



REPUBLIC OF KENYA



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**Thathi v Munene & 3 others (Civil Appeal E069 of 2024)
[2025] KEHC 14196 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E069 OF 2024
RM MWONGO, J
OCTOBER 8, 2025**

BETWEEN

STANLEY KINYUA THATHI APPELLANT

AND

KELVIN MUNENE 1ST RESPONDENT

PURITY WANJUKI NJERU 2ND RESPONDENT

JAMES JULIUS MUCHIRI 3RD RESPONDENT

TERESIO MUGENDI THATHI 4TH RESPONDENT

*(Appeal arising from the decision of Hon. S. Ouko in Runyenjes
MCCC No. E088 of 2023 delivered on 18th July 2024)*

JUDGMENT

The of Appeal

1. By a memorandum of appeal dated 30th July 2024 the appellant is seeks orders that:
 - a. This appeal be allowed;
 - b. The Judgment on general damages for diminished earning capacity by the trial court be set aside and substituted with a reasonable award commensurate to the injuries suffered by the appellant; and
 - c. The costs of this Appeal be borne by the respondents.
2. The appeal is premised on the grounds that:



1. That the learned trial magistrate erred in law and fact by failing to make an award for general damages for diminished earning capacity against the weight of evidence adduced and/or despite of the fact that the said amount had been pleaded for and proved;
2. That the learned trial magistrate erred in law and fact by failing to take into consideration the known principles of law thus disallowing the prayer for general damages for diminished earning capacity against the weight of evidence adduced and/or despite of the fact that the said amount had been pleaded for and proved;
3. That the learned trial magistrate erred in law and fact relying on the medical report by Dr. Wambugu, which was never produced in evidence by any witness, and thus reduced the future medical expenses proposed by the medical report by Dr. Njiru G.N., which report was produced by the Appellant; and
4. That the learned trial magistrate erred in law in failing to give proper consideration to the appellant's submissions and cited authorities on the quantum of damages.

Background of the case

3. The appellant filed a plaint in the trial court seeking judgment against the respondents for general damages for pain and suffering, special damages, future medical expenses and general damages for diminished earning capacity. The Appellant alleged that on or about 06th February 2023 he was lawfully riding motor cycle registration number KMEH 286Q along Kawanjara-Ishiara road at Gacisero area when the motor vehicle registration number KDD 128J was driven so negligently that it collided with his motor cycle causing him injuries. It was alleged that the said motor vehicle was registered in the names of the 2nd, 3rd and 4th respondents.
4. The respondents filed a statement of defense denying any liability and alluding negligence on the appellant's part. On the appellant's claim for diminished earning capacity, the respondents denied that the appellant had lost his capacity to earn as a result of the accident.
5. The appellant filed a reply to defense stating that the respondent's statement of defense amounted to nothing more than mere denials and raises no plausible defense.

Summary of the Evidence in the trial Court

6. PW1 was the appellant who stated that his motor cycle was hit by the respondents' motor vehicle. He stated that he suffered the following injuries:
 - a. Multiple cut wounds on the face;
 - b. Multiple bruises with associated swelling on the head scalp;
 - c. Comminuted fracture on the right humerus;
 - d. Multiple tender and swollen bruises on the right leg; and
 - e. Cut wound on the right toe with missing nail.
7. Further, he stated that as a result of the injuries, he lost the function of his right hand and cannot hold any object. These injuries he said, caused him 30% permanent disability as he now had metallic implants as medical interventions for the injuries sustained on his hands. He said these implants will have to be removed in the future. His right hand is disabled and cannot move from the elbow. The trial



court noted that the right hand had surgical marks and was visibly wasted. On cross-examination, he stated that he is a farmer but he did not have proof of his earnings. He then closed his case.

8. In their response, the respondents' counsel indicated that they wished to adopt the medical report by Dr. Wambugu as Defense Exhibit No.1. The respondents did not call any witnesses to testify, and the defence exhibit remained untested.

The Trial Court's Judgment

9. In its judgment on general damages for diminished earning capacity, the trial court found that the appellant did not submit any evidence on: his remuneration, or his age relative to the retirement age. The Court stated that the appellant did not demonstrate that he had a job which he lost and the circumstances under which this may have happened. The judgment found that there was nothing upon which the court could have based an assessment for damages for diminished earning capacity.
10. In the end, the trial court found liability at 80% against the respondents and made an award as follows:
 - a. General damages for pain and suffering - Kshs.1,000,000
 - b. Future medical expenses - Kshs.115,000
 - c. Special damages - Kshs.8,490
Less 20% liability - Kshs.224,698Costs and interest were awarded to the plaintiff.
11. Dissatisfied with the award, the appellant filed this appeal.

Submissions on the appeal

12. The appeal was canvassed by way of written submissions.
13. The appellant submitted that since the accident, he has not been able to do his farming work from which he drew a livelihood. He suffered injuries that resulted in a disabled right forearm assessed at 30%. He stated that his evidence was not in any way controverted by the respondents. He relied on the medical report which stated as much and that is the evidence that was available for the trial court to consider but it did not. He stated that he submitted before the trial court that he was earning Kshs.80,000/= from his farming activities.
14. It was his submission: That the trial court ought to have considered his national ID and work out his damages considering the statutory retirement age. That the time of the accident, he was 39 years old; That the trial court should have considered that even unskilled citizens can also earn an income from farming. On his prayer for damages for diminished earning capacity, he relied on the case of Joseph Muchiri Mbugua v Gatimu Ndirangu [2019] KEHC 1456 (KLR) where the court relied on the case of William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR). Further reliance was placed on the case of Eugene Reeksting v Attorney General & another [2021] KEHC 4077 (KLR) where the court awarded Kshs.1,000,000/= where the injuries caused 30% permanent disability. He also contended that the award of future earning capacity as erroneous and it did not reflect the position taken by the doctors in their medical reports. He urged the court to reconsider this award and increase it from Kshs.115,000/= to Kshs.150,000/=.
15. On their part, the respondents submitted that the appeal amounts to an abuse of the court process. They relied on the case of Caltex Oil Limited v Rono Limited [2007] KECA 427 (KLR). They argued that for the submission that a party cannot be granted prayers not pleaded. They argued that the trial



court did proceed on wrong principles of law and its findings on diminished earning capacity should be impugned. They relied on the cases of Ken Odoni & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] KECA 252 (KLR) and Nyatogo v Mini Bakeries Limited [2023] KEHC 1593 (KLR).

16. They stated that the income of Kshs.80,000/= alleged to be from the appellant's miraa farming is not proved through evidence despite the burden of proof being upon the appellant. That such alleged diminished earning capacity cannot be awarded without proof of disability. They challenged the medical evidence adduced and stated that it promised the appellant a full recovery and that he would return to his farming activities. They relied on the cases of Jacaranda Bodaboda Operators & another v Nyasero [2022] KEHC 13030 (KLR) and Lopiding General Building Construction Co Ltd v Loduar [2024] KEHC 10046 (KLR). On the issue of costs, the respondents relied on section 27 of the [Civil Procedure Act](#) to the effect that costs follow the event.

Issue for determination

17. From the foregoing, the issue for determination is whether the trial court erred in failing to make an award for general damages for diminished earning capacity.

Analysis and Determination

18. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

19. The appellant has only challenged the trial court's finding on diminished earning capacity. His evidence before the trial court was in his adopted witness statement and cross examination. He said that before the accident, he was earning about Kshs.80,000/= per month from his Miraa farming endeavors. Since the accident, he cannot continue with his farming business since he has developed 30% disability.
20. He produced a medical examination report dated 21st April 2023 authored by Dr. Njiru G.N. It stated that following the accident, the appellant was left with a 'disabled right forearm with reduced muscle bulk and power at 30% permanent disability causing him maim.' When the appellant was testifying as PW1, the trial magistrate noted that the appellant's right hand had surgical marks and was visibly wasted.
21. At the close of the appellant's case, the respondents produced a medical report authored by Dr. Wambugu P.M. dated 13th November 2023. This report indicated that the appellant was predominantly right-handed and the right upper limb had flaccid paralysis with mid-term sensory level. This Doctor's prognosis was that the fractured humerus has united and the metal implants may be electively removed after one year at an estimate all-inclusive cost of Kshs.85,000/= in a medium cost private hospital. It was noted that there was residual paralysis right upper limb and he assessed 30% as the degree of permanent incapacitation. The degree of permanent incapacity was agreed by both doctors to be 30% in the appellant's upper right hand.



22. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

23. PW1 testified that he was a Miraa farmer earning Kshs.80,000/= per month. This evidence was not controverted by the respondents. Both issues of disability of the appellant and the appellant’s earnings, must be proved on a balance of probabilities. The appellant testified that he was earning the income he declared and since the accident that resulted in his 30% disability, he may have since lost his capacity to make a living from his farming activities.

24. As already noted, when the appellant declared his income from the Miraa farming, his evidence was not controverted although in cross examination he stated that he had no proof of his earnings. In their submissions in this appeal, the respondents stated that the appellant did not prove his earnings and so it was not clear what considerations the trial court had in order to make an award. However, from jurisprudence, it clear that there is no formula for assessing loss of earning capacity. In the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] KECA 485 (KLR), the Court of Appeal held that:

“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 so employed....loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.” (Emphasis added)

25. The trial court found that there was no basis for considering the award. From the evidence adduced, there is enough proof that the appellant was earning an income from miraa farming but since the accident, his capacity for earning that income has diminished because of the injuries he sustained. In the case *William J Butler v Maura Kathleen Butler* (supra), the court held:

“...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.”

26. On the basis of these principles, the appellant was entitled to general damages for diminished earning capacity which should be now assessed.

27. In the case of *Nyatogo v Mini Bakeries Limited* [2023] KEHC 1593 (KLR) the court awarded a global sum of Kshs.800,000/= as general damages for loss of earnings where the plaintiff suffered between 15%-50% disability. Based on this finding, the court in *Njogu v Nyaga* [2024] KEHC 1876 (KLR)



awarded Kshs.900,000/= where the victim suffered 80% disability. The appellant herein suffered 30% disability. I think it is fair for the general damages for diminished earning capacity in these circumstances to be assessed at Kshs.450,000/=. This award should stand alone as general damages besides the other awards by the trial court.

Disposition

28. Ultimately in my view, and based on the foregoing discussion, the appeal must succeed, and I so hold.
29. I therefore order as follows:
 - a. The finding of the trial court on diminished earning capacity is hereby set aside;
 - b. An award of general damages for diminished earning capacity is hereby assessed and awarded as Kshs.450,000/=;
 - c. All other awards by the trial court are upheld as awarded except as herein stated.
 - d. The trial court's award of special damages to be paid to the appellant with interest from the date of filing the plaint until payment in full;
 - e. All the other damages assessed and awarded by the trial court to be paid to the appellant with interest from the date of that judgment until payment in full;
 - f. The award for diminished earning capacity as assessed and awarded by this court be paid to the appellant with interest from the date of this judgment until payment in full;
 - g. The costs of this appeal are awarded to the appellant with interest; and
 - h. Interest on all monetary awards shall be at court rates.
30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 8TH DAY OF OCTOBER, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Murimi for Respondents
2. K. Ndolo for Appellants
3. Francis Munyao - Court Assistant

