



Muturi v Two NK Holding Investment Group Limited (Civil Appeal E122 of 2022) [2025] KEHC 7752 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E122 OF 2022
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

DAVID MAINA MUTURI APPELLANT

AND

TWO NK HOLDING INVESTMENT GROUP LIMITED RESPONDENT

(Being an appeal from the judgment of the learned magistrate Hon. D. M. Ireri (SRM) delivered on 16th December 2022 at Baricho in Baricho SPMCC No. E049 of 2020)

JUDGMENT

1. This appeal is on quantum wherein in the trial court the Appellant and sued the Respondent claiming special damages, general damages for pain, suffering and loss of amenities, general damages for reduced/diminishing earning capacity, costs of the suit and interests in all the above damages and any other or further relief that this honourable court may deem just to grant. This arose from a road traffic accident that occurred on 8th September 2019 at about 7pm wherein it was alleged the Appellant was lawfully riding motorcycle registration No. KMDJ 636Z along Makutano – Sagana road when the Respondent’s employee, servant, agent and/or authorized driver so carelessly and negligently drove motor vehicle registration No. KCL 128J causing it to collide with the Appellant’s motorcycle. In response to the plaint dated 30th October 2020, the Respondent blamed the Appellant for contributing to the accident, that he suffered any injuries and incurred expenses as pleaded. After trial, judgment was delivered on 16th December 2022 where the Respondent was held 100% liable for the accident and damages were assessed as follows: General damages for pain, suffering and loss of amenities of Kshs.650,000/- earning interest from the date of the judgment to the date of payment in full Special damages of Kshs.39,180/- earning interest from the date of filing suit till the date of payment in full Appellant was also awarded costs and interests at court rates



2. The Appellant is aggrieved by the decision of the trial magistrate and has preferred the present appeal on 4 grounds:
 - a. That the learned magistrate misdirected himself in law in law and in fact by failing to award general damages for diminished earning capacity.
 - b. That the learned magistrate misdirected himself in law in law and in fact by failing to appreciate the degree and/or standard of proof for a claim on diminished earning capacity.
 - c. That the learned magistrate misdirected himself in law in law and in fact to consider the totality of the evidence adduced by the Appellant that gave rise to an inference that his capacity to earn had diminished.
 - d. That the learned magistrate misdirected himself in law in law and in fact by failing to consider the Appellant's submissions and authorities on awards made in similar cases.
3. The appeal was canvassed vide written submissions wherein both parties filed theirs and which I have carefully gone through the same which are summarized as follows:

Appellant's submissions

4. The Appellant began by reminding this court of its duty as a first appellant court. That the court is bound to reconsider the evidence, evaluate itself and draw its own conclusion even though it had no choice to see or hear the witnesses testifying. On this he cited *Selle & Another vs Associates Motor Boat Co. Ltd & Another* [1968] EA 123. The Appellant submitted on the general damages he had pleaded he had sustained permanent disability of about 5% - 25% thus he claimed an award for loss of future earning capacity.
5. That PW1 testified and produced his medical report dated 25th September 2020 in which he said he examined the Appellant who was complaining of pain on his right forefoot, inability to walk or stand for long hours. On examination, he noted that the right big toe had been amputated at the level of metatarsal phalangeal joint, forefoot was swollen and tender, remaining 4 toes were moderately stiff, large deep scar on the right knee, obvious outward deviation of the leg at the knee, full extension of the right knee restricted by 25 degrees, had thickened knee lining of the knee joint and signs of arthritis of the joint.
6. For that he noted the Appellant had suffered a lot of pain and blood loss form the severe injury on the right foot and he also suffered pain after the surgical procedures. It was then he assessed the degree of permanent incapacity at 25%. After the accident he was unable to resume work instead started selling greens from the market and not from the farm for he was unable to lift heavy goods. That he used to earn Kshs.30,000/- per form for which he referred to his mpesa statement.
7. That his evidence was not controverted but the trial court failed to appreciate the standard of proof and applicable principles for a claim on diminished earning capacity. He relied on the cases of *S J vs Francesco Di Nello & Another* [2015] eKLR, *Butler vs Butler* [1984] KLR 225 and *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR to state that he had proved his capacity to earn had diminished yet the trial magistrate misapprehended the evidence adduced and applied the wrong principles by finding that it was only the loss of his toe that contributed to his inability to work.
8. However, his evidence was clear that after the accident he was unable to resume his bar business and even if the grocery business he was doing, the same was not effective as he would have been were it not for the accident. That the learned magistrate failed to attach weight to the medical evidence of the doctor and found that his claim was unmerited yet he was entitled to a fair compensation for the



diminution of his capacity to earn. He urged the court to rely on the following cases in awarding him Kshs.600,000/- as general damages for diminished earning capacity: *Mumias Sugar Company Limited (supra)* *Magdaline Nzilani Mutende vs Kennedy Mutwii* [2019] eKLR *Elizabeth Nyawira Njoka vs Benjamin Ikinda Siboyi*, Keruguya HCCA No. 24 of 2019

9. That from the above re-evaluation of evidence, he had proved his capacity to earn was greatly finished thus entitled to Kshs.600,000/- which was commensurate to the degree of incapacitation. That he was also entitled to costs and interest in the lower court as well as this case.

Respondent's submissions

10. It started by reiterating and relying on the submissions filed in the trial court and that according to his plaint, the plaintiff listed the injuries he had sustained as: blunt head injury, bruises on the forehead, severe crash injury of the right forefoot, blunt and abrasion injuries on the right knee and traumatic amputation of the right big toe at the level of metatarsal phalangeal joint. That these were the same injuries listed in the P3 form and Dr. Okere's report.
11. It also relied in the case of *Mumias Sugar Company Limited (supra)* and added that the Appellant has stated he was a businessman who failed to show how the injuries he sustained made him lose his business or incur losses or customers or has exposed him to losing his business or will incur losses or customers in future. That he had also indicated he was a businessman but failed to indicate the estimated amount of loss he suffered or he may suffer as a result of the injury. It thus urged the court to dismiss the appeal with costs to it.

Analysis and determination

12. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini vs A.M. Lubia & Another* (1982-88) I KAR 777: "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages."
13. 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."
14. Taking into account 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 which caused him complaining of pain on his right forefoot and inability to walk or stand for long hours at the time he visited the doctor for re-examination. He relied on the case of *S J vs Francesco Di Nello & 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."



15. 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.”
16. 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 where 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 some time 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.”
17. Having considered the aforesaid decisions, I find that the Appellant’s claim before the lower court for general damages for diminished earning capacity was properly proven. It is a claim for general damages and its proof is on a balance of probabilities. The Appellant said that after the accident he was unable to proceed with his bar business and at the time of the hearing, he was selling vegetables which he would get from the market and not from the farms because he could not lift heavy goods.
18. There is nowhere in his medical documents that his profession was listed and he failed to call any witness to prove what business he used to conduct be the accident. In his cross examination, he confirmed he had no documents to prove he used to run a bar business though he used to pay taxes for his bar known as silver bar and his mpesa statement proved his Kshs.30,000/- monthly earnings. However, in his re-examination, he stated that were it not for the accident, he would be getting higher earnings because he would be getting the groceries from the farms and would not have employed someone to run his said business.
19. The trial magistrate in his judgment considered the above and stated as follows in page 6 of his judgment: “The plaintiff lost the big toe of the right foot. Dr. Wokabi assessed the degree of permanent incapacity as 25% but was clear that the plaintiff can work. The Persons With Disability (PWD) medical assessment report dated 14.1.2020 confirms that the plaintiff can take care of himself. The plaintiff confirmed in his evidence that he is now running a green grocery and has employed someone. There is thus no evidence to show that the lost big toe has diminished the plaintiff’s future employment or that he will not engage in any gainful employment in future or that his chances of running a business or any other business in future is at risk. While being guided by the doctor and the PWD assessment report, I find that the claim herein has no merit and is dismissed.”
20. Upon careful analysis I find that the trial magistrate did not err in holding that the appellant had, by use of her own medical report by the doctor and PWD report that although he had his right big toe amputated, that did not affect his earning capacity. That the Appellant had also proved the same by testifying of that he had already started a green grocery business wherein he had employed someone. It is my finding that the Appellant also forgot he availed his mpesa statement as his proof of earnings of Kshs.30,000/- and his exact words in his testimony was that: “.....I was running a bar before the accident. I was unable to proceed with the bar business since I was in hospital....” The said accident occurred on 8th September 2019 but the Appellant from his mpesa statement continued to earn the same amounts even as at the month of November 2019.
21. All the above evidence thus leads to the inevitable conclusion that the appellant was not entitled to general damages for diminished earning capacity. This Court thus finds no need to interfere with the trial court’s judgment. This appeal lacks merit and the same is dismissed with costs to the Respondent.



**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025
IN THE PRESENCE OF:**

Mutua for the Appellant

Kabita for the Respondent

Siele/Mark (Court Assistants)

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J.K. NG'ARNG'AR

JUDGE

