



REPUBLIC OF KENYA



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**Auko v Waweru (Civil Appeal E050 of 2024)  
[2025] KEHC 11216 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E050 OF 2024  
HI ONG'UDI, J  
JULY 29, 2025**

**BETWEEN**

**MARKLAND OCHIENG AUKO ..... APPELLANT**

**AND**

**HARUN WAITITU WAWERU ..... RESPONDENT**

*(Being an appeal against the Judgment/Decree of Hon. Ndengeni (SRM)  
delivered on 28th May 2024 in Naivasha CMCC No. E 251 of 2021)*

**JUDGMENT**

1. The appellant who was the plaintiff in the lower court had sued the respondent for general and special damages, loss of income plus costs and interest arising from a traffic road accident which occurred on 12<sup>th</sup> August 2020 at 5.30p.m. along Nairobi-Nakuru highway at Kayole trading centre. The appellant was driving motor vehicle Registration No. KCZ 065N while the respondent drove motor vehicle registration No. KAX 756R. The respondent's vehicle allegedly encroached onto the appellant's lane hence the accident resulting in severe injuries to the appellant.
2. The respondent filed a defence denying the claim. The matter proceeded to full hearing and later on 5<sup>th</sup> March 2024 the parties recorded a consent on liability in the ratio of 90:10 in favour of the appellant. After the close of the hearing Judgment was delivered on 28<sup>th</sup> May 2024 on quantum. The trial court made the following awards:  
General damages - Kshs.800,000/=  
Loss of income - Nil  
Future Medical expenses - Kshs.80,000/=  
Special damages - Kshs.131,800/=



Subtotal - Kshs.1,011,800/=

Less 10% Kshs.101,180/=

Total - Kshs.910,620/=

3. Aggrieved by the judgment the appellant filed the appeal dated 29<sup>th</sup> May 2024 on the following grounds:
  - i. That the learned trial Magistrate erred in law in awarding general damages, future medical expenses and special damages which were inordinately low and not commensurate to the injuries sustained and does not accord to the principle for award of damages and decided authority(ies).
  - ii. That the learned trial Magistrate erred in law and fact in failing to award the appellant damages for loss of income despite overwhelming evidence to suggest the appellant is incapable of working ever or at all.
  - iii. That the learned trial Magistrate erred in law in awarding manifestly and or inordinately low future medical expenses and special damages despite sufficient evidence at the trial of the matter.
  - iv. That the learned Magistrate erred in law and fact in failing or ignoring to consider the submissions of the appellant.
  - v. That the learned trial Magistrate erred in law and fact in failing to appreciate the respondent's injuries thereby awarding general damages that were inordinately low.
  - vi. That the learned trial Magistrate's judgment on quantum is unreasonable and untenable in law.
4. A summary of the evidence before the trial is that the appellant (PW1) suffered severe injuries as a result of the accident. He produced a copy of the P3 form, Dr. Kiamba's medical report, receipt for Kshs.11,000/= from Dr. Kiamba, NTSA search and receipt for Kshs.550/=, discharge summary from Nakuru Level 5 Hospital, receipt for Kshs.119,150/= from Provincial General Hospital, receipts for 1,100/= from Naivasha Sub County Referral Hospital (PExb A 1, 3-9). In his witness statement which he adopted he averred that he sustained a fracture on his right leg, dislocation on the right hip, injuries on his face, eyes, hips, waist, and suffered loose teeth. He said he is unable to walk, run and stand and cannot drive a vehicle. This has affected his source of livelihood, since he was a driver for Kenlick Company prior to the accident.
5. PW2 – No. 88790 PC Pauline Kibati of Naivasha Police Station (traffic) confirmed the occurrence of the accident involving the two vehicles. One person died while the appellant was admitted at Nakuru Provincial General Hospital for 2 months. She produced the police abstract (PExb2) and confirmed that the respondent was the owner of the vehicle No. KAX 756R.
6. The Respondent did not adduce any evidence.
7. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

8. The same were filed by Nancy Njoroge, Kairu & Co. Advocates and are dated 19<sup>th</sup> February 2025. Counsel submitted on the issue of quantum and referred to the report by Dr. Wellington Kiamba dated 23<sup>rd</sup> April 2021 (Page 13-15 of the record of appeal). The injuries outlined therein are:



- a. Compound fractures of both tibia, fibula in the middle one third.
- b. Dislocation of the right joint.
- c. Fracture of the ethmoid bone.
- d. Loss of one upper incisor tooth and fracture of one lower incisor tooth.
- e. Penetrating wound on the lower hip.
- f. Lacerations on the face.

Counsel submitted that the medical report (PExb B3) remained unchallenged and uncontroverted.

9. She further referred to the sums of money outlined by Dr. Kiamba for filling of the lower fractured incisor tooth and removal of the plate installations in the appellant's right leg. The total cost was Kshs.330,000/=. Further that the doctor assessed the degree of injury as grievous harm and permanent disability at 40%.

10. It is counsel's contention that the injuries suffered by the appellant were very severe and have affected his work as a driver, as he cannot walk, stand or even run. She proposed an award of Kshs.10,000,000/= while relying on the following authorities;

- i. Auren Vs Director General of Police & Another (Civil Case No. 274 of 2016) (2023) KEHC 293/KLR
- ii. Dorcas Wangithi Nderi Vs Samuel Kaburu Mwaura & Another [2015] eKLR among others.

Further that in Zipporah Nangila Vs Eldoret Express Ltd & 2 Others [2016] eKLR the victim sustained lesser severe injuries but was awarded Kshs.2,400,000/= as general damages.

11. On the appellant's loss of ability to work and provide for his family counsel referred to the medical report by Dr. Kiamba, letter from Kenlick Logistics Ltd dated 27<sup>th</sup> April 2021(former employer). She thus proposed the loss of income to be calculated as follows:

$Kshs.20,000/= \times 12 \times 20 = Kshs.4,800,000/=$ ,

based on appellant's age of 40 years and the retirement age of 60 years in Kenya. On the salary bit counsel still referred to the letter from Kenlick Logistics Ltd dated 27<sup>th</sup> April 2021 where the monthly salary of Kshs.20,000/= was indicated.

12. Reliance was placed on the following cases:

- i. Wambua V Patel & Another [1986] KLR 336
- ii. Alpharama Limited V Joseph Kariuki Cebron[2017] eKLR and Mumias Sugar Ltd V Francis Wamae [2007] eKLR where it was held:-

“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 employed. The justification for the award when plaintiff is employed is to compensate the Plaintiff for the risk that the disability has exposed him of either losing his job in future on in case he loses the job, his diminution of chances of getting an alternative job in the labour market.”

13. On special damages counsel submitted that documents and receipts were produced to prove the payment and future payments, totalling Kshs.461,800/=.



Finally, that costs follow the event, and referred to is the case of *Cicilia Kamumu Ngayu V Barclays Bank of Kenya & Another Nyeri High Court Civil Case No. 17 of 2014*. She urged the court to allow the appeal with costs.

### **Respondent's Submissions**

14. These were filed by G & G Advocates LLP and are dated 28<sup>th</sup> March 2024. Counsel restated the duty of an Appellate court by referring to the cases of (i) *Selle & Another V Associated Motor Boat Co. Ltd & Others* 1968 EA 123, (ii) *Ndiritu V Rapkoi & Another* [2004] eKLR where the Court of Appeal held that an Appellate court will interfere “where the finding is based on no evidence, or the Judge is shown demonstrably to have acted on the wrong principles in reaching the finding he did.”
15. On general damages counsel submitted that assessment of damages is discretionary and the court can only intervene where it is shown there was consideration or lack of it; In support of this submission, counsel referred to the case of *Alfred Magare Nyamatani V Nancy Lagat & Another* (Civil Appeal E021 of 2023[2024] KEHC 16485(KLR) where the court held:

“Assessment of damages is at the discretion of the trial court. The appellate court only interferes with the discretion where the trial court, in assessing damages erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assignment is based on no evidence.”

16. Additionally, counsel referred to cases where the victims suffered injuries similar to those suffered by the appellant. These are:
- i. *Damaris Wamucii Kagechu V Joseph Kirui & Another* [2019] eKLR where an award of Kshs.1,500,000/= was made.
  - ii. *John Njenga Maina V Humphrey Kinyua Rukeria* [2016] eKLR where Kshs.750,000/= was awarded.
  - iii. *Peter Mutemi Karuki V Finik Kaveza Charasinya and Another* (Suing as the legal representative of the Estate of Stanley Alemba Chavasi – (deceased). Civil Appeal No. E192 of 2021 [2022] KEHC 12132(KLR).
17. It was counsel's submission that the award of loss of income was not awardable to the Appellant as it is a special damage which must be specifically pleaded and proved. In support of this argument he cited the case of *SJ Vs Francesco Di Nello & Another* [2015] eKLR where it was held inter alia that:

“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 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.

This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 wherein Lord Denning M. R. said as follows:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity.



Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

Learned Counsel for the Respondent was therefore wrong in stating that loss of earning capacity is not pleaded and that it must be proved as though it is a claim under loss of income or future earnings.”

18. He further submitted that the employer’s letter produced showed the appellant was employed on permanent basis and nowhere stated that his employment had been terminated. That the essence of loss of income is ascertainable from the consequences of the injuries. This he argued was not reflected in the letter from the employer. In support he relied on the case of *Ezekiel Morara Nyagogo V Mini Bakeries Limited* (Civil Appeal No. E38/2021) [2023] KEHC 1593 (KLR) where the court held:

“However, it is the responsibility of the respondent to demonstrate by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.

Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure.”

19. Finally, on future medical expenses he argued that the same is futuristic and should not be allowed. On this he relied on the case of *Zacharia Waweru Thumbi V Samwel Njoroge Thuku* [2006] eKLR where it was held:

“Even where a medical report gives a prognosis that the Claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages.”

### **Analysis & Determination**

20. This is a first appeal and this court is guided on how to deal with it by the principle set out in the case of *Selle & Another* (supra) which stated:

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh & exhaustive scrutiny & make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

21. Having carefully considered the record of appeal, submissions by both parties, the cited authorities and the law I find the issue for determination to be whether the awards made by the trial court should be interfered with by this court. First and foremost, I wish to state that the parties herein entered into a consent on liability at 90:10 on 5<sup>th</sup> March 2024 in favour of the appellant. Therefore, the bone of contention is on quantum.

22. As per the medical report (PExb3) which was never challenged the appellant suffered the injuries outlined at paragraph 8 of this judgment. From the evidence and the submissions there is no dispute on



the injuries suffered by the appellant as a result of the accident that occurred on 12<sup>th</sup> August 2020. Dr. Kiamba's medical report (PExb3) further confirms that after the accident the patient was attended to at Naivasha Sub-county referral hospital and later transferred to Nakuru Level 5 hospital. He remained at the said hospital from 13<sup>th</sup> August 2020 to 19<sup>th</sup> October 2020 (2 months + 6 days). This is evidence showing that the appellant suffered very serious injuries. The same has not been contested by the respondent.

23. From the report PExb 3, the most affected part of the appellant's body is the right hip joint and right lower limb. This resulted in restricted movements of the right hip, knee & ankle joint resulting into reduction of function of the right lower limb.
24. There is no dispute that the appellant is a driver and had just been employed by Kenlin Logistics Ltd as a truck driver, when this accident occurred. The letter by Kenlin Logistics dated 27<sup>th</sup> April 2021 does not indicate whether or not the appellant would be retained as a truck driver and/or employee. However, from the injuries to the right limb it may not be possible for him to drive trucks as earlier designed for him, by the employer. Had the employer clearly indicated its position on the employment in view of the serious injuries suffered, then the issue of future income would have been ascertained.
25. Further, the plaint did not make a specific pleading on this item as it's a special damage. All that it stated is at paragraph 7 of the plaint which reads:

“The Plaintiff's claim against the defendant is for payment of loss of income being seeing he was a driver by profession earning Kshs.20,000/= and has no other source of income hence entitled to an award for loss of income particulars whereof are well within the defendant's knowledge.”

26. This alone would not have assisted the court in dealing with this issue. The trial court in dismissing this claim on future income relied on the case of Ezekiel Morara Nyatogo (supra) which I agree with. The court can only act on material placed before it. In this case none was placed before the trial court for this court to address the issue for future earnings.

27. On future medical expenses as stated in the report (PExb 3) is the sum of:

Kshs.300,000/= + Kshs.30,000/= Total – Kshs.330,000/=

The trial court granted Kshs.80,000/= as the common amount paid for such an exercise. She only considered the removal of plates, yet there was the element of replacement of the upper incisor tooth and filling of the lower incisor tooth at a cost of Kshs.30,000/=. Taking that into account I will round that figure to Kshs.100,000/=. I therefore set aside the award of Kshs.80,000/= and substitute it with Kshs.100,000/= for future medical expenses.

28. Coming to general damages, the nature of injuries has already been set out above. Was the figure of Kshs.800,000/= commensurate with the injuries suffered? I have considered the authorities cited by both parties on the issue of general damages. It must however be noted that injuries to different people can never be the same or to the same extent when it comes to the effects.

29. Some cases which have dealt with injuries almost similar to what the appellant suffered are:

- i. Dorcas Wangithi Nderi B Samuel Kiburu Mwaura & Another Embu HCCA No. 58/2023 – An award of Kshs.2,000,000/= was confirmed by Muchemi J.
- ii. Geoffrey Mwaniki Mwinzi V Ibero (K) Ltd & Another. Nrb Civil Case No. 578/2010 – An award of Kshs.2,000,000/=, was made.



- iii. Karuli V Ngare & Another HCCA No E192/2021 – an award of Kshs.1,800,000/= was reduced to Kshs.1,300,000/= by J. N. Mulwa.
- iv. John Njenga Maina V Humphrey Kinyua Rukeria (supra) – An award of Kshs.750,000/= was made by L. Njuguna J.

Taking into account the discussions in the above cases among others and in consideration of the injuries suffered by the appellant I find the award of Kshs.800,000/= by the trial court to be a bit low. I hereby set it aside and substitute with an award of Kshs.1,100,000/=.

30. The appeal partially succeeds in the following terms:-Loss of income - Nil  
General damages - Kshs.1,100,000/=  
Future medical expenses - Kshs.100,000/=

Total = Kshs.1,200,000/= less 10%

(Kshs.120,000/=)

Total = Kshs.1,080,000/=

Special damages - Kshs.131,800/=  
TOTAL - Kshs.1,211,800/=

31. The lower court judgment is hereby set aside and substituted with a judgment for Kshs.1,211,800/= (One Million, two Hundred and eleven Thousand and Eight Hundred Shillings) plus interest and costs from the date of Judgment in the lower court.

(b) The Appellant will get half of the costs of the appeal.

32. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JULY 2025 IN OPEN COURT AT NAKURU**

**H. I. ONG'UDI**

**JUDGE**

