

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**CIVIL APPEAL NO. E023 OF 2024**

*(Being an Appeal from the Judgment delivered by Hon.  
Geno L. Okwengu, Principal Magistrate, Kilungu Law  
Courts, on 12th February 2024 in CM Civil Case No. E350  
of 2020)*

**FELIX MUNYAO NGEI .....**

**APPELLANT**

**VERSUS**

**SALIM KHALID ..... 1<sup>ST</sup>**

**RESPONDENT**

**MOMBASA MAIZE MILLERS LIMITED ..... 2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

1. The Appellant was involved in a road accident along Nairobi-Mombasa road on 19<sup>th</sup> June, 2022 in which he

sustained several injuries. He blamed the Respondents for the accident and sued them at the lower Court seeking special damages at Kshs.6,050.00/=, general damages, Loss of Earnings, Diminished Earning Capacity, and Future Medical Expenses.

2. The Court delivered the Judgment on 12<sup>th</sup> February, 2024 in which it found in favor of the Appellant, and held liability at 100% as against the Respondents, jointly and severally. It also awarded the Appellant General Damages at Kshs.900,000.00/=, Special damages at Kshs.6,050/=, and Future Medical Expenses at Kshs.12,000.00/= making a sum of Kshs.918,000.00/=. The Court declined to award him damages for Loss of Earnings and Diminished Earning Capacity, holding that the Appellant had not proved his claim under the two heads.

3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 7<sup>th</sup> March, 2024 in which he raised the following grounds;

***1) The learned magistrate erred in law and in fact in failing to make an award for loss of earnings and***

***diminished earnings against weight of evidence on a balance of probability.***

***2)The learned magistrate erred in law and in fact for failing to award loss of earnings and diminished earnings when it was clear in the evidence that the Appellant had sustained a permanent disability of 30%.***

***3)The learned magistrate erred in law and in fact in failing to grant the Appellant loss of earnings and diminished earnings which had been adequately proved at the trial.***

***4)The learned magistrate erred in holding that there was no proof of earnings and in holding that the claim for loss of earnings and diminished earning capacity had not been proved to the required standard.***

***5)The learned magistrate erred in law and in fact in disregarding the aspect that documents are not the only means of proving earnings and in failing***

*to resort to the minimum wage if at all the earnings had not been proven.*

*6) The learned magistrate erred in law by failing to consider the fact that the claim for loss of earnings for 8 months and diminished earning capacity had been properly pleaded and proved by the Appellant and thus the failure to grant the same occasioned a miscarriage of justice.*

*7) The learned magistrate erred by disregarding the Appellant's evidence on loss of or diminished earning capacity and loss of earnings.*

*8) The learned magistrate erred in law and in fact by failing to consider in totality, evaluate and give due weight to the Appellant's pleadings, evidence, exhibits, submissions, and binding authorities which contended various aspects of the position advanced by the Appellant on the quantum of damages thereby arriving at an erroneous decision as he did.*

4. He asked the Court to allow the appeal and set aside the lower Court's judgment, and enter judgment against the Respondents for Loss of Earnings and Diminished Earning Capacity.

### **Appellant's written Submissions**

5. The Appellant submitted that the lower Court was wrong in failing to award him damages for Loss of Earnings. He submitted that the Court erred in finding that he had no proof of earnings, arguing that the court disregarded the principle that documents are not the only way to proof earnings. He submitted that Courts have overtime affirmed that earnings were proved where a witness was consistent on what he did for a living and where his evidence was not controverted. He submitted that, through his evidence, he had established that he was a businessman earning Kshs.1,000.00 /=per day.

6. The Appellant also submitted the Court was wrong in failing to award his damages for Diminished Earning Capacity. He argued that even after getting back to work his earnings

were not the same as they used to be and that they had gone down. He submitted that the accident had impacted his earnings which have significantly reduced from Kshs.1,000.00/= to Kshs.700.00/= per day. He submitted that the Court ignored the principle that documents are not the only proof of earnings. He argued that even if the Court was to find otherwise, it should have resorted to the statutory minimum wage.

### **Respondents' written Submissions**

7. The Respondents submitted that the Court was right in failing to award damages for Loss of Earnings. They argued that the Appellant failed to provide tangible evidence in the form of either receipts of his inventory, M-pesa records of payments, a catalogue of his inventory, employment records and/or records of business registration, in the case he was self-employed. They submitted that, without these crucial documents, the court cannot make any award because, apart from being counteractive to the general principles on

the award of special damages, the court cannot operate in a vacuum.

8. The Respondents also submitted that the Court was right in failing to award damages for Diminished Earnings Capacity. They argued that the Appellant did not show that his disability stopped him from conducting his miraa-selling business. They submitted that he did not provide any evidence to show that his earnings had significantly lowered from what he initially earned as a result of the reduction in productivity. They argued that he needed to show a connection between the suffered disability and the fact that his earnings reduced drastically from what he was earning.

### **Issues for Determination**

9. Having considered the Grounds of Appeal and the submission by the parties, I find that there are two issues for determination;

**a) Whether the Appellant proved his claim for damages for Loss of Earnings.**

**b) Whether the Appellant proved his claim for damages for Diminished Earning Capacity.**

10. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR**.)
11. Accordingly, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

**Whether the Appellant proved his claim for damages for Loss of Earnings**

12. The Appellant pleaded that he was a businessman engaged in selling miraa and was earning approximately Kshs.1,000.00/= per day before the accident. He stated that he was unable to return to work immediately after the

accident, and that he was only able to resume work after 8 months from the date of the accident.

13. Before I delve into whether the Appellant warranted this award, I shall first highlight what courts have said regarding the award for Loss of Earnings, and particularly on how a party should prove its claim under this head.
14. The Court of Appeal has pronounced itself on this issue on several occasions, and it has all along been consistent on how a litigant is supposed to establish a claim for Loss of Earnings.
15. The Court of Appeal in **Douglas Kalafa Ombeva v David Ngama [2013] KECA 538 (KLR)** held that Loss of Earnings is a special damage and must be strictly proved. It observed as follows;

***Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically. In the present case, the appellant provided no evidence that he was***

*indeed employed at Bons Company and that he was earning the 3,670.00. In this case, the sum pleaded was Kshs. 3,913.60, but like in the Karanucase, there was no evidence to support this claim. Even though the appellant claims that the sum was reasonable, and the court ought to allow it, we find no basis to do so. We are satisfied that the trial judge applied the correct principles on this head and this ground of appeal therefore fails.*

16. In instances where a litigant claims to have been operating/running a business as self-employment, the courts have guided on how such litigants ought to prove their claims for Loss of Earnings. The Court in **Karani vs. Nchedu (1995-1998)1 EA 87** declined to award Loss of Earnings to a litigant who claimed to have been operating a kiosk, for lack of documentary evidence. It held;

*“The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she*

*used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Ksh.50,000/= per month. **She produced no documentary evidence to support this claim** but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.”*

17. In addition, the Court of Appeal in **Tracom Ltd & another v Adan (Civil Appeal 192 of 2006) [2009] KECA 48 (KLR)** declined to award damages for Loss of Earnings to a litigant who claimed he was a businessman, for lack of documentary evidence. The Court observed as follows;

*It was not stated where the respondent was employed, if he was employed. It was not stated what businesses he was doing if he was doing any business. Mrs. Mbanya in reply to Mr. Musangi’s submissions in the superior court stated that **there were some businesses where records were not kept. That may be so, but would that business not have a***

**name? There was no evidence that the amount of Ksh.3,000/= was what he was earning.** In fact Mrs. Mbanya admitted in effect that they had no evidence of what he was earning and that is why she was prepared to settle for what she called minimum award. If the respondent was a businessman as Dr. Shah's medical report says, then the court was not told what business he was engaged in and the income per year or per month....

Here there was no attempt [to prove loss of earning] at all, we repeat, it was not pleaded and not proved. The sum of Ksh.3,000/= was thrown to the court from the blues and baptized "minimum award." That could not be a basis for allowing this award. We agree with Mr. Murimi that this award was not proper in its entirety. We disallow it.

18. In **Francis v Mash East Africa Limited [2026]** **eKLR**, the Court of Appeal held that loss of business profits must be specifically pleaded and strictly proved. The Court dismissed the Appellant's claim for Kshs. 67,500 for loss of

income on account of the alleged loss of user of his tuktuk, holding that the claim for the loss of income had not been strictly proved. It observed as follows;

*On the authority of the afore-cited decisions, **the claimant is obligated to demonstrate by factual evidence, and with specificity, the justification upon which he/she claims those damages. In principle, it is not enough to make a sweeping statement that this or that figure was the daily or periodic income earned from the business, and that it was lost due to the misfortune complained of.***

29. We find nothing to suggest that the learned Judge was at fault in upholding the trial court's decision to decline the appellant's claim for loss of user, which was not strictly proved at the trial. **Moreover, the appellant admitted that he had no records of his alleged income or any evidence, other than his word for it, on which his claim was founded.**

19. Based on the above authorities and with respect to a claim for damages for Loss of Earnings, it can be deduced/construed that, where a litigant claims to have been operating a business before the accident, that litigant ought to bring some form of documentary evidence to prove the existence of the business, and where possible, to prove his monthly earnings in form of profits.
20. During the hearing at the lower Court, the Appellant told the court that he is a businessman, miraa business, and that he gets Kshs.1,000.00 in a day. He told the court that the profits have reduced compared to what he used to make before the accident happened. He stated that he is making about Kshs.600.00 to Kshs.700.00 per day. During cross-examination, he stated that he had no document to show the earnings from his miraa business.
21. In my view, other than his word for it, the Appellant did not adduce evidence to substantiate his claims under this head. There was no documentary evidence to show the existence of the alleged business inform of a business permit or other documentary evidence. There was also no

documentary or other evidence to substantiate his alleged monthly earnings from the said business. Having failed to substantiate his claim under this head, the Court cannot award the same on the basis of guesswork or mere presumption. The Appellant's claim for damages for Loss of Earnings thus fails.

**Whether the Appellant proved his claim for damages for Diminished Earning Capacity**

22. The next issue for determination is whether the Appellant proved his claim for damages for Diminished Earning Capacity, which is also known as Loss of Earning Capacity. The nature of a claim for Diminished Earning Capacity was explained by the Court of Appeal in *Butler v Butler* [1984] KLR 225, where the Court held as follows;

*“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 the general damages. ...”*

23. The Court of Appeal has issued useful guidance on what a trial court should consider when assessing an award under this head. In **Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR**, the Court of Appeal held that an 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. It observed as follows;

*“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. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award*

*where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”*

24. The court in **Eric Onyango Okumu vs SDV Transami (K) Limited [2007] eKLR** discussed the factors to be considered in awarding damages for Loss of Earning Capacity. It observed as follows;

*This is a head of damages awardable irrespective of whether the plaintiff was in salaried employment before injury or not. The factors to be considered in awarding it vary with the circumstances of each case. They include the age and qualifications of the plaintiff,*

*his remaining length of working life, his disabilities, previous service, if any, and so on.*

25. In the instant case, the Appellant told the Court that he got back to work on February, 2023. He stated that his profit is not the same because he used to wake up to go and select the miraa for sale but at the moment he can no longer wake up. As a result, he testified that he now makes about Kshs.600.00 to Kshs.700.00 compared to what he used to earn before, 1000.00 per day.
26. PW2 was the medical doctor who examined the Appellant. He examined him on 25<sup>th</sup> April, 2023, while the accident had happened 19<sup>th</sup> June, 2022. This means that he was examined 10 months and 2 weeks after the accident. He assessed permanent disability at 30% and opined that the Appellant had pains on the shoulder, which affected his work. I have seen the said medical report. It shows that the Appellant has a shoulder joint deformity and that he needs assistance in carrying out his daily activities.
27. Based on these facts, I am satisfied that, on a balance of probabilities, the injuries sustained by the Appellant

have, one way or the other affected his ability to perform tasks with the efficacy that he had before the accident happened. I thus find that he has proved his claim for Diminished Earning Capacity.

28. The next issue for determination is the quantum of damages under this head. In **Chege & another v Ngari (Civil Appeal E349 of 2023) [2024] eKLR**, it was held that in cases where the court cannot tell the exact earnings of the plaintiff, the court should make a global award but in consideration of the fact that an award for general damages has been made. It held as follows;

*It is not disputed that by virtue of the permanent disability the respondent may not be able to earn as he used to though the court is not clear on his exact earnings. **In that case the court may only make a global award but in consideration of the fact that an award for general damages has been made.***

29. In the instant case, I have already found that the Appellant's monthly earnings could not be ascertained. This,

therefore, means that the only available way for assessing this award is by use of the global award.

30. I have also considered comparable awards made in similar circumstances. In **Chepkwony & another v Lomongin aka Samuel Erupe aka Lorenge aka Samuel Erube aka Samwel Erupa aka Samuel Lorupe aka Samuel Erupe Lorege [2023] eKLR**, the court awarded Kshs.200,000.00 for a herder who suffered 22% permanent disability.

31. I also associate with the observations of the Court in **Mutugi v Waymark Safaris Limited [2024] eKLR**, where the court declined to award damages for Loss of Earning Capacity for a litigant who had suffered 30% permanent disability. In dismissing the claim, the Court held that the Appellant did not adduce evidence to substantiate the claim that his earnings capacity has diminished by 30%. Majanja J, (as he was then) observed as follows;

*The Appellant pleaded that he was in the business of selling motor vehicle spare parts earning an average monthly income of Kshs. 194,000.00 and that by*

*reason of the accident he has been unable to resume his economic activities and that his earning capacity was diminished by 30%. Whereas documentary evidence is not mandatory for proof of loss of earning capacity, I refuse to believe that the Appellant ran a business without keeping business records such as copies of orders and receipts that show purchases and proceeds of his sales. I agree with the Subordinate Court that the Appellant did not adduce evidence to substantiate the claim of his earnings and how the same was diminished. It was not enough for him state in his pleadings that he was earning Kshs. 194,000.00 per month from sales and leave it at that.*

*The medical report on record did not also show that as a result of the injuries sustained, the Appellant's earnings diminished and therefore, the subordinate court did not err in not awarding this sum in the absence of such evidence (see Bhaven Harjivan Kurji v Trivedi Sushil Liladhar [2020] eKLR). This ground of appeal by the Appellant fails.*

32. The Appellant testified that he has already resumed his business activities. He stated that his earnings had reduced by 30-40%, although he did not adduce evidence to substantiate the claim that his earnings had diminished by the said percentage. This notwithstanding, there is no doubt that the Appellant will not be able to work as prior to the accident due to permanent disability resulting from the injuries.

33. I have considered that the lower court made an award of Kshs.900,000/= for General damages. I have also considered his age (33 years) and the percentage of permanent disability. Putting all these factors into consideration, I find that a global award of Kshs.150,000/= would be sufficient. I hereby award the Appellant Kshs.150,000/= as damages for Diminished Earning Capacity.

34. In the end, the Appeal is allowed, albeit partially.

### **Disposition**

35. The Appeal succeeds.

36. These are the final orders of the Court.
- 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.150,000/=.
  - c) Appellant's Claim for Loss of Earnings is hereby disallowed.
  - d) Considering that the awards on the other heads were not challenged, all other awards by the trial court are upheld as awarded.
  - e) 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;
  - f) 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;
  - g) 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;

- h) The costs of this appeal are awarded to the appellant assessed at 40,000/= with interest; and
- i) Interest on all monetary awards shall be at court rates.

**DATED, DELIVERED and SIGNED at NAIROBI** through the Microsoft Teams Online Platform on this **06TH** day of **MARCH 2026**.

**HON C. KENDAGOR**  
**JUDGE, HIGH COURT**

**In the presence of:**

Court Assistant: Beryl

Ms Moranga holding brief for Ms Mutuku, Advocate for the Appellant

No attendance for Respondent