



**Muriithi v My Beauty Transporters Limited & 2 others (Civil Appeal  
242 of 2019) [2025] KECA 516 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 516 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 242 OF 2019  
DK MUSINGA, F TUIYOT'T & GV ODUNGA, JJA  
MARCH 21, 2025**

**BETWEEN**

**JAMES MAINA MURIITHI ..... APPELLANT**

**AND**

**MY BEAUTY TRANSPORTERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PETER NJIHIA GITAU ..... 2<sup>ND</sup> RESPONDENT**

**TIMOTHY KINUTHIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi  
(Mwongo, J.) dated 28th September 2018 in Civil Suit No. 262 of 2014)*

**JUDGMENT**

1. This is an appeal from the judgment of the High Court at Nairobi (Mwongo, J.) delivered on 28<sup>th</sup> September 2018 in Civil Case No. 262 of 2014.
2. The dispute culminating in this appeal relates to a road traffic accident that occurred on 31<sup>st</sup> March 2013 on Koma Rock Road involving motor vehicle registration No KBT 242Q in which the appellant was a fare paying passenger. It was pleaded that the said motor vehicle overturned due to the negligence of the 3<sup>rd</sup> respondent who was the authorized driver, agent or servant of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the registered owners of the said motor vehicle. Particulars of negligence were set out in the plaint. As a result of the said accident, it was pleaded, the appellant sustained serious injuries resulting in his confinement to a wheelchair. The appellant claimed:
  - a. "Special damages in the sum of Kshs. 7,152,056.00;
  - b. Damages in respect of lost income and future living expenses, Kshs 15,500,000.00;
  - c. General damages for pain and suffering;



- d. General damages for loss of amenity and consortium;
  - e. Costs of the suit;
  - f. Interest on (a) (b) and (c) at court rates."
3. At the hearing, three witnesses gave evidence for the appellant. In his evidence, the appellant, who testified as PW1, stated: that he was a passenger in a Mitsubishi bus registration number KBT xxxQ on the way to work at Kariokor market where he was a grocer, selling cabbages; that the bus swerved and overturned and as a result, he was thrown about and sustained serious injuries, though he did not lose consciousness; that after being extricated from the wreckage, he was taken to Mama Lucy Hospital in Kayole before being transferred to Kenyatta Hospital where he was admitted for almost one month; that upon discharge, he continued to make regular return visits for check-up and therapy; that his arm and right leg were amputated, resulting in the use of prostheses; that the said prosthesis required regular service for which he spent Kshs 3,000/= per service; that at the time of his testimony, the prosthesis was in need of a replacement; and that he was subjected to regular injections and his only hope of regaining mobility was through invasive surgical procedures and arthroscopic intervention, including shoulder disarticulation modular prosthesis whose costs he obtained from doctors.
  4. The plaintiff further testified: that at the time of the accident, he was thirty five years old and had lost all prospects of continued employment; that he reasonably expected to continue in his work for a further twenty five years; that, as a result of the accident, he would have to rely on a caretaker all his life to assist him with mobility and day -to- day functions; and that he has unrelenting soreness and pain.
  5. It was the appellant's evidence: that he earned a monthly income of about Kshs 30,000 at an average of Kshs 700 per day; that he never kept any documents or receipts to show his income; that as a result of the accident, he was left at the mercy of friends, brothers and parents for his survival; that his wife had no serious work, while his three year old son was in a kindergarten; and that he was spending about Kshs 15,000 per month on movement using taxis and for other needs.
  6. Finally, as regards his marital life, the appellant testified: that as a man without money, life was very difficult; that his wife was his main caretaker; and that although he had generally healed, he was still badly off psychologically.
  7. Prof. Kiama Wangai, PW2, an advocate and professor of medical law & forensic medicine, produced a medico-legal report dated 5<sup>th</sup> December 2013 which disclosed that the appellant sustained the following injuries:

“Frictional burns over the lower abdomen, Frictional buns on both thighs, Crush injury right lower limb with eventual below knee amputation, Crush injury left upper limb with eventual disarticulation, Pains, blood loss and soft tissue injuries.”
  8. In PW2's prognosis, the appellant had significantly recovered from the injuries, and would benefit from functional prosthesis whose cost he estimated at Kshs 400,000 for the lower limb and Kshs 1,000,000 for the upper limb. He assessed permanent functional disability at 50% for each of the lower and upper limbs. In his evidence, at the time of his testimony, the estimates could be 800,000/- for lower limb and 1,800,000/- for upper limb prosthesis and that during the plaintiff's remaining lifetime, he would need to change his prosthesis three to four times.
  9. Peter Ongubo PW3, an Orthopedic Technologist, specializing in prosthetics and orthotics prepared and produced a Quotation dated 24<sup>th</sup> April, 2017 by Gateway Prosthetics and Orthotics Limited. The quotation included a below knee prosthesis at Kshs 301,600 and two options for shoulder



- disarticulation prostheses: Option A for Kshs 551,080 and Option B for myo-electric shoulder prosthesis for Kshs 6,500,000. It was his testimony that the appellant visited his office in 2013, when, upon examination, he prepared the first quotation. He explained in details the functioning of the prostheses and the differences in the models in the different options. Option A, he said, has a lifespan of 5-6 years and gives only 10% use and has a replaceable glove of Kshs 30,000 – Kshs 40,000 that lasts about a year. Option B uses electrodes and muscles and has up to 70% functional use. It has parts such as batteries and electrodes and can last 4-6years. In his opinion, the latter quotation was the better option although it did not include physiotherapy costs because his company was not offering such services.
10. On behalf of the respondents, Peter Gitau, DW1, testified: that he had been a driver for 17 years; that on the material day, he was driving vehicle registration No KBT xxxQ from Nairobi towards Dandora at about 40 km per hour when suddenly a boda boda motorcycle carrying a lady and a child overtook him and swerved back onto his lane; that to avoid hitting them, he swerved sharply to the right as there was a trench on his left; that there was another car approaching from the opposite direction, so he drove onto the pavement on the right-hand side of the road but the vehicle lost control and overturned on the passenger side; that he could not apply the emergency brake because the boda boda was too close, and in any case, his vehicle would not have stopped immediately; and that he was aware that the appellant got injured as a result.
  11. DW 2, Anthony Wainaina Gichina, the conductor of the accident vehicle, recalled seeing the appellant seated not far from him. He recalled that the appellant was wearing a seatbelt, because he had told the passengers to wear them. In cross examination, he said that he became unconscious when the accident occurred, and regained consciousness when he was in hospital.
  12. In his judgement, the learned Judge found that both the ownership of the vehicle and the person driving it were proved; that from the evidence, the accident vehicle was being driven fast and that the driver was incautious and had poor judgment in swerving to overtake instead of braking if indeed he was driving only at 40kph; that DW1 underestimated the use of brakes as a main tool of safety; and that he was wholly to blame for the accident hence the 1<sup>st</sup> and 2<sup>nd</sup> respondents were vicariously liable.
  13. On quantum of damages, the learned Judge awarded: Kshs 4,200,000.00 for pain and suffering; Kshs 150,000.00 for loss of amenities; and Kshs 1,352,400.00 for future medical costs and wheelchair. The learned Judge, however, declined to award damages for loss of consortium on the basis that the appellant, as opposed to his wife, could not claim loss of consortium. He also declined to make an award in respect of loss of earning capacity for lack of proof.
  14. In this appeal, the appellant challenges part of the said judgement on the ground: that the learned Judge failed to consider that being, in an informal sector, the appellant did not keep detailed books of accounts and therefore ought to have taken into account secondary evidence of earnings instead of denying the appellant the award in respect of loss of earning capacity in its entirety; that the learned Judge erred in awarding the appellant Kshs 650,000 for loss of shoulder disarticulation prosthesis instead of Kshs 6,500,000 in light of the clear evidence of the current market cost of the same; that the learned Judge erred in failing to consider that both the shoulder disarticulation prosthesis and the lower limb prosthesis require replacement costs which ought to have been factored in the award for damages; that the learned Judge erred in failing to consider the evidence adduced in court by the appellant in support of loss of consortium; and that the award was, based on the cases cited, not fair and commensurate.
  15. It was sought that the appeal be allowed and that the award be enhanced.
  16. We heard the appeal on the Court's virtual platform on 19<sup>th</sup> November 2024 when the appellant was represented by learned Senior Counsel, Mr Charles Kanjama, who appeared with Mr Vincent



Anyona. Mr Kanjama relied on the written submissions filed on behalf of the appellant which he briefly highlighted. The respondent neither filed submissions nor appeared at the hearing despite due service of the hearing notice.

17. In his submissions, the appellant cited: *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 highlighting the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions; *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR and *Samuel Osoro Nyamwaro & 2 Others v Boniface Kamau & Another* [1995] eKLR submitting on the principles that underlie the interference by an appellate court on award of general damages; *Jacob Ayiga Maruja & b Another v Simeone Obayo* [2005] eKLR and *Kimantu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR; [2007] 1 EA 139 on what amounts to proof of earning capacity; *Jackson Mutuku Ndetei v A. O. Bayusuf & Sons Ltd* [2007] eKLR in support of an award of Kshs 1,000,000 for knee prosthesis; *Best v Samuel Fox & Co. Ltd* [1951] 2 KB 639 and *Kimotho & Others v Vesters & Another* [1988] KLR 48, *PBS & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others* [2016] eKLR and *Salvadore De Luca v Abdullahi Hemedi Khalil & Another* [1994] eKLR in support of the submissions for an award in respect of loss of consortium.
18. It was submitted that the learned Judge erred in his decision as regards awards for loss of earning capacity, shoulder disarticulation prosthesis and loss of consortium. In the appellant's submissions, the awards in respect thereof should be enhanced to Kshs 200,000, Kshs 6,000,000 and Kshs 6,500,000 for loss of consortium, loss of earning capacity and shoulder disarticulation prosthesis respectively.
19. We have considered the submissions filed as well as the oral address by Mr Kanjama during the plenary hearing. The principles guiding the award of damages and the appellate court's power to interfere therewith are now well established. This Court in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, held that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties... The quantum of damages being a question of fact for the trial Judge the...question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff.

20. Therefore, in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] 2 KLR 55 the Court set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”



21. This Court appreciates that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as the Court's views. See *Sheikh Mustaq Hassan v Nathan Mwangi Kamau & 5 Others* [1986] KLR 457.

22. The appellant, while giving evidence on loss of earning capacity, testified that:

“Before the accident, I was working at Kariokor market selling cabbages and other goods. Monthly, I earned 30,000/=. The accident occurred on 31/3/2013...When working you can earn 200 or 700 for example. Per month it was about 30,000/=. There were no receipts because I was doing for cash.”

23. In respect of this claim, the learned Judge expressed himself as follows:

“...loss of earning capacity must be predicated on documentation that discloses ascertainable figures which are intended to be relied upon in assessing the damages payable. At no time has the plaintiff been able to produce a single document on which the figures he claims for loss of earning capacity are predicated. For lost income, the plaintiff's calculation is based on an income of 20,000/-, for which he supplied no documentary evidence. Further, in his oral evidence he said he earned, say, 300-700/- daily, which in any case would not add up to 20,000/- per month. He did not provide evidence that anyone depended on him, nor did he call anyone to support the allegation that he worked as a grocer. It is insufficient to throw figures at the court and ask the court to assess damages. On what basis can this court find that the plaintiff was earning 20,000/- monthly.”

24. While it is trite that damages ought to be proved and it is not enough to simply throw figures at the Court saying, “this is what I lost, award it to me”, the law, as pronounced by this Court in *Jackson K Kiptoo v The Hon Attorney General* [2009] KLR 657 is that:

“...the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

25. This Court in *Jacob Ayiga Maruja & Another v Simeon Obayo* (supra), while rejecting the contention that only documentary evidence can prove earnings, did not:

“...subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways.”

26. Similarly, the Court in *Wambua v Patel & Another* [1986] KLR 336 appreciated that in that case the evidence of the deceased earnings was:

“...a very poor account. Although he appeared to be a man of enterprise and somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So all his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 years cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. The figures he gave as his business earnings and expenditure must be considered with great care. Nevertheless, the court is satisfied that he was in the cattle trade and earned his livelihood



from that business. A wrongdoer must take his victim as he finds him and the defendants ought not to be heard to say that the plaintiff should be denied his earnings because he did not develop more sophisticated business methods. Whereas damages for loss of earnings must be established by satisfactory evidence and the evidence should appreciate that, the court should approach the consideration of the plaintiff's evidence with caution and must not allow him to "pluck a figure from the air", a victim does not lose his remedy in damages merely because its quantification is difficult."

27. In the instant case, the learned judge seemed to have taken the appellant's lack of sophistication in keeping his records against him. In our view, an amount of Kshs 300 – Kshs 700 per day cannot be deemed to have been unreasonable. In our view a sum of Kshs 500 per day ought to have been a reasonable sum in the circumstances. That would translate to Kshs 15,000 per month. Since the appellant was 35 years at the time of the accident, we would adopt a multiplier of 20 years considering that he will get a lumpsum. We therefore set aside the order disallowing the appellant's loss of earning and substitute therefor an award of Kshs 3,600,000.

28. As regards, the cost of prosthesis, the learned Judge was of the view that:

"I do not think it prudent to make an award in favour of an exceedingly specialised piece of equipment in an environment such as we have in Kenya where there is a risk that only one person can effectively service it.... I have also taken into account the evidence and explanations given by PW3, Peter Ongubo of Gateway Prosthetics. The 2017 quotation by PW 3, was for Dynamic foot prosthesis at Kshs 301,600; For shoulder disarticulation prosthesis he gave Option A from China without a warranty and Option B was from Germany with a warranty of four years. Option A cost 551,080 and Option B cost Kshs 6,500,000. I note that other than these Chinese and German options, other makes and types of prostheses were not availed for comparison, so that only limited choices were availed. Given all the circumstances, and in light of comparative awards, I award as follows: Below knee prosthesis Kshs 520,000 as proposed by the defendants, and for Shoulder Disarticulation prosthesis I award Kshs 650,000."

29. We are unable to see the justification for disagreeing with the expert evidence of PW3. The learned Judge took issue with limited options presented before the court. In our view, there is no prescribed number of options for future medical treatment that ought to be availed before the court can determine the costs. If the respondent believed that there were cheaper options available in the market, nothing stopped them from availing evidence in that regard. The learned Judge's view that there could be cheaper options amounted, in our respectful view, to speculation. As a rule, expert evidence is entitled to the highest possible regard.

Although a court must form its own independent opinion based on the entire evidence before it and is not bound to accept and follow it as the truth under any circumstances, such evidence must not be rejected except on firm grounds. This Court appreciated in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* (supra) that:

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."





30. In our view, there was no proper and cogent basis for disagreeing with PW3’s opinion. We allow this ground, set aside the award of Kshs 650,000 in respect of shoulder disarticulation prosthesis and substitute therefor an award of Kshs 6,500,000.

31. Regarding loss of consortium, this Court in *Kimotho & Others v Vesters & Another* (supra) cited the definition of “consortium” in *Best v Samuel Fox & Co. Ltd* [1951] 2 KB 639 as:

“companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state.”

32. In determining whether the claim in respect of loss of consortium was merited, we are persuaded by the decision of Emukule, J. in *Mwaura Muiruri v Suera Flowers Limited & Another* [2014] eKLR that:

“This claim can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A plaintiff who has himself suffered any injuries and as a result is unable to perform his marital duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium. It was the Plaintiff’s testimony that since the accident, he had been unable to perform sexual relations with his wife. However, I have carefully perused the medical reports and find that the Doctors who examined the Plaintiff did not find that the injuries sustained by him hindered his ability to fulfill his marital duties in any way. In addition, the Plaintiff did not raise any such complaint at the time of examination to enable the doctors assess the same. For this reason, I find that the claim of inability to perform sexual relation has not been proved. I will therefore disregard the Plaintiff’s claim under this head.”

33. Whereas the claim for loss of consortium could have been available to the appellant’s spouse had evidence been laid in support thereof, it certainly was not available to the appellant himself. This ground of appeal lacks merit and is disallowed.

34. In the premises we allow the appeal to the extent of loss of earning capacity which we award in the sum Kshs 3,600,000 and enhance the award in respect of shoulder disarticulation prosthesis from Kshs 650,000 to Kshs 6,500,000.

35. The costs of the appeal are awarded to the appellant.

36. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**D. K. MUSINGA, (PRESIDENT)**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**



I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

