Epuret v Kioko & 2 others (Civil Appeal E367 of 2024)
[2025] KEHC 3991 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3991 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E367 OF 2024

J NGAAH, J

MARCH 28, 2025

BETWEEN

PETER EBUYA EPURET ..... APPELLANT

AND

TIMOTHY NGUI KIOKO ..... 1ST RESPONDENT

REUBEN MULWA KIOKO T/A KIOKO ENTERPRISES ..... 2ND RESPONDENT

PATRICK LUMUMBA KIMUYU ..... 3RD RESPONDENT

(Being an appeal from the judgment of Resident Magistrate, Honourable Noelyne Ake delivered on 4 October 2024 in Chief Magistrates Court Civil Case No. E534 of 23023; Peter Ebuya Epuret versus Timothy Ngui Kioko & 2 Others)

JUDGMENT

1. On or about 27 March 2023, in the evening, the appellant was riding a bicycle along Mijikenda Street near Unigroup area, in Mombasa, when he was knocked down by motor vehicle, registration number KCZ 984R/ZD 6838. The vehicle belonged to the 1st and 2nd respondents and, at the time of the accident, it was being driven by the 3rd respondent. As a result of the accident, the appellant sustained severe bodily injuries.

2. The accident, according to the appellant, occurred because of the carelessness of the 3rd respondent in driving or controlling the vehicle causing it to lose control, veer off the road and knock down the appellant. Accordingly, the appellant sued the respondents, jointly and severally, for general and special damages in the magistrate's court.

   The respondents, on their part, opposed the suit and filed a statement of defence to that effect.

3. In her judgment, after the trial, the learned magistrate held the respondents solely responsible for the accident and awarded the appellant Kshs. 200,000/= as general damages and costs of the suit.

She, however, did not make any award on special damages; damages on loss of earning capacity; and, damages for future medical expenses which the appellant had also sought in his suit.

4. The appellant was thus dissatisfied with the learned magistrate's decision and hence this appeal. In the memorandum of appeal dated 24 October 2024, the appellant has raised the following grounds:

    1. That the learned trial magistrate erred in fact and law by writing a judgment that is not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable law and principles for awarding of damages.

    2. That the learned trial magistrate erred in law and in fact in awarding the appellant general damages for pain and suffering of Kshs. 200,000/= which is manifestly low in the circumstances.

    3. That the learned trial magistrate erred in law and in fact by failing to assess and make an award on general damages for diminished earning capacity and future medical expenses in favour of the Appellant.

    4. That the learned trial magistrate erred in law and fact in failing to award the appellant special damages thus constituting a miscarriage of justice in the circumstances of this case."

5. The appellant prays that the appeal be allowed and, in particular, the judgment and decree of the magistrates' court be set aside in their entirety; that this Honourable court assesses afresh general damages for pain and suffering and also special damages, future medical expenses and diminished earning capacity.

The appellant has also sought for costs of the appeal.

6. In Mwanasokoni v Kenya Bus Services Ltd (1985) eKLR it was held that although an appellate court on appeal will not lightly differ from the judge at first instance on a finding of fact, it is undeniable that the appellate court has the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. In so holding, the Court of Appeal followed the decision of the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983 where it was held:

> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

7. Again, in Peters v Sunday Post Ltd (1958) EA 424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

> "It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

8. Thus, this Honourable Court has the obligation, in exercise of its appellate jurisdiction, to evaluate the evidence at the trial and make its own factual findings that may either be consistent with or vary from those conclusions reached by the lower court. Regardless of the conclusions this court reaches, it is bound to bear in mind that the lower court had the advantage, which this Court does not have, of seeing and hearing the witnesses.

9. The record shows that corporal Evaline Moturi from Makupa police station testified as the first plaintiff witness and all she did at the hearing was merely to produce the police abstract of the report made to the police on the occurrence of the accident. Dr. Pamus Wambua Kiema testified as the second witness for the plaintiff and, like the first witness, he did not state anything more than produce a medical report of his examination of the plaintiff after the accident. The plaintiff himself testified last. His brief testimony was as follows:

> " I produce my documents. I produce the documents as exhibit Pexh 1-8"
>
> In answer to questions put to him during examination, he testified as follows:
>
> " I still take medicine. I was taken to general hospital. Investigations were done. I was admitted for one week."

10. On the part of the defence, Patrick Lumumba Kimuyu simply told the court that he was adopting his statement as evidence. It is on cross-examination that he testified that:

> " I did not step on anyone. He fell down and hit the vehicle. I was the driver."

11. The matter was then reserved for judgment. The learned magistrates' judgment is rather short. All that she said is this:

> " The plaintiff instituted this suit against the defendant vide a plaint dated 14.8.23 for inter alia general and special damages for an accident that occurred on 27.3.23 against the defendants who failed to enter appearance despite service and the matter proceeded for hearing. The issue for determination is whether the plaintiff has established his case against the defendants. I am guided by the case of Miller vs Minister of Persons (1947) 2LL ER 372. Where the court held that proof of balance of prependence (sic) of probabilities means a win. However, narrow a draw is enough. In the case of William Kabogo Gitau vs George Thuo and 2 others.
>
> The court held that in ordinary civil cases, a case maybe determined in favour of party persuades the court that the allegations he has pleaded in his case are more likely than not to be more than what they look like.
>
> In this particular matter the defendants did not enter appearance. It follows therefore that liability is apportioned at 100% against the defendants. On special damages, the same should always be pleaded, the plaintiffs gave a breakdown of the stated amount. In regards to general damages. On general damages the plaintiff suffered the following injuries.
>
> 1. Pain on the right foot
> 2. Difficulties in walking
>
> In the above circumstances I therefore award general damages at Kshs.200,000/= judgment is therefore entered as above stated and costs of the suit from date of institution and interest thereof."

12. The respondents filed a statement of defence and, it is even clear from the record and the judgment of the court that the 3rd respondent testified. It is, therefore, clear from the outset that statement by the learned magistrate that the respondents did not enter appearance and, impliedly, the case proceeded

without the participation of the respondents is against the evidence on record. As far as the injuries sustained by the appellant are concerned, they were pleaded and particularised in the plaint as follows:

> " Crush/degloving injury to the right foot
>
> Fracture right medial malleolus
>
> Periosteal stripping distal fubula bone
>
> Permanent disability assessed at 25%
>
> Present condition; -
>
> Pain on the right foot
>
> Difficulties in walking"

13. It is clear that, contrary to the appellant's pleadings, the learned magistrate erroneously captured the appellant's condition as at the time of filing suit as the injuries he sustained in the road traffic accident. She overlooked the injuries as pleaded and, as will become clearer in due course, as proved by medical evidence.

14. In his witness statement which he adopted as evidence, the appellant testified that:

    4. That as a result of the accident, I sustained injuries to wit; crush/degloving injury to the right foot, fracture on the right femur medial malleolus, periosteal stripping on the right distal fibula bone and permanent disability rated at 25%.

    5. That Doctor Kiema in his medical report dated 30/03/2023, opined that the degree of permanent disability which assessed at 25%, due to deformity on the right ankle/foot with arthritis and stiffness of the right ankle/foot rendering the foot practically useless equivalent to an amputation, a lifetime of recurring post-traumatic pains right ankle/foot, and highly diminished capacity to work and in undertaking other activities of daily living."

15. This evidence is consistent with the evidence of Dr. Darius Wambua Kiema who examined the appellant three days after the accident and established that the appellant sustained injuries that he described as "crush/degloving injury right foot; fracture right medial malleolus; and periosteal stripping right distal fibula bone".

16. In the doctor's opinion, the injuries had led to post traumatic deformity right ankle/foot, arthritis and stiffness right ankle/foot; a lifetime of post traumatic pains right leg/ankle/foot especially when walking or working and during periods of cold weather. He also established that the fracture sites had become a point of weakness and could easily fracture in future. The appellant is also said to have suffered a highly diminished capacity to work and undertaking other daily life activities.

17. These findings, critical to assessment of the extent to which the appellant sustained injuries are represented in the medical examination report by Dr. Kiema dated 30 March 2023. For the record, this report was admitted in evidence.

18. It is clear from the learned magistrate's judgment that she did not consider this evidence before she made her award. Where there is such obvious disregard of evidence or a misdirection on the evidence by the lower court, this court is entitled to intervene and upset the impugned judgment.

19. In Butt v Khan [1978] KECA 24 (KLR), the Court of Appeal held that, where it can be demonstrated that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low, an appellate court will be

entitled to disturb an award of damages. Where the award is tainted by these infractions, it represents an erroneous estimate.

20. Speaking of principles, the Court of Appeal outlined the principles to be considered in award of damages in Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KECA 21 (KLR) where Kneller JA, held as follows

> " The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by this court to an award of damages by a trial judge:
>
> 1. each case depends on its own facts;
> 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
> 3. comparable injuries should attract comparable awards;
> 4. inflation should be taken into account; and
> 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."

21. The last principle must be reiterating the point that the appellate court will interfere with the award if the award is based on an application of a wrong principle, or misdirection on evidence or if the award is, on the face of it, an erroneous estimate because, contrary to the available evidence, it is either too high or too low.

22. Besides ignoring the evidence available as to the extent of the injuries sustained by the appellant, the learned magistrate did not make any reference to any of the decisions with which she was presented by the disputants as the comparable decisions from which she could make a comparable award.

23. It follows that the award of Kshs. 200,000/= as general damages, has neither legal nor factual basis, and; as was held in Butt v Khan (supra), it is obvious here that that the learned magistrate ignored the principles on award of damages and either ignored or misapprehended the evidence with which she was presented in some material respect. Consequently, she arrived at a figure which was not only inordinately low but was also an erroneous estimate.

24. It is also rather disturbing that the learned magistrate could make such an award when the respondents were prepared to pay at least Kshs. 800,000/= as general damages. To quote the respondents in the submissions filed in the magistrates' court:

> " Your Honour, the most reliable information regarding the Plaintiff's injuries is the Treatment Notes Referral Hospital which confirms the injuries sustained by the plaintiff.
>
> Further, the Plaintiff further underwent a Medical Examination and Medical Report prepared by Dr. Darius W. Kiema dated 30th March 2023 and produced as Pexh-5 made reliance to the said Treatment Notes.
>
> The doctor's report concurred with the treatment notes and assessed permanent incapacity at 25%.
>
> In view of the foregoing, we humbly submit that an award of Kshs. 800, 000/= would be sufficient compensation for the injuries sustained."

> In proposing the said award, we rely on the case of China Wu Yi Company Ltd v Stephen Muniu Kinyanjui [2021] eKLR where the Plaintiff in the case had sustained comparable injuries to the matter herein to wit; fracture dislocation of tarsal-metatarsal joint right foot and degloving injury medical aspect right foot. The trial court assessed general damages at Kshs. 800,000/=. On appeal, Learned Judge E.K Ogola in upholding the said award in November 2021 cited with approval the case of Kiru Tea Factory & another v Peterson Watheka Wanjohi [2008] eKLR where the court upheld the award of kshs. 800,000/- where the plaintiff had the following injuries..."

25. The learned magistrate did not proffer any reason why she could not, at the very least, award the sum proposed by the respondents themselves following the decisions to which she had been referred as cases where comparable awards had been made for comparable injuries.

26. The claim for loss of future earning capacity was pleaded but no proof was provided to the effect that the appellant was employed as a security guard and was earning Kshs. 15,000/= as alleged. The court could not proceed on the assumption that the appellant was employed and earning as alleged. But that does not necessarily mean that the appellant is not entitled to award of damages for loss of earning capacity. All it means is that assessment of damages for such a loss cannot be pegged on the assumption the appellant was employed and earning an ascertained regular income when no evidence has been provided in proof of this fact.

27. To put it straight, the award would be made whether or not there is proof that the claimant was in gainful employment at the time of the accident. This point was taken in SJ v Francesco Di Nello & another (2015) eKLR and Mumias Sugar Limited v Francis Wanalo (2007) eKLR which were cited with approval in Nyatogo v Mini Bakeries Limited [2023] KEHC 1593 (KLR). In SJ v Francesco Di Nello & another the court held that:

> " Claims under this (sic) heads of loss of future earnings and loss of earning capacity are distinctively 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. 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 of general damages once proved..."

28. And in Mumias Sugar Limited v Francis Wanalo the court held thus:

> " 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 of the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market, while the justification for the award where the plaintiff is not employed at the date of the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future..."

29. The Court of Appeal had occasion to address the distinction between loss of future earnings and compensation for diminution of earning capacity in William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR). The court held as follows:

> " Now, there was no evidence of what the respondent had earned before the accident either as an unqualified nurse or the wife of a farmer at Nakuru, so this was not a claim for 'loss

of future earnings'. It was, as the learned judge described it, for a 'loss of earning capacity' which she suffered and this should be part of the general damages for her disabilities and not compensation, for future loss of earnings. The respondent would be at a considerable disadvantage or, indeed, without any hope in the labour market because of her injuries. There are no reported decisions of any court in this part of the world for all this.

The English law on the issue is this: The respondent brought this action for damages and she had to prove her damages. Lord Goddard CJ in Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177.

Sometimes it is impossible, though the justice of the case requires some award to be made or as Holreyd LJ said, in Daniel v Jones [1961] 1 WLR 1103, 1109:

"…. Arithmetic has failed to provide the answer which common sense demands."

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.

Ashcroft was a skilled precision engineer who, at the age of 57, was injured by Curtin in a traffic accident. He was left with tinnitus and disturbance of his balance for the rest of his life. 'He was no man at keeping accounts' so he could not quantify his private company's loss but had he had to find work outside his company, for which he had been trained since he was 14, which was a real risk, he would be greatly handicapped and he was entitled to compensation, which was put by the Court of Appeal, in late July, 1971, at Pound Sterling 2,500.

It 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 in this way:

"… 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."

Lord Denning MR in Fairley v John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40, 42 (CA).

These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were 'plucked from the air'. Later, in England, damages under this head had to be separately quantified: Jefford v Goe [1970] 2 QB 130, and no interest is recoverable on them: Clark v Rotax Aircraft Equipment Ltd [1975] 1 WLR 1570.

Guidance on the principles for assessing such damages were given by the same Court of Appeal in Moeliker v Reyrolle & Co [1977] 1 WLR 132 by Brown LJ in this form.

The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court

can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can." (Emphasis added).

30. Being a claim in general damages, the court has to do the best it can to reach a particular figure. In the decision cited above, Chesoni, JA held that though awarded as general damages, the award under this head could still be made independently. The learned judge held:

> " Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in Fairley v John Thomson [1973] 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of the result of the injuries suffered in this case, I would not consider too excessive as to justify this court's interference."

31. It follows that the appellant would be entitled to an award of general damages for loss of earning capacity. An important factor that I must consider in assessment of damages in this respect is that the appellant was aged 60 at the time of accident. I have also to take into account the doctor's assessment that the appellant's disability was rated 25% "due deformity right ankle/foot with arthritis and stiffness right ankle/foot rendering right foot practically useless equivalent to an amputation." According to the doctor, the appellant was going to endure a lifetime of recurring post traumatic pains in the right ankle and what he described as a "highly diminished capacity to work" and undertake other activities.

32. As far as the award under the head of pain and suffering is concerned, there is also no doubt that the appellant endured considerable pain at the time of the accident and even thereafter. The evidence presented before the lower court revealed a rather ghastly open wound on the appellant's foot, showing the outer skin and sinews on that part of the body had been ripped off. According to the doctor, he will endure post traumatic pains at his right foot or ankle for the rest of his life. A 'release form' from Coast General Teaching and Referral Hospital shows that the appellant was admitted in hospital on 27 March 2023 and discharged on 28 March 2023.

33. There is, therefore, sufficient basis for award of damages for pain and suffering. Taking all these factors into account, and doing the best I can in these circumstances, I hereby do enhance the general damages and award a global sum of Kshs. 1,000,000/=. For the avoidance of doubt, the general damages here include, damages for pain and suffering and diminished earning capacity.

34. As far as special damages are concerned, it is trite that they have to be specifically pleaded and proved. In his plaint, the appellant pleaded these damages as follows:

> "Particulars of special damages

Motor vehicle search Kshs. 1, 100/=Medical reports Kshs. 2,0001=Hospital expenses Kshs. 196,9001="

35. These figures are, however, at variance with what the counsel for the appellant submitted as the special damages due. The submissions in respect of special damages were as follows:

> " Medical report from Dr. Darius Kiema Kshs. 2000/=
>
> Motor vehicle search Kshs. 1,100/=
>
> Treatment Costs Kshs. 11,000/=

36. This brings the figure of the total special damages to Kshs. 14,100/=. Indeed, the evidence of receipts for payments made to Coast General Hospital, Adonai Medical Centre, My Clinic hospital and payments for the auxillary crutches add up to this figure. Considering the plaintiff's expenditure under this head was not contested, the appellant was entitled to this amount and there is no reason why the learned magistrate did not award it.

37. As far damages under the head of future medical expenses is concerned, it is apparent from the plaint that the appellant pleaded for these damages. In terms of proof, the only evidence that such expenses will be incurred was provided by Dr. Darius Kiema who in his report, admitted in evidence, opined that:

> " He will incur future medical expenses related to;
>
> 1. Purchase of painkillers and joint/bone medication estimated at KES3,000 per month for at least one year.
> 2. Physiotherapy sessions estimated at 650 per session at Coast General Teaching and Referral Hospital for 40 sessions totalling KES 26,000.
> 3. Provision for future corrective surgery/skin grafting right foot/ankle at Coast General Teaching & Referral Hospital estimated at Kes 120, as per NHIF surgical package."

37. The circumstances under which damages can be made under this head is a question that was discussed by the Court of Appeal in Tracom Limited & another v Hasssan Mohamed Adan [2009] KECA 48 (KLR). In that case, the Court of Appeal relied on medical reports as sufficient proof of the need of future medication and, therefore, future medical expenses. An award can be made on this basis. To quote the learned judges of the Court of Appeal:

> " It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e, that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will need future medication is not in our mind in dispute. Of the two reports suggesting amounts needed, the Kenyatta Hospital report which suggests approximate figure of Ksh.100,000/= per year was prepared on 23rd December 1999. It is instructive that Dr. Shah's report made about three months later said the left hip was fusing and Osteomyelitis was settling down such that in his mind respondent was unlikely to need any further operation. Dr. Wangai's report made three years later suggested only Ksh.50,000/= for future medical expenses. Thus there was some evidence of progressive drop in the need for future medication. The amount of Ksh.50,000/= that the learned Judge of the superior court used as the amount that would be required every year was an amount suggested by the respondent's counsel in her submission. The learned Judge referred to it as a reasonable and fair amount in the circumstances. He, with respect did not consider that that was the amount as at the time the report was made in May 2003. He also did not consider that it reflected a 50% decrease from the amount in Kenyatta Hospital report made in December 1999. In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award – see the case of Henry H. Ilanga vs. M. Manyoka [1961] EA

705 at page 713. In this case, as we have stated, the learned Judge failed to consider what he should have considered. Hence we are entitled to interfere with the award of Ksh.50,000/= per year on this head. We reduce it to Ksh.40,000/= per year."

37. Taking cue from this decision, and considering the evidence by Dr. Kiema was not disputed, I would award the appellant the sum of Kshs. 170,000/= under this head.

38. Ultimately, the appellant's appeal is allowed and the judgment of the learned magistrate is set aside. Except for the order on costs, her award is substituted with the following awards:

    1. General damages Kshs. 1,000,000/=

    2. Special damages Kshs. 14,100/=

    3. Damages for future medical expenses Kshs. 170,000/=

The appellant will also have costs of the appeal and, of course, the costs in the lower court. The appeal is allowed in those terms. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 28 MARCH 2025

NGAAH JAIRUS

JUDGE