned trial magistrate’s award of general damages for pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the respondent.
 - b) The learned trial magistrate erred in both fact and law by awarding special damages for loss of earnings which were not strictly proved.
 - c) The learned trial magistrate erred in fact and in law by awarding damages for diminished earning capacity, which was not adequately proved.

3. The respondent opposed the appeal through Murimi, Mbago & Muchela Advocates. It was contended that:
 - a) The award of general damages was commensurate with the injuries sustained by the respondent.
 - b) The award of special damages was proven.
 - c) The award for loss of earnings was justified and proven.
 - d) The award for diminished earning capacity was proven.
4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of **Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123**, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
5. Before an appellate court can modify a damages award, it must determine that a wrong legal principle was used, irrelevant factors influenced the decision, relevant factors were overlooked, or the award is excessively low or high. These standards were set by the Privy Council in **Nance v. British Columbia Electric Railways Co. Ltd. [1951] AC 601, page 613**, which stated:

The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a wholly erroneous estimate of damages (Flint vs Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.
6. The parties reached a consensus on liability, which the learned trial magistrate accepted. The appeal now concerns only damages.

7. Special damages must be both pleaded and rigorously proven. In the case of **Coast Bus Service Ltd. v Sisco & Murunga Danii & 3 Others Civil Appeal No. 192 of 1992 (unreported)**, the Court of Appeal held as follows:

We would restate the position special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damage were to be supplied at the time of the trial if at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only where the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars. [Emphasis added]

8. In his pleadings, the respondent enumerated special damages amounting to a total of Kshs.79, 200.00. During the hearing of the case, he produced only receipts totalling Kshs. 37650 in support of his claim for special damages. I therefore set aside the award of Kshs.79, 200.00, by the learned trial magistrate. It is substituted with an award of Kshs. 37,650.
9. The respondent was examined by Dr Wellington K. Kiamba, who noted that he sustained the following injuries:
- a) Midshaft fracture of the right tibia.
 - b) Proximal right fibula fracture.
 - c) Perforation of the hemidiaphragm.
 - d) Head injury leading to loss of consciousness for 10 hours.
 - e) Soft tissue injuries of the chest.
 - f) Soft tissue injuries of the lower back.
 - g) Deep laceration on the right leg.
 - h) Laceration of the right gluteal region.

10. The doctor opined as follows:

John Njihia Ndungu sustained a midshaft fracture of the right tibia, proximal right fibular fracture, perforation of the hind diaphragm, head injury, lost consciousness for 10 hours, soft tissue injuries of the chest, soft tissue injuries of the lower back, deep laceration on the right leg and laceration on the right gluteal region during his accident. The fracture of the right tibia has malunited, and the leg is deformed. He has

prominent depressed scars on the posterior of the leg where there is loss of soft tissue beneath the scars. There is also restricted movement in the right knee and ankle joints. The function of the right lower limb is reduced, and he cannot walk or stand without support (using one crutch). He has a chronic wound on the heel. He suffers from severe abdominal pain and cannot lift heavy objects. He will develop adhesions and suffer from intestinal obstruction in future. He has not resumed his usual duties and will require laparotomy. The cost of further treatment will be at least Kshs. 300,000/=. I classify the degree of injury as grievous harm. Taking all the injuries and complications into consideration, he should be awarded a permanent disability of forty per cent (40%).

11. John Njehia Ndung'u, the respondent, testified that he worked as a mechanic but did not provide proof of his earnings. The trial magistrate correctly based the compensation on the minimum wage for a general labourer, awarding him Kshs. 55,958.40 for loss of earnings, calculated as 9326.40 x 6 months. I see no reason to alter the award.
12. In awarding compensation in diminished working capacity, the learned trial magistrate was guided by the decision in **Ongata Works Ltd v Mwangi [2024] KEHC 5738 (KLR)**, where Kizito Magare J. stated:

Loss of earnings go hand in hand with the employment of the victim. loss of earning capacity of the other hand is notional. It can apply even for the unemployed.

13. In the case of **Alpharama Limited v Joseph Kariuki Cebon [2017] eKLR**, P. Nyamweya, as she then was, said of assessment of damages for diminished earning capacity:

To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired.

14. In the instant case, the learned trial magistrate applied the law correctly, and her award ought not to be disturbed.
15. The Kshs. 300,000/= award for further treatment was uncontested and will remain unchanged.
16. The appellant's appeal has partially succeeded on special damages. He will therefore have half the costs of this appeal.

Delivered and signed at Nyandarua, this 7th day of May 2026

KIARIE WAWERU KIARIE

JUDGE