



REPUBLIC OF KENYA



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**Muthuku v Nthiga (Civil Appeal E002 of 2023)
[2025] KEHC 12448 (KLR) (4 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E002 OF 2023
HM NYAGA, J
SEPTEMBER 4, 2025**

BETWEEN

MARK MWIRIGI MUTHUKU APPELLANT

AND

PATRICK KIBUGI NTHIGA RESPONDENT

*(An Appeal from the Judgement and Decree of Hon. J.M Njoroge (CM)
in Meru CMCC No. 263 of 2021 delivered on 16th November, 2022)*

JUDGMENT

1. By a Plaint dated 9th June, 2021, the Appellant herein (the Plaintiff before the trial court) instituted a suit against the Respondent herein (the Defendant before the trial court) in Meru CMCC No. 264 of 2021. In the said suit, the Appellant sought judgment for general damages, special damages and costs & interests of the suit.
2. The Appellant's claim arose from a road traffic accident that occurred on or around 10th December, 2020 along Meru-Mitunguu Road involving motorcycle registration number KMDN 253T Captain and motor vehicle registration number KCD 251 B. The Appellant was a motor cyclist of the said Motor Cycle while the Respondent was the owner of the said Motor Vehicle.
3. The Appellant blamed the Respondent's driver for driving the said motor vehicle so carelessly and negligently that it knocked him down and thereby occasioning him multiple injuries.
4. After full trial, the learned magistrate entered judgment for the Appellant against the Respondents in the following terms: -
 - a. Liability 100%
 - b. General Damages Ksh.350,000/=



- c. Special Damages Ksh.10,000/=
 - d. Costs and Interests.
5. Aggrieved by the aforesaid decision of the trial court, the Appellant lodged this appeal vide the Memorandum of Appeal dated 28th November,2022 raising the following grounds: -
- a. That the trial Magistrate erred in law and in fact by awarding the Appellant an award that was way below the mark compared to the nature of injuries the Appellant sustained.
 - b. That the trial Magistrate erred in law and in fact by failing to consider the degree of injuries the Appellant sustained.
 - c. That the trial Magistrate erred in law and in fact by failing to consider the evidence of loss of earnings, the permanent incapacitation and the costs of future medical expenses despite having been pleaded and proved.
 - d. That the trial Magistrate erred in law and in fact by failing to award special damages despite having been pleaded and proved by documentary evidence.
 - e. That the trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 - f. That the trial Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.
 - g. That the trial Magistrate erred in law and in fact when making his award by failing to consider passage of time and incidence of inflation.
6. The Appellant is thus seeking that the trial court's Judgement be set aside and this court be pleased to reassess the special and general damages payable to him.
7. The Appeal was canvassed by way of written submissions.

Appellant's submissions

8. The Appellant submitted that the trial court failed to consider the pleadings and the evidence presented before it thereby arriving at an award that was inordinately low.
9. He thus urged this court to consider the authorities relied on before the trial court and adjudge this matter accordingly.
10. The Appellant referred this court to cases of Shah v Mbogo [1967] EA 116 and In Re Global Tours & Travel Ltd HCWC No. 43 of 2000 in support of his submissions.
11. The Appellant also prayed to be awarded costs of this Appeal.

Respondent's Submissions

12. On general damages for pain, suffering and loss of amenities, the Respondent submitted that an award of ksh.350.000/= was fair, reasonable and based on correct principles. He argued that the authorities relied on by the trial court in making this award were applicable.
13. On future medical expenses, the respondent submitted that the same was neither pleaded nor proved.



14. With respect to loss earning, the respondent argued that this is a special claim which was not proved and therefore trial court rightly dismissed it.
15. The respondent thus submitted that the appeal is devoid of merit and urged this Court to dismiss it with costs.

Analysis & Determination

16. I have considered the grounds of appeal, the record of appeal and the submissions of the parties. It is patent that this Appeal is only against the quantum of damages awarded by the trial court. As such, the main issues that arise for determination are;
 - a. Whether the award of general and special damages by trial court was erroneous or unjustified and/or low in the circumstances of this case.
 - b. Whether the court erred in failing to award the appellant loss of future medical expenses
 - c. Whether the court erred in failing to award the appellant loss of earning.
17. This is a first appeal. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’
18. This position was also buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.” [See also: *Selle v. Associated Motor Boat Co. Ltd* [1968] EA]
19. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 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.”
20. I will determine this Appeal in light of the principles enunciated above.
21. With regard to General Damages for Pain and Suffering, it is not in dispute that the Appellant sustained the following injuries: -
 - a. Fractures of right radius.



- b. Dislocation of right wrist.
 - c. Abrasions on the anterior aspect of the right leg.
 - d. Scars and abrasions on the posterior aspect of right fore-arm.
 - e. Tenderness on flexion of the right ankle.
22. The Appellant proposed a sum of Kshs. 3,500,000/= guided by the case of Zipporah Nangila v Eldoret Express Limited & 2 Others (2016) eKLR, where the Plaintiff sustained comminuted compound fracture of the right distal and fibular, fracture of the left distal and fibular and was awarded Kshs.2,400,000/=.
23. The Respondent proposed a sum of Kshs. 250,000/= relying on the case of Patrisia Adhiambo Omolo v Emily Mandala SYA HCCA No. 19 of 2019 [2020] eKLR ,where the Judge upheld an award of Kes.180,000/= for a fracture of the left forearm radius and ulna bones, colles fracture of the left forearm, swollen deformed distal aspect of the left forearm, multiple bodily injuries and injuries on the left forearm with swelling.
24. In the impugned judgment, the learned trial magistrate relied on the case Patrisia Adhiambo Omolo v Emily Mandala (supra) and the case of Kimathi Mbuvi t/a Kimathi Mbuvi & Bros v Augustine Munyao Kioko [2006]eKLR, where the Court of Appeal upheld an award of Kshs 300,000/- for multiple cuts and fractures of radius and ulna bones suffered by the appellant on 28/7/2006.
25. The authority by the appellant is of injuries which are more severe compared to those that he sustained herein while the authorities relied upon by the Respondent and the trial court are of injuries which are almost similar to those sustained by the Appellant herein.
26. The Appellant herein sustained a single fracture, dislocation of right wrist and multiple soft tissue injuries. In the cases cited by the trial court, the claimant therein sustained more than one fracture and multiple soft tissue injuries. However, I note the cause of action in the first case was in 2017 and in the latter case was in 2006. The cause of action in the instant case was in 2020. Factoring in the rate of inflation, I am of the view that the award by the trial court was inordinately low. I hereby set aside the award of Ksh.350,000/= as general damages for pain and suffering and substitute it with an award of Kshs. 500,000/=.
27. With respect to Special Damages, it is trite law that special damages must be both pleaded and proved before they can be awarded. In the case of Hahn v. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held as follows:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
28. In this case, The Appellant pleaded for Kshs. 12,170/= as special damages but only produced a receipt for Kshs. 10,000/= in respect of the medical report. The trial magistrate therefore rightly awarded him Kshs. 10,000/= as special damages being the only amount specifically pleaded and strictly proved.
29. The costs of future medical expenses is a special claim which needs to be specifically pleaded and proved before a court of law can award it. However, the same need not be specifically captured in terms of the exact costing.



30. The Court of Appeal in *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR extensively discussed this award and held as follows: -

“...We readily agree 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. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated: -“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof 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 thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.” We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

31. The Appellant neither pleaded nor prayed for the costs of future medical expenses. I have also perused the medical report dated 2nd February, 2021 that was produced in evidence and it has no recommendation for any future medical treatment.

32. On loss of earning, the Appellant pleaded for the same. He stated that he was aged 32 years old in good health and earning Ksh.20,000/= out of his business as a motorist. He did not make a prayer for the same in the plaint. It is trite that courts normally award only orders that have been sought. The trial court did not consider this claim. I also note that during hearing, the Appellant did not adduce any documentary evidence in support of this position.

33. In *S J vs Francesco Di Nello & Another* [2015] eKLR the Court of Appeal propounded the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 at page 14 wherein Lord Denning M. R. said in part 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”

34. In *William J Butler v Maura Kathleen Butler* [1984] eKLR [1984] KLR 225 at 232 Kneller JA defined loss of earning capacity and stated:

“45. Loss of earning capacity 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 by Lord Denning M.R. in *Fairely vs John Thompson (Design & Contracting Division) Ltd* [1973] 2 Lloyd’s Rep 40,42(CA)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.”

35. From the foregoing, damages under the head of loss of earning is the income the Appellant lost during the recovery period as a result of the accident and is therefore a special damage claim. Being a special damage claim the same has to be proved. In the absence of cogent evidence and a specific prayer for the same, there exists no legal basis upon which such an award can be made.
36. In light of the above analysis, the appeal partly succeeds to the extent that the trial court’s judgement on quantum of general damages in the said sum of Kshs. 350,000/- is substituted with a sum of Kshs. 500,000/=.
37. The appellant shall have costs of the appeal while the costs in the court below will remain as directed in the trial court’s judgement.
38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF SEPTEMBER 2025.

H. M. NYAGA

JUDGE.

