

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL NO. E024 OF 2024

CHRINSES KIMUYU alias CHRIS KIMUYU EDWARD

APPELLANT

VERSUS

SALIM KHALID 1ST

RESPONDENT

MOMBASA MAIZE MILLERS LIMITED 2ND

RESPONDENT

***(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)***

JUDGMENT

1. The Appellant was involved in a road accident on 19th June, 2022 along Nairobi-Mombasa road as a result of which he

sustained injuries. He blamed the Respondents for the accident and brought a suit at the lower Court seeking general and special damages. The Court delivered the Judgment on 12th February, 2024, in which it held liability at 100% as against the Respondents jointly and severally.

2. The Court awarded him General damages of Kshs.750,000/= and special damages of Kshs.6,050/=. It, however, did not award him damages for Loss of Earnings and Diminished Earning Capacity, finding that the Appellant did not proof he was earning and that the accident diminished his earnings.

3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 7th March, 2024, in which he listed 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 earning capacity 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 earning and

diminished earning capacity when it was clear in evidence that the Appellant had sustained a permanent disability of 40%.

3) The learned magistrate erred in law and in fact in failing to grant the Appellant loss of earning and diminished earning capacity 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 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 18 months and diminished earning capacity had been properly pleaded and proved by the Appellant and this the failure to grant the same occasioned a miscarriage of justice.

7) The learned magistrate erred in law and in fact by inaccurately holding the Appellant's occupation as a miraa trader, despite his evidence to the effect that he was a carpenter, resulting in a failure or refusal to award compensation for loss of earning or diminished earning capacity, contrary to the weight of evidence presented.

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

9) 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. He also asked the Court to enter judgment against the Respondents for Loss of Earning and Diminished Earning Capacity.
5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellant submitted that the lower Court was wrong for failing to award him damages for Loss of Earning. He submitted that the Court was wrong to find that he had no proof of earning, arguing that it disregarded the principle that documents are not the only way to proof earning. He also submitted that the Court was wrong to find that he was a businessman, yet he had pleaded that he was a carpenter. He submitted that his pleadings and oral testimony that he was a carpenter and used to earn Kshs.20,000/= monthly,

and that he had not yet resumed his duties, was enough evidence of proof of Loss of Earnings.

7. The Appellant also submitted that the lower Court was wrong in failing to award him damages for Diminished Earning Capacity. He submitted that his testimony and pleadings showed that he suffered a 40% permanent disability and the accident had affected his ability to work and earn a living. He argued that his evidence that he was earning Kshs.20,000/= monthly prior to the accident was not controverted. He argued this Court to rectify this by granting him the appropriate compensation in line with legal principles and precedents.

Respondents' written Submissions

8. The Respondents submitted that the lower Court was right in failing to award damages for Loss of Earning and Diminished Earning Capacity. On Loss of Earning, they submitted that even though the Appellant pleaded the same, he did not prove it as required by law. They argued that such an award must be specifically pleaded and proved.

They argued that the Appellant failed to provide tangible evidence in the form of receipts of his inventory, M-pesa records of payments, catalogue of his inventory, employment records and/or records of business registration, in the case he was self-employed.

9. On Diminished Earning Capacity, the Respondents submitted that the Appellant did not adduce evidence to warrant the award. They argued that the Appellant was required to show the connection between the suffered disability and either, the fact that he lost his initial job, the fact that his earnings reduced drastically from what he was earning, and that he undertook a lesser role than his previous one. They argued that the medical reports showed that the Appellant did not suffer any permanent disability as a result of the accident, and thus there was nothing to limit his normal functioning at the 'workshop.'

Issues for Determination

10. 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.

11. 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.**)

12. 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

13. The Appellant submitted that he was a carpenter before he was involved in the accident and used to earn Kshs.20,000/= monthly. He argued that he should be awarded damages for Loss of Earnings because, as a result of the accident, he had not yet resumed his duties.
14. 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.
15. 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.
16. 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.

17. The Court in **Chege & another v Ngari [2024] KEHC 6121 (KLR)** took a similar approach in which it

declined to award damages for Loss of Earnings and observed as follows;

“The loss of earnings was pleaded at Kshs.468,000/=. This being the case, the respondent had a duty to prove this by way of evidence. It is a special damage and that is what the law provides. A special damage must be strictly proved. The trial court did not allow this one”.

18. The Appellant told the Court that he was employed as a carpenter and that he used to be paid Kshs.20,000/= per month. He said he was being paid in cash and there was nowhere to sign. He stated that the workshop is registered but he had no letter or document to show that he worked in that workshop.

19. I have relooked at his amended witness statement as well as his testimony in court, with a view to ascertaining the particulars or the nature of his alleged employment. I note that, throughout the proceedings at the lower Court, the Appellant did not mention the name of the workshop

where he alleges to have been employed and he did not provide any other form of evidence through which the lower Court could establish the existence of the alleged employer-employee relationship.

20. Based on these facts, I find that in the present case, the Appellant did not provide any evidence to show that he was indeed employed as a carpenter. I am also not persuaded that he was an employee at all, much less of an undisclosed employer. Similarly, his claims that he used to be paid Kshs.20,000/= per month were unsubstantiated and hence the claim under this heading ought to fail.

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

21. 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 Court of Appeal has issued useful guidance on what a trial court should consider when assessing an award under this head.

22. 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.”

23. 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”.

24. 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”.

25. 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.

26. I have also considered comparable awards made in similar circumstances. In **Blowplast Ltd v Julius Ondari Mose [2018] eKLR** the Court assessed the award for

damages for Loss of Earning capacity to Kshs.400,000/=. In that case, the Respondent suffered an amputated distal phalanx, fracture of the right index finger, and loss of dexterity/grip of the right hand; and where disability was fixed at 25%.

27. In **Chege & another v Ngari (Supra)**, the Plaintiff suffered fracture of the carpal bones, fracture of the right radial styloid process, Dislocation of capital joints, and brunt and bruise facial injuries. The first medical examination assessed his permanent disability at 10%, while a second examination done 3 years after the accident found 15%. As a result of the injuries, he would not be able to use his right hand. The Court awarded him a global award of Kshs.300,000/=.

28. In the instant case, the Appellant suffered soft tissue injuries on the head and the chest, and fracture right head of femur. The first medical examination was done 10 months after the accident and assessed his permanent disability at 40%. It also found that he was not walking normally and that the disability may affect his work. A second medical

examination was done 2 weeks after the first examination and found that the Appellant did not suffer any permanent disability. It found that he had healed completely his complaints notwithstanding.

29. The Appellant confirmed that he was examined twice. I have noted the variance in the assessments for the degree of disability. Both were seemingly done by medial officers. In that case, I shall go by the average of the 2 assessments, which is 20% permanent disability. The Appellant himself told the Court that he could not stand for more than 30 minutes as his leg hurts if he stands for long. He stated that his earnings would go down as he would not be as productive as before. The medical reports indicate that the Appellant was 21 years at the time of the examination.

30. I have considered that the lower Court made an award of Kshs.750,000/= for General damages. I have also considered his age and the percentage of permanent disability. Putting all these factors into consideration, I find that a global award of Kshs.350,000/= would be sufficient. I

hereby award the Appellant Kshs.350,000/= as damages for Diminished Earning Capacity.

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

Disposition

32. The Appeal succeeds.

33. 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.350,000/=.

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 6TH day of MARCH, 2026.

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HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

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

No attendance for Respondent

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