



**Kabatha & another v Mutahi (Civil Appeal E073 of 2024)
[2025] KEHC 1868 (KLR) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E073 OF 2024
JK NG'ARNG'AR, J
FEBRUARY 4, 2025**

BETWEEN

JOSEPHAT MWANGI KABATHA 1ST APPELLANT

ESTHER NJAMBI GITHUA 2ND APPELLANT

AND

PETER MONJE MUTAHI RESPONDENT

(Being an appeal against the Judgment of Hon. J. B. Kalo (CM) delivered on 22nd February 2024 in Mombasa Chief Magistrate's Court Civil Suit No. E914 of 2022, Peter Monje Mutahi v Josephat Mwangi Kabatha & Esther Njambi Githua)

JUDGMENT

1. The background of the appeal is that vide a Complaint dated 3rd June 2022, the Plaintiff/Respondent averred that at all material times to this suit, the 1st Defendant/Appellant was the driver and in actual custody and possession of Lexus motor vehicle registration number KCV xxxB while the 2nd Defendant/Appellant was the registered and/or beneficial and/or insured owner, and that the 2nd Defendant/Appellant was vicariously liable for acts of the 1st Defendant/Appellant. That on or about 20th June 2021, the Plaintiff/Respondent was lawfully and carefully cycling his motorcycle registration number KMET xxxS at Total Petrol Station along Mombasa Malindi Road when the 1st Defendant/Appellant by its authorized servant, driver/or agent carelessly and negligently drove, controlled and/or managed motor vehicle registration number KCV xxxB causing it to lose control, veer off its lane and hit the Plaintiff/Respondent thereby causing him to sustain severe injuries.
2. The Plaintiff/Respondent averred that the particulars of injuries suffered by the Plaintiff included compound (open) comminuted segmental fracture right tibia/fibula bones, post traumatic arthritis and stiffness right knee and right ankle joints, bruises and abrasions on the forehead, left ear and both



- hands, and blunt object trauma soft tissue injuries to the right thigh. That as a result of the accident, the Plaintiff/Respondent also suffered loss and damage with 25% partial permanent disability.
3. The Plaintiff/Respondent prayed for judgment against the Appellants/Defendants for special damages of Kshs. 704,397.00, general damages, future medical expenses of Kshs. 226,000.00, loss of earnings, costs of the suit and interest on special damages, general damages and future medical expenses.
 4. This suit was heard in the trial court and judgment delivered on 22nd February 2024 where judgment was entered in favour of the Respondent against the Appellants jointly and severally as the court found the 1st Appellant who was the driver to be 100% liable for the accident and the 2nd Appellant was held vicariously liable for negligence of the driver. The court then awarded Kshs. 2,000,000 for general damages, Kshs. 360,000 for lost earnings, Kshs. 586,000 for future medical expenses, Kshs. 2,000 for special damages, costs of the suit, and interest at court rates on special damages from the date of filing suit until payment in full and on general damages, lost earnings, future medical expenses, and costs of the suit from the date of the judgment until payment in full.
 5. Being dissatisfied, the Appellant appealed the entire judgment through the Memorandum of Appeal dated 20th March 2024 on grounds that the learned trial magistrate erred in fact and in law by awarding general damages of Kshs. 2,000,000 which were manifestly excessive and a wholly erroneous estimation of the damages suffered by the Respondent, in not taking into account past awards for comparable injuries to those suffered by the Respondent, by awarding Kshs. 360,000.00 as loss of future income which was not only manifestly excessive but also without any evidentiary basis as the Respondent never proved he was gainfully employed prior to the alleged incident, that he was earning a salary of Kshs. 30,000 and that he was unable to continue working as a result of the alleged accident, in awarding the exorbitant amount of Kshs. 586,000 as future medical expenses which amount exceeded what the Respondent had prayed for, in awarding excessive damages for costs of painkillers, physiotherapy and removal of implants to the Respondent, in entirely failing to take into account the Appellant's written submissions and authorities supplied, and in apportioning liability at 100% against the Appellants in favour of the Respondent despite evidence of the contrary.
 6. The Appellant prayed that the appeal be allowed, that this court be pleased to set aside the entire judgment of 22nd February 2024 by the trial court and substitute it with a decision of this court, and that costs of this appeal be awarded to the Appellant.
 7. The Respondent filed a cross appeal dated 26th July 2024 against part of the judgment delivered on 22nd February 2024 that the learned magistrate erred in fact and law by failing to award all the special damages despite evidence produced by the Cross Appellant on the costs of treatment, by failing to award the amount for the medical expenses, by awarding inordinately low general damages in comparison to the adverse injuries sustained by the Cross Appellant, and by failing to consider the Cross Appellant's submissions and judicial authorities on special damages thereby arriving at an erroneous figure. The Cross Appellant prayed for orders that the cross appeal be allowed and the judgment delivered on 22nd February 2024 be reversed to the extent that the court herein be pleased to reassess the general damages payable to the Plaintiff/Cross – Appellant, that medical expenses of Kshs. 694,197.00 be awarded to the Cross Appellant being part of the special damages as prayed, and any other orders that this court may deem fit.
 8. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 16th November 2024 argued that recent decisions within our jurisdiction do not support excessive award of Kshs. 2,000,000. The Appellant cited the case of *Daniel Otieno Owino & Ezekiel Otieno Owino v Elizabeth Atieno Owuor* (Civil Appeal 18 of 2019) (2020) KEHC 4895 (KLR) (29 May 2020) (Judgment), *Mohamed Younis Quereshi & Khan Riaz v Chris Maina Mathu* (Civil Appeal 96 of



- 2015) (2020) KEHC (KLR) (13 February 2020) (Judgment), and *DG (Minor suing through her next friend MOR) v Richard Otieno Onyisi* (Civil Appeal 117 of 2019) (2021) KEHC 7745 (KLR) (15 April 2021) (Judgment) where the court awarded Kshs. 400,000. The Appellants submitted that there ought to be some uniformity of awards for comparable cases. That the trial court did not cite any comparable case where a similar amount had been awarded.
9. The Appellants maintained that the trial court awarded the Respondent Kshs. 360,000 being the equivalent of one year's salary where the Respondent failed to produce any evidence of employment contract, pay slip or account statements showing details of his employer confirming he earned a salary of Kshs. 30,000 as alleged. That loss of earnings is a special damage that ought to be pleaded and proved as was held in the cases of *Nzuki Isaac Muveke v Francis Njogu Njehia* (Civil Appeal 83 of 2015) (2021) KEHC 6458 (KLR) (25 May 2021) (Judgment) and *Beena Khambaita v Talvinder Sagoo, Manjit Kaur Sagoo & Harpin Kaur Sagoo* (Civil Suit 107 of 2005) (2015) KEHC 519 (KLR) (Civ) (30 November 2015) (Judgment). The Appellants submitted that the Plaintiff sought the sum of Kshs. 226,000 as future medical expenses but the trial court awarded the Respondent Kshs. 586,000. That PW3 testified on cross examination that the figure was arrived at using estimates of Premier Hospital, a private facility, and that the medical expenses would be lower if undertaken at a public facility such as the Coast General Hospital.
 10. The Appellants argued that the Respondent did not provide sufficient evidence before the trial court to support the finding that the Appellants were 100% liable for the accident and to fully absolve the Respondent of negligently riding his motorcycle KMET xxxS on the material date, which motorcycle was not insured. The Respondent relied on the case of *Nobel Trading Company Limited & Another v Opondo* (Civil Appeal E105 of 2020) (2024) KEHC 8860 (KLR) (Civ) (27 June 2024) (Judgment) where the trial court was faulted for apportioning liability against the Appellants at 100% without considering the evidence. The Appellants responded to the Respondent's Cross Petition by reiterating contents of their submissions as stated herein before.
 11. The Respondent in their submissions dated 25th November 2024 stated that according to his testimony, he was on his motorcycle heading towards Nyali area at around 2100 hours on the fateful day. That on cross examination, the Respondent explained that the driver of the motor vehicle KCV xxxB was driving on the opposite side heading towards Shanzu general direction. That the said driver suddenly made a turn towards the right in an attempt to branch at Total Petrol Station without indicating, that he was driving at an excessive speed and suddenly veered onto the Plaintiff's lane and hit him. That this position was corroborated by PW2, Police Constable Ominde who relied on the occurrence book and the police file done by the investigating officer who visited the scene. To support this position, the Respondent relied on the cases of *Jacquiline Mueni Muasya v Kenya Power & Lighting Co. & Kimunya Julius* (2019) eKLR, *Mary Njeri Murigi v Peter Macharia & Another* (2016) eKLR and *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* (2012) eKLR.
 12. The Respondent relied on the holding in the case of *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR where the court held that the context in which compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. The Respondent submitted that an award of Kshs. 2,000,000 for general damages for pain and suffering was inordinately low given the nature of the injuries sustained. The Respondent proposed an award of Kshs. 4,000,000 in the circumstances.
 13. The Respondent relied on the holding in *Gabriel Mwashuma v Mohammed Saijad & Another* (2015) eKLR where partial permanent disability was assessed at 30% and the court assessed general damages for pain, suffering and loss of amenities at Kshs. 3,000,000, the case of *Alex Wachira Njagua v Gathuthi Tea Factory & Another* (2010) eKLR where the court awarded Kshs. 3,000,000 and the case of *Duncan*



- Kimathi Karagania v Ngugi David & 3 Others* (2016) eKLR where similar injuries were sustained with permanent incapacity being assessed at 30%, and the Plaintiff was awarded general damages of Kshs. 4,000,000 for pain, suffering and loss of amenities in 2016.
14. The Respondent proposed that the award under loss of earnings would be the multiplicand x 12 months x Multiplier x % of incapacity which translates to Kshs. 30,000 x 12 months x 35 years = Kshs. 12,000,000 x 25% = Kshs. 3,150,000. That the mode of calculations for loss of earnings was referenced in *Pioneer Plumbers Ltd v Joseph Nyongesa Mughula* (2018) eKLR. The Respondent submitted on whether the trial court erred in making an award for loss of earnings by citing the case of *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR and *Evans Juma Otuala v Jackline Kazungu Kambi* (2020) eKLR. That the trial court judicially exercised its discretionary powers as the Respondent had clearly lost his life as a guard at the age of 25 years and the ability to earn and that as a result his family had been permanently inhibited as a result of actions of the negligent Appellants.
 15. On whether the trial court erred in failing to make an award for medical expenses under special damages, the Respondent submitted that to prove medical expenses to the tune of Kshs. 694,197, the Plaintiff produced various detailed invoices which were settled by the Plaintiff's insurance company. The Respondent relied on the holding in *Leli Chaka Nodoro v Mabree Ahmed & S. M. Lardhib* (2017) eKLR and stated that the Respondent ought to be compensated without due regard on how the funds were cleared. On whether the trial court erred in making an award for future medical expenses, the Respondent submitted that the award made under the head was reasonable and ought not be disturbed.
 16. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) EA 123 as follows: -

“ ... 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 ...”
 17. I have considered the Record of Appeal dated 21st August 2024, the Respondent's Cross Appeal dated 26th July 2024 and submissions by the parties. The issues for determination are: -
 - a. Whether the liability apportioned was proper
 - b. Whether the award for quantum/damages was fair
 18. On liability, the trial court entered judgment in favour of the Respondent against the Appellants jointly and severally where the court found that the 1st Appellant who was the driver to be 100% liable for the accident and the 2nd Appellant was held vicariously liable for negligence of the driver.
 19. The Appellants in their grounds of appeal stated that 100% liability was apportioned against them despite evidence to the contrary. The Appellants submitted that the Respondent did not provide sufficient evidence before trial to absolve him of negligently riding the motorcycle which was also not insured.
 20. The Respondent stated that while he was riding his motorcycle heading towards Nyali, the 1st Appellant was driving motor vehicle KCV xxxB on the opposite side heading towards Shanzu. That the 1st Appellant suddenly made a turn towards the right in an attempt to branch at Total Petrol Station without indicating, that he was also driving at an excessive speed and suddenly veered onto the Respondent's lane and hit the Respondent. The Respondent submitted that this position was



corroborated by PW2 who relied on the occurrence book and the police file done by the investigating officer who visited the scene.

21. This court has perused proceedings of the trial court and notes that save to say that 100% liability was apportioned despite evidence to the contrary, the Appellants did not tender any evidence to support their position.

22. Section 107(i) of the *Evidence Act* provides that: -

Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. This court therefore finds that the trial court was right in holding the Appellants 100% liable.

24. On quantum/damages, the Appellants on the one hand stated in their grounds of appeal that general damages of Kshs. 2,000,000 was manifestly excessive, that the award of Kshs. 360,000 as loss of future income was manifestly excessive and not proved, and that future medical expenses of Kshs. 586,000 exceeded the amount prayed for. The Respondent on the other hand in his cross appeal stated that the award on general damages was inordinately low in comparison to the injuries sustained. The Respondent prayed for reassessment of the same and that medical expenses of Kshs. 694,197 be awarded as part of special damages.

25. The court in the court in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR pronounced itself on interference with assessment of damages in the lower court as follows: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

26. Further, the court in *Batti v Katana* (Civil Appeal 20 of 2021) [2023] KEHC 21300 (KLR) (10 May 2023) (Judgment) held that: -

“The guiding principle in the award of damages is that whereas no two injuries are exactly alike, comparable injuries should, as far as possible, be compensated by comparable awards. The evidence on the nature and extent of claimant’s injuries normally forms the basis upon which an award of damages is founded.”

27. I will proceed to analyse them under the heads of general damages, loss of future income, future medical expenses and medical expenses as follows:

General Damages

28. The Appellants submitted that recent decisions in our jurisdiction do not support an award of Kshs. 2,000,000 for general damages. The Appellants cited authorities where the court awarded Kshs. 400,000 and stated that there ought to be uniformity of awards for comparable case. The Respondent on the other hand submitted that the award of Kshs. 2,000,000 for general damages was inordinately low for injuries sustained and he proposed an award of Kshs. 4,000,000.

29. The injuries pleaded by the Respondent included compound (open) comminuted segmental fracture right tibia/fibula bones, post traumatic arthritis and stiffness right knee and right ankle joints, bruises and abrasions on the forehead, left ear and both hands, and blunt object trauma soft tissue injuries to the right thigh with 25% partial permanent disability. These injuries were confirmed by the medical



examination report dated 15th February 2022 prepared by Dr. Darius Wambua Kiema that was furnished to this court.

30. This court relied on the holding in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* (2019) eKLR the injuries suffered were soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident and the court awarded Kshs. 1,000,000 and in *Alphonse Muli Nzuki v Brian Charles Ochuodho* (2014) eKLR where the injuries sustained included compound comminuted fracture right tibia and fibula and degloving injury medial aspect of right leg and foot and the court awarded Kshs. 800,000 in general damages.
31. It is the considered view of this court that on the basis of comparable injuries, passage of time and inflation, an award of Kshs. 1,400,000 for general damages for pain and suffering and loss of amenities is reasonable. The trial court therefore faulted in awarding Kshs. 2,000,000.

Loss of future income

32. The Appellants submitted that the Respondent failed to produce evidence of the alleged monthly income of Kshs. 30,000. That loss of earnings are special damages that ought to be pleaded and proved. The Respondent submitted that the award under the head was not opposed by the Appellant as the trial court judicially exercised its discretion.
33. The trial court in its judgment held that the Plaintiff claimed Kshs. 30,000 monthly for one year, a period he alleges he did not work due to the horrific nature of the injuries sustained. Kshs. 360,000 was therefore awarded under this head.
34. The court in *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment) held that: -

“Diminished earning capacity refers to decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.
35. Usually, loss of earning capacity is concerned with the effect of the injury on the person’s future earning ability as opposed to the present loss.
36. 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.
37. 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, the court must show how it has arrived at that amount, it not just by coming up with a random figure”.
35. This court has perused the Record of Appeal and noted that the Respondent pleaded in the plaint that he worked as security officer and lost earnings of Kshs. 30,000 per month for a full working year when he was unable to discharge his duties. In his testimony in court, the Respondent stated that he works with the prisons department and indicated that he could not work because of the injury. However, the Respondent being a civil servant did not provide proof of the lost earnings for the year that he could not work. I therefore find that the trial court faulted in awarding under this head.



Future medical expenses

36. On future medical expenses, the Appellants submitted that the Respondent sought the sum of Kshs. 226,000 but the trial court awarded Kshs. 586,000. However, the Respondent stated that the award under future medical expenses was reasonable and out not be disturbed.
37. The court of appeal in *Tracom Limited & v Hasssan Mohamed Adan* (2009) eKLR 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.”
38. The Respondent pleaded the need to purchase painkillers and bone/joint medication at the cost of Kshs. 3,000 per month for at least one year, that physiotherapy sessions were estimated at Kshs. 1,000 for 40 sessions totaling to Kshs. 40,000 and that he would require provision for removal of metal implants at Premier hospital estimated at a minimum of Kshs. 150,000 as per NHIF surgical package for the hospital or at the rate of previous hospital admission. I have established that the recommendations for future medical expenses were made by Dr. Darius Wambua Kiema in the medical examination report dated 15th February 2022. I therefore find that the trial court faulted in awarding Kshs. 586,000 under the head instead of Kshs. 226,000.

Medical expenses

39. On the award for medical expenses, the Respondent submitted that there was proof of Kshs. 694,197 which was settled by the Respondent’s insurance company and that compensation ought to be done without due regard to how funds were cleared. That the award under this head ought to be part of special damages.
40. The court in *St Bakhita Day Care & Kindergarten School & another v SBO (Minor suing through his mother as next friend NO)* (Civil Appeal 732 of 2017) [2023] KEHC 712 (KLR) (Civ) (9 February 2023) (Judgment) held as follows: -
- “... had the Insurance Company instituted a suit for the recovery of the special damages it paid, through a recovery suit under the doctrine of subrogation, the court would not hesitate to order for the payment of the sums paid by the Insurance Company to itself, not to the Respondent.
- The principle of subrogation applies where there is a contract of insurance. If the insured risk takes effect and the Insurer settles the Insured’s claim, then the Insurer is entitled to diminish the loss suffered by the Insured by seeking compensation from the party who caused the loss. See *Leli Chaka Ndoro v Maree Ahmed & Another* (2017) eKLR.”
41. Pursuant to the holding above, the Respondent did not qualify to be awarded under this head.
42. In the end, judgment for the Respondent in this appeal is as follows: -
- a. Liability – 100%
 - b. General damages – Kshs. 1,400,000
 - c. Future medical expenses – Kshs. 226,000
 - d. Special damages – Kshs. 2,000



- e. Interest on b), c) and d) above at court rates from date of judgment in the trial court until payment in full
- f. No orders as to costs.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellants

..... Advocate for the Respondent

Court Assistant – Shitemi

