



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chepkwony v Chepkwony & another (Civil Appeal E044 of 2022)  
[2025] KEHC 10013 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 10013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E044 OF 2022  
GL NZIOKA, J  
APRIL 29, 2025**

**BETWEEN**

**MICHAEL CHEPNGENO CHEPKWONY ..... APPELLANT**

**AND**

**BETSY C CHEPKWONY ..... 1<sup>ST</sup> RESPONDENT**

**ELIAS MWAURA KAMANDE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the decision of Honourable E. Cherop Resident Magistrate  
delivered on 17th day of May, 2022 vide Naivasha CMCC NO. 506 of 2016)*

**JUDGMENT**

1. By a plaint dated 29<sup>th</sup> June 2018 and amended on 9<sup>th</sup> July, 2019, the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) seeking for judgment against the respondents for: -
  - a. General damages and damages for loss of earnings and earning capacity.
  - b. Future medical expenses and operations.
  - c. Payment for physiotherapy
  - d. Special damages of Kshs. 11,175
  - e. Costs and Interest of this suit
  - f. Interest on (a), (b) and (c) above at court rates
2. The cause of action arose from a road traffic accident that occurred on or about 8<sup>th</sup> January 2016, in which the appellant sustained bodily injuries. The appellant pleaded that, he was lawfully travelling along the Maai Mahiu – Narok road in motor vehicle registration No. KCB 427Y which is registered, beneficially owned and/or insured by the 1<sup>st</sup> respondent.



3. That at Suswa area, the 1<sup>st</sup> respondent's servant, agent or employee drove the motor vehicle negligently and as a result it collided with motor vehicle registration No. KBY 823G which is registered, beneficially owned and/or insured by the 2<sup>nd</sup> respondent.
4. That as a result of the accident, the appellant sustained the following injuries:
  - a. Fracture dislocation of the right hip joint;
  - b. Displaced fracture of the right tibia and fibula;
  - c. Displaced fracture of the left tibia and fibula;
5. The appellant attributed the cause of the accident to both respondents. The particulars of negligence attributed to the 1<sup>st</sup> respondent's agent are tabulated at paragraph 6 of the plaint and of 2<sup>nd</sup> respondent's agent, servant or driver at paragraph 7 of the plaint.
6. However, the 1<sup>st</sup> respondent filed a statement of defence dated 9<sup>th</sup> August 2016 and denied that she was the registered owner, beneficially owner and/or insured of the motor vehicle registered KCB 427Y. She further denied that the accident occurred as alleged, and/or the appellant was a lawful passenger in the subject vehicle.
7. The particulars of negligence attributed to the 1<sup>st</sup> respondent's servant and or agent were also denied and instead the driver of motor vehicle registration No. KBY 823G was blamed for causing the accident as per the particulars of negligence set out in paragraph 7 of the statement of defence.
8. However, the 1<sup>st</sup> respondent averred in the alternative and without prejudice basis that if the accident occurred, then the appellant solely and/or substantially contributed to it as per the particulars of negligence set out at paragraph 7 of the defence.
9. Be that as it were, it suffices to note that when the matter came up for hearing in the trial court the appellant and 1<sup>st</sup> respondent entered consent on liability in the ratio of 90:10% in favour of the appellant as against the 1<sup>st</sup> respondent and further agreed to produce all the documents by consent save for the medical report by Dr. Kiamba.
10. Subsequently, the matter proceeded to hearing on quantum with the appellant (PW1) testifying that, as a result of the accident both his legs were broken and he suffered a dislocated hip joint. That consequently he cannot walk for long distances and that has affected his job as a Ranger with Kenya Forest Service and can only perform light duties.
11. The appellant's case was also supported by the evidence of PW2 Dr. Wellington Kiamba who examined him and noted that, he sustained fractures of both his right and left fibula and tibia which had been fixed with interlocutory nails. That, the left limb fracture had united, however the right ankle joint movement was restricted and was shorter by 2cm.
12. Further, that the appellant was limping and the pelvis was tilted to the right. As a result, he would develop post traumatic issues. That the appellant could not walk or stand for many hours. The doctor assessed appellant's temporary disability for a period of twenty (20) months and 20% permanent disability due to the shorted leg. He classified the injuries suffered as grievous harm. In addition, he noted that the interlocutory nails would be removed in future at a cost of Kshs. 500,000.
13. The 1<sup>st</sup> respondent called Doctor Kamau who examined the appellant on 7<sup>th</sup> November 2019. He stated that, the appellant was involved in a road traffic accident as a result of which both legs were broken and right hip dislocated. That he was admitted to the ICU for a week and interlocking nails implanted and hip reduced through an open procedure. That, at the time of examination, the appellant



only complained of difficulties in squatting and hips pains. That the fractures had healed. The doctor assessed permanent disability at 5%. He further stated that, the interlocking nails would require to be removed at a cost of Kshs. 250,000 all inclusive.

14. At the close of the hearing parties filed their submissions and the judgment dated 17<sup>th</sup> May 2022 delivered wherein the trial court entered judgment as follows: -
  - a. Liability -----90:10% (by consent)
  - b. General damages -----Kshs 850,000
  - c. Special damages -----Kshs 10,050
  - d. Future medical expenses-----Kshs 350,000Subtotal-----Kshs. 1,210,050  
Less 10% contribution-----Kshs. 121,005  
Net award-----Kshs 1,089,000  
Costs and interest thereon from the date of the judgment
15. It is against the afore decision that the appellant has filed the appeal herein relying on the following grounds: -
  - a. That the learned trial Magistrate erred and misdirected herself in law and in fact in her assessment of damages awardable to the appellant by awarding damages that were inordinately low in the circumstances.
  - b. That the learned trial Magistrate failed to appreciate and/or misapplied the principle applicable in the assessment of damages under the circumstances.
  - c. That the trial Magistrate erred and misdirected herself in law and in fact by not properly analysing the appellant’s testimony in court, medical documents produced and his submissions on the severity of his injuries.
16. As a result, the appellant prays that the judgment/decree of the trial Magistrate be set aside, reviewed and/or be enhanced and the costs be borne by the respondents.
17. The appeal was canvassed vide filing of submissions. The appellant in submissions dated 14<sup>th</sup> May 2024, invited the court to consider the circumstances under which an appellate court can interfere with an award of damages by the trial court. He relied on the Court of Appeal decision in relation to the same as stated in *Tridev Construction vs Charles Wekesa Kasembeli Civil Appeal 121 of 2022* citing *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A. M. Lubia and Olive lubia [1982-88] KAR 727*
18. The appellant further submitted that the learned trial Magistrate applied wrong principles of law and awarded general damages of Kshs. 850,000 which are inordinately low considering the injuries he sustained as proved by the medical documents produced in evidence and testimony of PW2 Dr. Kiamba.
19. That, he had proposed an award of Kshs. 3,500,000 as general damages and relied on the case of, *Rebecca Mumbua Musembi vs Lucy K. Kinyua [2014] eKLR* where the plaintiff lost of 5 teeth and sustained compound fractures of the right tibia and fibula in the middle third, compound comminuted fractures in the upper third of the left tibia and fibula, undisplaced fracture of the right acetabulum and right pubic rami, internal fixation of the fractures and reconstruction surgery with



- metal plates and had extensive surgical scars and the High Court awarded her Kshs. 3,000,000 as general damages for pain and suffering.
20. That, the trial court disregarded his submissions and instead relied on the case of, S A O (minor suing through next friend) M O O vs Registered Trustees Anglican Church of Kneya Maseno North Parish (2017) eKLR where the plaintiff suffered a head injury with brain concussion and damage of right lower mandible jaw and left cheek, blunt chest injury, multiple friction lacerations/bruises on right elbow joint, fracture of right tibia/fibula at midshaft region, compound fracture left tibia/fibula at distal metaphysic, multiple cut wounds on left lower limb involving thigh down to knee region, fracture left ankle joint involving malleolus bones and dislocation right ankle joint and the High Court set aside the trial court award of Kshs. 200,000 and enhanced the award to Kshs. 600,000 as general damages.
  21. The appellant argued that, the injuries suffered by the plaintiff in the afore case were less severe than the injuries he had sustained and the parties therein did not suffer any permanent disability. That, the trial court ought to have considered comparable cases for comparable awards and take into account relevant factors such as inflation and age of the authority. He cited the case of H. West & Son Ltd vs Shephard (1964) AC 326, 345 and Terrell's Law of Running Down Case 3rd ed London Butterworths (1964) in support of her contention.
  22. The appellant further relied on the case of Guardial Singh Ghataurhae vs Parminder Singh Manku & 3 Others (2018) eKLR the plaintiff sustained comminuted intra articular fracture of the right tibial plateau and metaphysic, fracture right patella, comminuted fracture of right distal radius, osteoarthritis of right knee, fracture of four ribs on right side and severe lacerations, bruising and scarring and the High Court awarded Kshs. 2,500,000 as general damages for pain and suffering.
  23. The appellant further cited the case of Samson Simbe vs Callen Obonyo Nyangau (2022) eKLR where the respondent sustained multiple fractures of the ribs, fracture with dislocation of the tibia and talus bones, extreme degloving injury on the left ankle and malleolar and dislocation of the left thumb and the High Court upheld the trial court award of Kshs. 2,000,000 as general damages.
  24. The appellant further submitted that, the trial court failed to award damages for loss of earning capacity despite having pleaded for the same in the plaint. Further, the trial court failed to take it into account the evidence of PW2 Dr. Kiamba who assessed permanent disability at 20%. Furthermore, DW1 Dr. Kamau assessed permanent disability at 5% and played down the injuries he sustained by leaving out serious injuries such as the tilting of the pelvis and the shortening of his limb which were captured in the medical report of the Ministry of Health and which report recommended that he be registered as a person with disability.
  25. However, the respondent in submissions dated, 12<sup>th</sup> July 2023 cited the case of; Power Lighting Company Limited & another vs Zakayo Saitoti Naingola & another (2008) eKLR quoting Jennifer Mathenge vs Patrick Muiruki Maina [2020] eKLR where the court discussed the principles to be considered before the appellate court can interfere with an award of damages.
  26. That the subject principles are; the damages awarded should not be inordinately too high or low as they are meant to compensate a party for loss suffered but not to enrich a party and should be commensurate to injuries suffered. Further, where past decisions are taken into consideration they should be taken as mere guides as each case depends on its own facts. Furthermore, inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of judgment.
  27. The appellants submitted that an award of Kshs. 500,000 as general damages would be sufficient compensation and relied on the case of; Atunga vs Mogambi [2022] KEHC 9854 (KLR) where the



respondent sustained soft tissue injuries, fracture of the right tibia and fibula as well as dislocation of the right wrist and hip joint, and the High Court upheld the trial court award of Kshs. 550,000 as general damages.

28. Further, reliance was placed on the case of, *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where the High Court set aside the lower court award of Kshs 1,000,000 for general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/ fibula, segmental distal fracture of the right femur and substituted it with Kshs. 450,000.
29. That furthermore, in *Reamic Investment Limited vs Joaz Ameyia Samuel* [2021] eKLR where the victim suffered a fracture of the femur and soft tissue injuries, the High Court considered the authorities relied on and held that an award between Kshs. 200,000 and Kshs. 300,000 was reasonable and reviewed the trial court award from Kshs. 600,000 to Kshs. 350,000.
30. Finally, the respondents submitted that costs follow the event and cited section 27 of the *Civil Procedure Act* (Cap 21) Laws of Kenya and urged the court to allow the appeal as prayed and award them costs of the appeal.
31. In considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
32. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

33. Furthermore, I note that it is settled law that the appellate court will only interfere with the award of damages if; in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkubee -vs - Nyamuro* 1983 KLR 403.
34. Furthermore, the Court of Appeal in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* *CA 142/2003* (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The



question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs Musila* [1984] KLR 257).”

35. To revert back to the matter herein, I note the injuries the appellant pleaded in the plaint already referred to herein and the evidence produced in support thereof. In his submissions the appellant relied on the case of; *Rebecca Mumbua Musembi vs Lucy Kinyua* (2014) eKLR. The trial court assessed the same and noted that it related to more severe injuries than what the appellant sustained.
36. In the same vein the trial court analyzed the authorities referred to by the respondents and found that they were in relation to less severe injuries than those herein.
37. The trial court then relied on the case of; *SAO (Minor suing through next Friend) MOO vs Registered Trustees, Anglican Church of Kenya Maseno North Parish* (2017) eKLR, where the appellant was awarded Kshs 600,000 in the year 2017 and the trial court awarded Kshs 850, 000 as general damages.
38. The appellant has made further reference to other cases in the submissions herein being the cases of; *Guardial Singh Ghataurhae vs Parminder Singh Manku & 3 others* (2018) eKLR where an award of Kshs 2,500,000 was awarded for general damages and *Samson Simbe vs Callen Obonyo Nyangau* [2022] KEHC 3275 (KLR) where Kshs 2,000,000 was awarded as general damages. However, he did not indicate full particulars of the injuries therein and how they compare to the injuries herein. Furthermore, the current authorities were not relied on in the trial court for consideration.
39. Be that as it were, I have considered the respective submissions and legal principles that govern assessment of damages. I note that, the trial court has at paragraphs 14 to page 18 of the judgment, stated the reasons for assessing general damages in the sum awarded.
40. The trial court further notes at paragraph 14 of the judgment that there was no variance in the medical documents produced as to the injuries the appellant sustained save on the degree of permanent disability. The court then stated that, the permanent disability assessed by Dr Kamau of 5% was not substantiated and his report was prepared three (3) years after the accident.
41. The trial court then observes at paragraph 17 of the judgment that;

“I do find that the plaintiff suffered immensely as a result of the accident. Several limbs were operated on and in-plants subsequently inserted. He also sustained a hip reduction which causes the Plaintiff to limp while walking”.
42. The trial court then stated at paragraph 18 that the plaintiff suffered 10% permanent disability as he cannot perform the duties he used to.
43. However, with outmost respect to that finding by the trial court, the doctors who are professionals had made their assessment albeit varying findings and the trial court could not make any finding on the same as the court had no medical qualification to assess the degree of appellant’s permanent disability. In case of variance the same could only be reconciled by a further independent and neutral medical report.
44. Pursuant to the afore said, a comparison of the injuries in the authority relied on by the trial court and those of the appellant it is noteworthy that; the plaintiff therein did not suffer any displacement of either or both right tibia and fibula as herein. Further, there is no indication of any degree of permanent disability suffered by plaintiff in the decision relied on by the trial court. In this matter the trial court conceded that the appellant suffered permanent disability and additional fracture and hospitalised in ICU.



45. Notably therefore injuries in the case relied on by the trial court were less severe than those the appellant suffered. Furthermore, that decision was rendered in the year 2017 and the decision herein in the year 2022, even if the injuries were comparable taking into account that the accident herein occurred in the year 2016 and inflation factors, the amount of Kshs 850,000 cannot be deemed reasonable enhanced from Kshs 600,000.
46. In assessing reasonable sum as general damages I have considered alongside all other materials on record that, the appellant suffered a lot of pain as he went through several procedures. The discharge summary from War Memorial Hospital indicates that he was admitted on 9<sup>th</sup> January 2016 and discharged on 24<sup>th</sup> January 2016 thereof for thirteen (13) days. He went through open reduction/internal fixation of fracture and was in ICU for one (1) week after developing embolism. That all movements are restricted at the right hip joint. He has surgical scar on anterior aspect of knee. The injuries were classified in the P3 form as grievous harm.
47. In the conclusion of the medical report of dated; 9<sup>th</sup> July, 2019, it is stated that he has shortening of right lower limb by 2cm is limping and pelvis is tilted to the right.
48. Consequently, the sum of Kshs 850, 000 as general damages was too low and set it aside and substitute with a sum of Kshs 1,500,000. The special damages awarded are not in dispute.
49. As regards the appellant's submissions that the trial court did not award damages for loss of earning capacity although it was pleaded. The question is; was it and/or the issue of disability canvassed in the trial court? First and foremost, as pleaded, "general damages and damages for loss of earning and earning capacity" fall under same head. Secondly there was no evidence of loss of earning or future earning capacity. Finally, with due respect the appellant's submissions on pain and suffering, loss of amenities does not support the pleading of loss of earning and earning capacity.
50. As regards future medical expenses. I find the figures a sum of Kshs 350,000 awarded reasonable. In fact, in his evidence in chief at page 5 of supplementary record of appeal, PW1 simply testified to injuries sustained and state "I pray for damages and future medical expenses."
51. Therefore, the appeal succeeds on the award of general damages only which is enhanced to Kshs 1.5 million. Interest on a sum Kshs 850,000 will accrue from date of Judgment on the trial court until payment in full and on the additional sum from date of this judgment. Costs of appeal be borne by each party.
52. As the judgment is delivered in the absence of the parties, though notified it shall be transmitted to the parties by the Hon. Deputy Registrar
53. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

N/A for the appellant

N/A for the respondents

Ms. Hannah: court assistant

