



REPUBLIC OF KENYA



**Makena & 2 others v Ntiinyari (Civil Appeal E156 of 2023)
[2025] KEHC 7810 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E156 OF 2023
SM GITHINJI, J
MAY 29, 2025**

BETWEEN

FAITH MAKENA 1ST APPELLANT

LYNTONS PHAMACY LIMITED 2ND APPELLANT

FARMERS CENTRE LIMITED 3RD APPELLANT

AND

LYDIA N'TIINYARI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. M.A Odhiambo
(SRM) in Meru CMCC No. 150 of 2020 delivered on 31st August, 2023)*

JUDGMENT

1. This Appeal arises from the judgment of the learned Senior Resident Magistrate Hon. M. A. Odhiambo delivered on 31.08.2023 in Meru Civil Suit No. 150 of 2020 wherein judgment was entered in the following terms;
 1. Liability 100%
 2. General Damages Ksh. 800,000
 3. Loss of Earnings (Ksh. 7240.95 × 10 × 12) = Ksh. 868,800
 4. Future Medical Expenses Ksh. 3,000,000
 5. Special Damages Ksh. 88,050
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 26th September, 2023;



1. The Honorable Trial Court erred in law and fact by finding that the accident occurred on the “proper lane” of the unregistered subject motorcycle yet the Plaintiff, during her evidence in cross examination, denied knowledge of how the accident occurred.
2. The Honorable Trial Court erred in fact and law by finding that the Plaintiff had tendered prima facie evidence showing the accident, the subject of the suit, was caused by the driver of motor vehicle registration number KAQ 163 Z which finding was not supported by her evidence in cross-examination.
3. The Honorable Trial Court erred in law and fact by failing to appreciate the distinction between the claims of loss of earnings and loss of earning capacity, which failure resulted in the court conflating the two claims and assessing loss of earnings without particulars thereof having been pleaded and without strict proof thereof having been tendered.
4. The Honorable Trial Court erred in law and fact by finding the evidence of Dr. James Kihumba, PW4, on estimated future medical evidence was credible, consistent and of probative value and in so doing made an erroneous award in future medical expenses.

The Evidence

3. PW1 Dr. Paul Wambugu, a medical Officer at Meru Teaching and Referral Hospital, who filled the Respondent’s P3 form told the court that on 2/2/2020, the Respondent was involved in a road traffic accident along Meru-Nanyuki road after Technical college. She was treated through surgery, implant and put on traction, antibiotics and pain killers. She had mid femur trauma with an implant insitu and the X-ray showed chronic osteomyelitis (infection of the bone). The age of the injury was one month and the degree of injury was classified as maim.
4. On cross examination, he stated that he examined the Respondent on 4/3/2020 and maintained that she would live on life time consumption of antibiotics or amputation, because there was loss of bone (chronic ostalylsis).
5. PW2 P.C Robert Tumno stationed at Meru Police station traffic department confirmed that a report of an accident had been made on 2/2/2020 involving motor vehicle registration No. KAQ 163 Z driven by the 1st Appellant and an unregistered motor cycle ridden by David Mwiti. The driver of the motor vehicle unexpectedly swerved in order to join Kenya Re-estate thus hitting the oncoming motor cycle, while on its lane. The rider and the pillion passenger were both injured and they were taken to Meru Teaching and Referral Hospital.
6. PW3 Lydia Ntinyari, the Respondent herein and the Plaintiff in the trial court adopted her witness statement dated 11/3/2022 as her evidence in chief and produced copies of records, demand notice, photographs, bundle of receipts, taxi receipts, letter from Mutuma Gichuru dated 10/5/2021, letter dated 24/2/2020, certificate of incorporation, log book dated 2/6/2006, civil suit 200/2021 pleadings and X-ray photos as exhibits. She told the court that on 2/2/2020 at around 1900 hours, she was headed home aboard a motor cycle along Meru-Nanyuki road when the 1st Appellant, carelessly and recklessly drove motor vehicle registration No. KAQ 163 Z, that it swerved from its lane to theirs thus hitting them. She sustained serious injuries and was treated at Meru General Hospital, Materi Hospital and Kijabe Hospital. She is the sole breadwinner of her children and she used to work as a house maid earning Ksh. 15,000 monthly. She can no longer bathe herself, is constantly in pain and she uses diapers due to the total hip crash she sustained since she cannot take herself to the toilet. Her legs are supported with a metal that pricks into her flesh everyday with so much pain and they need dressing after every 2 days because they produce pus. Her children dropped out of school since her unemployed husband



is overburdened. When she is taken to the hospital by a taxi after every 2 weeks, she sleeps at a guest house. She had not yet healed as she required another surgery and a hip replacement.

7. PW4 Dr. James Kihumba, a medical officer at Meru Teaching and Referral Hospital produced the Respondent's medical report dated 11/3/2021 together with the receipt of Ksh. 20,000 as exhibits. He told the court that the Respondent sustained a left mid shaft femur fracture as a result of the accident, and she was treated at Meru Teaching and Referral Hospital for 3 days, before being transferred to Saint Orsola. After an interlocking nail was inserted to fix the fracture, she was allowed to go home for physiotherapy, but put on painkillers and follow up treatment. On 3/6/2020, she was diagnosed with the infection of the bone due to exposed locking screw and a neck of the femur fracture. She was severely wasted as a result of the chronic illness, had pain from the left hip to the knee, was unable to walk well and had a sinus which was draining pus on the left lateral thigh. She will require removal of the internal hardware and placement of external fixation and removal of the dead bone at the proximal part. She will then require grafting of the mid shaft graft (bone graft to enhance healing), which will take a few years. Once the mid shaft graft has healed, a total hip replacement should be considered. She was unable to engage in active sexual life until the resolution of the issue and would need Ksh. 3 Million until full recovery or near recovery. She still undergoes a clinic of therapy at Kijabe hospital and will require expensive and long term intervention. He assessed the degree of disability at 60%.
8. DW1 Dr. Peter Mwangi, a consultant Surgeon examined the Respondent on 22/4/2022 and prepared the medical report produced as D Exh. 1. The Respondent was still on treatment, and although the fracture had not united, it would eventually re-unite. The degree of disability ought to have been done after the treatment was done as it was difficult to make probable future expenses.
9. On cross examination, he stated that the Respondent's left leg was shortened and wasted as a result of the bone infection. She was on crutches with external fixators with a discharge, and was still undergoing treatment to control the infection. She had surgical intervention on 26/4/2022 and she would still need future medical care. There was a possibility of permanent incapacitation if the bone was wasted and the issue of hip replacement would come after a re-examination.

Appellants' Submissions

10. The Appellants through the firm of J. Mwangi & Co. Advocates filed submissions dated 3/9/2024 citing *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, on the principles guiding appellate jurisdiction. Counsel faulted the trial court for finding the Appellants jointly and severally liable for the accident without a credible eye witness's account, and relied on *Keziah & another (Personal Representatives of the Late Isaac Macharia Mutunga) v Lochab Transport Limited* (Civil Appeal 82 of 2018) [2022] KECA 477 (KLR) (18 March 2022) (Judgment). Counsel submitted that the relief for general damages for loss of earnings was unknown in law, and cited *Douglas Kalafa Ombeva v David Ngama* (2013) eKLR. Counsel submitted that there was no credible and consistent evidence of the estimated future medical expenses, and prayed for the award under that head to be set aside in its entirety.
11. The Respondent through the firm of Vivian Loice Aketch & Co. Advocates filed submissions dated 14/10/2024. Counsel submitted that the Appellants' defence remained mere allegations because no evidence was called in support thereof, and cited *North End Trading Company Limited (Carrying on the business under the Registered Name of Kenya Refuse Handlers Limited v City Council of Nairobi)* (2019) eKLR and *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another* (1979) eKLR. Counsel argued that the award of Ksh. 5,863,294 was not inordinately high to warrant disturbance by this court, and relied on *Tracom Limited & Another v Hassan Mohamed Adan* (2009) eKLR.



Analysis and Determination

12. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
13. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.”
14. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by counsels.
15. From the grounds of appeal, the issues for determination are whether liability, loss of earning and future medical expenses were proved.
16. On liability, the Respondent’s eye witness account on the causation of the accident is that the accident motor vehicle driven by 1st Appellant, swerved from its lane to the motor cycle’s lane, thus seriously injuring her and the rider. That evidence remained uncontroverted because the Appellants’ cross examination was majorly centered on the injuries the Respondent had sustained and the recovery therefrom. Her testimony was corroborated by PW2 who stated that the motor cycle was on its lane when the accident occurred and the point of impact was on the right lane of the motor cycle.
17. I find that the Respondent proved, on a balance of probabilities, that the Appellants were wholly to blame for the accident, and the apportionment of liability at 100% jointly and severely against them was justified.
18. On loss of earnings, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR 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 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.”
19. In drawing the distinction between loss of future earnings and loss of earning capacity, the Court of Appeal in *S J v Francesco Di Nello & another* (2015) eKLR noted as follows; “Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or 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 in general damages, once proved.”
20. It is therefore trite that loss of future earnings or loss of income is awardable for real assessable loss proved by evidence while loss of earning capacity is awardable as part of the general damages.
21. The Respondent testified that she was previously working as a house girl earning a monthly salary of Ksh. 15,000, which she used to support her children and her unemployed husband. She stated



that the accident had totally incapacitated her, and her children had since dropped out of school. I find that the Respondent was entitled to an award of loss of future earnings because her chances of ever working in future were completely shattered. If the accident had only diminished or lessened the Respondent's ability to earn a living in future, then damages for loss of future earnings would have been unjustifiable. But here, the Respondent suffered a 60% permanent disability rendering her fully immobile and therefore the trial court's award of Ksh. 868,800 for loss of earnings was proper.

22. On future medical expenses, the injuries sustained by the Respondent are particularized at paragraph 15 of the amended plaint as left midfemoril fracture with a K-Rail insitu, chronic osteomyelitis, traumatic injuries of both limbs in the tibial region, inability to engage in sexual life and inability to walk.
23. In his medical report dated 11/3/2021, PW4, Dr. James Kihumba opined that the Respondent would require several surgeries and long term follow up, at an estimated cost of Ksh. 3,000,000. The internal hardware and the avascular necrosed head of femur would be surgically removed and an external fixator placed. After the healing of the midshaft fracture grafting, a total hip replacement would be considered. Those findings were affirmed by DW1 Dr. Peter Mwangi who restated that although the Respondent had undergone a surgery on 26/4/2022, she would still require future medical intervention, because there was a possibility of permanent incapacitation due to bone wastage.
24. The Court of Appeal in *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR readily agreed that, the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it.
25. Likewise in *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, the court held that; "While an award of damages to meet the cost of future medication is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award thereon. In personal injury cases, the only damage that is contemplated by law as arising naturally is the personal injury itself and the consequential pain and suffering. Accordingly, matters pertaining to hospitalization, treatment and management, the need for further medical care, the disabilities, and attendant pecuniary losses (present and future) are special damages which must be pleaded."
26. It cannot be gainsaid that the Respondent sustained grave injuries as a result of the Appellant's negligence. The damage done to her body was so extensive, that no amount of money can effectively and wholly repair. What the court should strive to do is award reasonable compensation, in the circumstances.
27. Monetary compensation for personal injuries serves as means to provide reasonable solace for the pain and suffering endured, rather than fully restore the injured party to their pre-accident state. The court should endeavor to provide fair and reasonable awards that reflect the severity of the injuries and the suffering endured.
28. The cost for future medication cannot be precisely proven and is only a logical estimate that can be ascertained. The claimant is therefore entitled to reasonable and justifiable estimates. In the case of *H. West & Son Ltd -vs- Shepherd* [1964] AC 326, it was held that;-Future medical expenses may be awarded based on medical expert opinion and reasonable life expectancy. In *Simon Mucheni Atako & Another -vs- Gordon Osore* [2013] e KLR.-The court held that future medical expenses must be specifically pleaded and proved, but the court may accept reasonable estimates based on expert evidence. Likewise, In *Zablon Ayieko -vs- Uganda Railways Corporation* [2003] e KLR;-The court accepted an estimation of future medical expenses supported by a doctor's report, noting that exact future costs could not be determined but a logical estimate sufficed.



29. In this case there is a medical report dated 11/3/2021 by PW-4, Dr. James Kichomba, who estimated future medical costs to about 3,000,000/=. He indicated what the respondent will need to undergo in terms of future medication, which would cost the estimated sum. In my view, the amount is logical and reasonable. I find no reasonable ground adduced to warrant interfering with the same.
30. For the foregoing reasons, I find the appeal in want of merit and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED THIS 29th DAY OF MAY 2025.

S. M. GITHINJI

JUDGE

Appearances:

Miss Ruta holding brief Miss Mwangi Muthuri for the Appellant.

Miss Onyango holding brief for Mr. Aketch for the Respondent.

Miss Ruta – We request for a temporary stay of 30 days for advice to our client.

Miss Onyango – It's their right they can have it.

Court: 30 days stay is granted to the Appellant.

S. M. GITHINJI

JUDGE

29/5/2025

