



REPUBLIC OF KENYA



**Gathotho alias Gathotho v Benjo (K) Limited & 2 others (Civil Appeal E051 of 2024) [2025] KEHC 8904 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8904 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E051 OF 2024  
FN MUCHEMI, J  
JUNE 19, 2025**

**BETWEEN**

**STEPHEN MWANGI GATHOTHO ALIAS STEPHEN MWANGI GATHOTHO  
ALIAS STEPHEN N GATHOTHO ALIAS GATHOTHO STEPHEN  
MWANGI ..... APPELLANT**

**AND**

**BENJO (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
BENARD NJOROGE ..... 2<sup>ND</sup> RESPONDENT  
BIDAN MAINA WAIRAGU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. I. F. Koome (SRM) delivered on 7th March 2024 in Thika CMCC No. E592 of 2021)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. E592 of 2021 in a suit that arose from a road traffic accident whereby the trial court found the 3<sup>rd</sup> respondent fully liable while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were found vicariously liable. The appellant was awarded general damages for pain and suffering at Kshs. 550,000/-, future medical expenses at Kshs. 80,000/- and special damages at Kshs. 6,250/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact by failing to award general damages for diminished earning capacity.



- Directions were issued that parties put in written submissions and the record shows that the appellant complied by 19<sup>th</sup> March 2025. While the 1<sup>st</sup> & 3<sup>rd</sup> respondents failed to file.

### **Appellant's Submissions**

- The appellant submits that he led evidence to demonstrate that the injuries he sustained due to the accident were severe and had the effect of incapacitating him. The medical report of Dr. Wokabi showed that he had been incapacitated to the extent of 10%. The appellant argues that the disability had impaired his ability to work and neither was his evidence controverted or challenged. To support his contentions, the appellant refers to the cases of *Unleek Electrical Company Limited v Joseph Fanuel Alela* NBI HCCA No. 676 of 2002 and *Jamal Ramadhan Yusuf & Another v Ruth Achieng' & Another* [2010] eKLR.
- Relying on the cases of *S J v Francesco Di Nello & Another* [2015] eKLR; *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR; *Butler v Butler* [1984] KLR 225 and *John Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR, the appellant submits that the accident placed him at a relative disadvantage in terms of the work he used to do before the accident and therefore entitled to damages for diminished earning capacity. The appellant further submits that his ability to work, not only as a teacher, had been diminished. As a teacher, he stated that he could not engage in strenuous activities such as co-curricular activities and writing for long. At the farm, due to the injuries, he has to hire someone to assist him which he would not do but for the injuries.
- Relying on the cases of *S.J. v Francesco Di Nello & Another* (*supra*); *Shah & Another v Shah & Others* [2003] 1 EA 290 and *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR, the appellant submits that the trial court ought to have considered the degree of incapacitation indicated by Dr. Wokabi in his medical report and awarded damages for diminished capacity. Instead the trial magistrate held in his judgment that there was no evidence that the appellant's ability to work had been affected.
- The appellant refers to the cases of *John Kibicho Thirima v Emmanuel Parsmei Mkoitiko* [2017] eKLR; *Mariga v Musila* [1984] eKLR and *Regina Mwikali Wilson v Stephen M. Gichubi & Another* [2015] eKLR and submits that a global award of Kshs. 400,000/- is fair and reasonable in the circumstances.

### **Issue for Determination**

- The main issue for determination is whether the appellant is entitled to an award of diminished earning capacity.

### **The Law**

- Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”



10. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles: -

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**Whether the appellant was entitled to an award of diminished earning capacity.**

12. The Court of Appeal in *Butler v Butler* [1984] KLR 225 had this to say:-

A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury...It 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 in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of general damages.

13. Similarly the Court of Appeal in *S. J. v Francesco Di Nello & Another* [2015] eKLR held 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 Llyod's Law Reports 40 at pg 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.



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

14. Evidently, from the above cases, loss of earning capacity is awarded as part of general damages and need not be specifically pleaded nor proved as though it were a claim under loss of income or future earnings, but ought to be proved on a balance of probability.
15. The factors to be taken into account in considering such damages vary from case to case and they include such factors as the age and qualifications of the claimant, his remaining length of working life, his disabilities and previous service if any. *Butler v Butler* [1984] KLR 225.
16. Guided by the above principles, the appellant testified that he is a teacher at Riara Group of Schools. He further stated that the injury to his right arm diminished his working capacity as he could not as a teacher engage in co-curriculum activities which involved physical exercises. The appellant further testified that the injury hinders his chances to grow in his career and he could not get allowances and per diems as those were given to teachers who went for co-curricular activities. The medical report by Dr. Wokabi dated 10/06/2021, assesses the degree of disability by the appellant at 10%. The appellant testified that he could still work as a teacher but due to the injuries he sustained, his chances for career growth were stifled to the effect that he could not participate in extra curricular activities which brings on board chances of going for duty outside the station of work and attracts payments of allowances. The appellant said that in his outside hustle of farming, his capacity was diminished and that he has to engage people to work on the farm for him. The said farming activity gave him some income to subsidise his salary and support his family.
17. The learned magistrate in her judgment said that the appellant had failed to provide evidence in that he did not produce any document or other evidence to prove that his career would be adversely affected by his injury sustained. In my view, such documents as pointed out in the judgment may not have been available for use by the appellant during the hearing of the case. The court referred to policy documents that the appellant would not be qualified for payment of per diem or other allowances on duty outside the station. The magistrate even intimated that the appellant ought to have called the school principal to testify on said claim of diminished capacity and its disadvantages in earning capacity.

It was held in the Court of Appeal case of *Mumias Sugar Co. Ltd v Francis Wanalo* (2007) eKLR that:-

“Having regard to degree of incapacity that the respondent suffered risk of not being able to find employment in the labour market ..... We think that an award of KSh.500,000 would be adequate compensation or diminution of respondents chances of employment....”

The Court of Appeal relied on the doctor’s report herein where the respondent suffered permanent 15% incapacity of the 5<sup>th</sup> finger of the right hand.

18. In the case before me, the report of Dr. Wokabi assessed the degree of permanent incapacity as 10%. The injury was a fracture of the right (radius) forearm where a metal palate was fixed to join the fracture. The medical report and the evidence of the appellant was clear that the appellant had suffered 10% permanent disability. The doctor’s report and the evidence of the appellant on how his work was affected was sufficient in the circumstances to justify an award of diminished capacity which ought to have been considered in the award of general damages.
19. In my considered view, the magistrate erred in disregarding the evidence on record on diminished capacity and this court is entitled to interfere with the award.



20. It is trite law, that the diminished capacity award ought not to be awarded separately from general damages though I note that in this case it was claimed as a separate item. For that reason, I will treat it as a separate item. The appellant prayed for KSh.400,000 in the said item. Comparative authorities include: -
- a. *Nzoia Sugar Company v Francis Wanalo* where the Court awarded KSh.599,000/= for diminished capacity of 15% involving only the 5<sup>th</sup> finger of the left hand.
  - b. *Mariga v Musila* (1984) eKLR where an award of KSh.500,000/= was made for permanent incapacity of 10 – 15%.

### **Conclusion**

21. I am of the considered view that KSh.350,000/= is adequate compensation for diminished capacity suffered by the appellant which I hereby award. This appeal is successful and is hereby allowed with costs to the appellant.
22. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF JUNE 2025.**

**HON. F. MUCHEMI**

**JUDGE**

