



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okore v Wambui (Civil Appeal E012 of 2022)  
[2025] KEHC 7113 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E012 OF 2022  
CM KARIUKI, J  
MAY 28, 2025**

**BETWEEN**

**CHURCHIL ODHIAMBO OKORE ..... APPELLANT**

**AND**

**JOHN W WAMBUI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Sisenda (R. M.)  
delivered on 24/10/2022 in Narok CMCC NO.6 OF 2020)*

**JUDGMENT**

**28/05/2025**

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No.6 of 2020, delivered on 24/10/2022, in which the trial court made awards as follows: -
  - i. Liability 75% against the defendant
  - ii. General damages Kshs. 600,000/=
  - iii. Special damages Kshs 17,959/=
  - Total Kshs. 617,959/=
  - iv. Less 25% Kshs. 154, 490/=
  - v. 75% Kshs. 463,469/=
  - vi. Net total Kshs. 463,649/=plus, costs and interest at court rates.



2. The appellant, aggrieved with the decision, filed an amended memorandum of appeal dated 19/12/2022. He cited 3 grounds of appeal as follows.
  1. The learned trial magistrate erred in law by apportioning liability in the ratio of 75: 25 when the trial court had not been appropriately moved by the parties to adopt such apportionment and disregard the submissions of the parties and notwithstanding that no such apportionment of liability had been adopted as an order of the court as at the time of entry of judgment.
  2. The learned trial magistrate failed to take into account the appellant's diminished earning capacity and thereby failed to make provision for the same, thereby arriving at an erroneous estimate of damages.
  3. The learned trial magistrate failed to (reasonably) consider case law cited in the appellant's submissions on damages for guidance and thereby arrived at an erroneous estimate of damages.
3. The respondent filed a notice of preliminary objection dated 19/04/2024. The respondent raised the following grounds.
  1. That this Court lacks jurisdiction to entertain this appeal on liability since the appeal relates to a consent recorded by the parties before the trial court on liability.
  2. Section 67 (2) of the *Civil Procedure Act* expressly and in mandatory terms prohibits appeals from an original decree passed by the court with the consent of the parties. The judgment of the trial court on liability forms part of an original decree passed by the trial court with the consent of the parties.
  3. That this appeal should, therefore, be limited to grounds 2, 3, and 4 of the Memorandum of Appeal on quantum of damages only, and submissions be made by the parties limited to the three grounds of appeal touching on quantum of damages.

#### **Directions of the court**

4. The preliminary objection and appeal were canvassed by way of written submissions.

#### **The Appellant's Submissions**

5. The appellant submitted that the trial court erred in law and in fact by making a reference to the alleged consent, which was never formally moved for adoption as a court Order. The alleged consent by the respondent was neither adopted by the parties nor formally adopted before and by the trial court as the Court Order of this honourable court, thus, the alleged consent cannot be deemed to be a decree of this honourable court. The appellant relied on *Sanyo & 3 others v Attorney-General (Petition 7 of 2019)* [2020] KESC 62 (KLR) (10 January 2020) (Judgment) Geoffrey M. Asanyo & 3 others v Attorney-General [2020] eKLR Neutral citation: [2020] KESC 62 (KLR), and Section 67(2) of the *Civil Procedure Act*.
6. The appellant submitted that, being a fare-paying passenger, there was no way he contributed to the occurrence of the accident. The appellant further contends that respondent is to be held 100% liable for the occurrence of the accident from the submissions before the trial court the respondent admitted liability at 100% as it was held in *Narok MCCC No. 91 of 2019* a suit arising from the same accident and the same respondent who caused the accident, the respondent was held 100% liable for the accident.



7. The appellant submitted that the trial court erred in not considering the medical report tabled before her and the appellant's testimony on the incapacitation suffered by the appellant due to the accident, as he still suffers from on-and-off pain in his right leg and cannot lift heavy weights with his right hand. The appellant contends that from the medical report, the appellant on 31/01/2019, when he was first examined, was 30 years old. He still had many productive/working years ahead of him. The appellant could have worked a further twenty-five (25) years in the informal sector. The appellant proposed that he would have worked a further 20 years. Given that there was no evidence adduced on the appellant's specific income, the appellant proposed a global award of Kshs. 1,000,000.00 would reasonably compensate for the appellant's loss of earning capacity. The appellant relied on *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*, *Mumias Sugar Company Limited v Francis Wanalo CA KSM Civil Appeal No. 91 of 2003 [2007] eKLR*, *Butler v Butler [1984] KLR 225*, *Jubilee Haulers Limited & 2 Others v Brian Muchiri Waihenya (2021) eKLR*, *Jubilee Haulers Limited & 2 others v Brian Muchiri Wihinya(2021)eKLR*, *Nzoia Sugar Company Ltd vs Francis Wanalo* cited with approval in the case of *Mumias Sugar Company Limited vs Francis Wanalo(2007)eKLR*.

### **The respondent's submissions.**

8. The respondent submitted that this court should not interfere with the consent on liability because (i) under Section 67(2) of the *Civil Procedure Act*, no appeal shall lie from a decree passed by the court with the consent of parties (ii) a consent is in the nature of a contract and is binding to the parties (iii) no vitiating factors have been exhibited by the Appellant to justify the setting aside of the consent on liability. The respondent relied on *Brooke Bond Liebig Ltd v Mallya [1975] E A 266*, *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485*, *Hirani v Kassam [1952] 19 EACA 131*, *Wema Foundation Trust Company Limited v County Government of Nairobi City & another [2022] eKLR*.
9. The respondent submitted that in none of the medical evidence is it said that the injury of the Appellant diminished his earning capacity. The respondent relied on *Abuga v Northern Rangeland Trust [2023] KEHC 23656 (KLR)*, *Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR*, *Butler v Butler [1984] KLR*.
10. The respondent submitted that the trial court was alive to submissions filed and caselaw cited by the parties and considered the submissions and caselaw before it, and cannot be faulted for failing to adopt or follow the caselaw cited.
11. The respondent submitted that this appeal be dismissed with costs and that the said costs be recovered from the award made to the Appellant by the trial court, which award is yet to be settled. The court is also urged to summarily assess the said costs at a modest sum of Kshs. 300,000/= so as to reflect the status of litigation before the Superior Court.

### **Analysis and Determination.**

#### **Duty of the court**

12. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).



13. The first Appellate Court should, therefore, evaluate the evidence afresh and draw some of its conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –vs. Associate Motorboat Co. Ltd* 1968 EA 123.

### Issues

14. I have considered the record of appeal, the notice of preliminary objection, and the respective parties' written submissions. The main issues that fall for determination are.
- i. Whether the learned Magistrate erred in apportioning the liability at the ratio of 75:25.
  - ii. Whether the learned magistrate erred in failing to award diminished earning capacity appeal is merited.
15. It is an appeal on both liability and quantum of damages.

### Liability

16. The preliminary objection raised by the respondent is primarily on the alleged consent entered by the parties on liability before the trial magistrate.
17. This court has perused the record and found that consent was recorded on 21/01/2022 in a ratio of 75:25 in favour of the appellant.
18. The issue of liability was settled by the consent of the parties. The law on consent Judgments in civil disputes is provided for at Section 67(2) of the *Civil Procedure Act*, which provides that, “no appeal shall lie from a decree passed with the consent of the parties”.
19. It is well settled in law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify settling aside a contract, or if certain conditions remain to be fulfilled, which are not carried out. See court of appeal decision in *J.M Mwakio -vs- Kenya Commercial Bank Ltd* Appeal No. 28/1982 E.R. In the case of *Hirani -vs- Kasam* (1952) 19 E.A, C. At page 134, it was stated that:
- “The mode of paying the debt, then, is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescanning a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7<sup>th</sup> Edn) Vol 1, page 24 as follows: “Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court... or of the consent was given without sufficient material facts, or in general for which would enable curt to set aside an agreement.”
20. See also *Brook Bond Liebig Ltd -vs- Mallya* (1975) E.A 226 at 269 what it was stated that:
- “A court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
21. Thus, for this court to set aside consent, the appellant is bound to proof that circumstances that would justify the setting aside of a contract exist. These include fraud, collusion, misrepresentation, or that the agreement is contrary to the policy of the court.



22. This forms the record of the court, and there can be no doubt that the parties recorded that consent. The contention by the appellant that the consent was 75:25 is not borne out by the record. I find that the appellant has not laid any ground to warrant this court to interfere with the consent recorded on liability.
23. The appellant was travelling as a fare-paying passenger aboard motor vehicle registration number KCJ 278F when the said motor vehicle was involved in a road traffic accident. The appellant pleaded negligence on the part of the driver of motor vehicle KAW 499D.
24. The appellant testified that the motor vehicle he was travelling in, being KCJ 278F, was knocked from behind by the respondent's motor vehicle, registration number KAW 499D, causing the accident; the testimony of the appellant and the events leading to the accident were never controverted by the respondent.
25. The appellant contends that, being a fare-paying passenger, there was no way he contributed to the occurrence of the accident. The appellant further contends that respondent is to be held 100% liable for the occurrence of the accident from the submissions before the trial court the respondent admitted liability at 100% as it was held in Narok MCCC No. 91 of 2019 a suit arising from the same accident and the same respondent who caused the accident, the respondent was held 100% liable for the accident.
26. The appellant has challenged the apportionment of liability at 75:25 in favour of the Appellant. The apportionment of liability came about because of a consent recorded by the parties. The question, then, is whether this court should interfere with that consent.
27. I find that the appellant has not disclosed any ground to warrant this court to rule that the consent is not what was agreed by the parties. Grounds for setting aside consent were stated by the Court of Appeal in *Flora N. Wasike -vs- Destimo Wamboko* (1988) eKLR, where it was stated:

“It is well settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract.”
28. I find that this ground has no merit.

## **Quantum**

29. The appellant suffered the following injuries, as captured in the medical report.
  - i. Deep cut wound on right chin, about 8cm long.
  - ii. Right parietal scalp cut wound, 6 cm long.
  - iii. Comminuted fracture of the right ulna.
  - iv. Fracture of the right lateral malleolus.
  - v. Multiple soft tissue injuries to the chest.
30. From the discharge summary. It is noted that the appellant suffered a fracture, and he was put on a complete fracture cast on both upper and lower limbs.
31. The doctor from the medical report concludes that the appellant sustained major injuries which are likely to leave him with chronic pains, hence some incapacitation.



32. The appellant testified four years after the accident, he stated he had not healed, he had on-and-off pain in the right leg, and he could not walk for long, and his right hand could not carry heavy things.
33. The holding that damages for loss of future earnings are awardable for real assessable loss proved by evidence. In none of the medical evidence is it said that the injury of the Appellant diminished his earning capacity. In fact, in the medical report by Dr. Maurice Raute, the doctor concludes, “sustained major injuries which are likely to leave him with chronic pains and hence some incapacitation.” The doctor did not award any degree of incapacitation. Neither did the Appellant in his witness statement make mention of any incapacity or diminished earning capacity arising from the injury suffered.
34. Dr. Adegu William, in his report dated 19/04/2021, concluded that the injuries have healed well. The right leg pain that is on and off can be managed using analgesics. He ascertained that no permanent incapacitation occurred.
35. In respect to the claim for general damages for diminished earning capacity, this court has to determine whether diminished earning capacity is the same as loss of future earnings. Black’s Law Dictionary, Tenth Edition defines “earning capacity” as: -
- “A person’s ability or power to earn money given the person’s talent, skills, training, and experience.”
36. The Appellant is complaining in these grounds of appeal that the trial court failed to consider the caselaw cited by the Appellant at the trial. The trial court, while addressing the question of quantum, stated that,
- “I have perused the Plaintiff’s and Defendant’s submissions, and the authorities cited therein”.
37. Clearly, the trial court was alive to submissions filed and caselaw cited by the parties and considered the submissions and caselaw before it and cannot be faulted for failing to adopt or follow the caselaw cited. A court is at liberty to conduct its own research and rely on authorities other than those cited by the parties.
38. Considering the ordinary meaning of “diminished” in the context of the appeal, I find that the appellant’s claim was in respect of reduced ability to earn by reason of his injury.
39. In S.J. -VS- Fransesco D. Nello And Another [2015] eKLR where the court held 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 actual loss, is loss of future earnings. Loss of earning capacity may be defined as a diminution in earning capacity. Loss of income as 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.
40. In Mumias Sugar Company Limited -vs- Francis Wanalo[2007]eKLR, the Court of Appeal, citing several English decisions, held that:-
- “It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future earnings. Compensation for loss of future



earnings are awarded for real assessable loss proven by evidence. Compensation for the diminution in earning capacity is awarded as part of general damages.”

41. The characteristics of an award for loss of earning capacity and the principles on which it is assessed were more comprehensively enunciated in *Moeliker -vs- Rey Rolle And Company Ltd*[1977] 1 WLR 132. In that case, Browne LJ said at page 140 paragraph B.

“This head of damages generally only arises where the plaintiff is at the time of the trial in employment, but there is a risk that he may lose his employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well-paid job. It is a different head of damages from an actual loss of future earnings, which can already be proved at the time of the trial.”

42. Having considered the aforesaid decisions, I find that the appellant’s claim before the lower court for general damages for diminished earning capacity was not properly proven.

43. The appellant has not challenged other awards in the trial court judgment. In the circumstances,

- i. The notice of preliminary objection dated 19/04/2024 is merited.
- ii. Thus, the appeal is dismissed for want of merit with costs to the respondent.
- iii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,  
THIS 28<sup>TH</sup> DAY OF MAY, 2025**

.....

**CHARLES KARIUKI**

**JUDGE**

