

Judgement was delivered, on 21st August 2024. Liability was apportioned at 70% against the respondent and 30% against the appellant. General damages were assessed at Kshs. 2,500,000.00 and Kshs. 373,110.00 special damages, making a total of 2,873,110, which, when subjected to 30% contribution came down to Kshs. 2,011,177.00.

4. The appellant was aggrieved, hence the instant appeal. There is only 1 ground, that the trial court erred in not making a finding on loss of earning capacity.
5. Directions were taken, on 17th November 2025, for canvassing of the appeal by way of written submissions. Both sides did file written submissions, which I have read, and noted the arguments made.
6. The appellant argues that he engaged in farming and business, prior to the accident. He cites *Jacob Ayiga Maruja & another vs. Simeone Obayo* [2005] eKLR (Omolo, Tunoi & Githinji, JJA) and *Mumias Sugar Company Limited vs. Wanalo* [2007] KECA 485 (KLR) (Bosire, O’Kubasu & Githinji, JJA), for the argument that loss of earning capacity could be awarded, even where the claimant was not employed; and *Kipkemboi & another vs. Morris Kedolo* [2019] KEHC 8736 (KLR) (Musyoka, J), where an award of Kshs. 1,500,000.00 was made for loss of earning capacity.
7. The respondent has submitted on 2 issues, the first is that the appeal was incompetent, for lack of a decree. The second is that the appellant did not give an indication of the sort of farming or business that he engaged in, hence his allegations amounted to hearsay. It is further submitted that the pleadings only alleged that the appellant was a peasant farmer. It has attached 2 decisions. *Bwana vs. Bonaya & 2 others* [2015] KESC 8 (KLR) (Rawal DCJ&VP, Tunoi, Ibrahim, Ojwang & Ndung’u, SCJJ) and *Watu Credit Co. Ltd vs. Ezra*

Siundu Wanjala Bungoma HCCA/E054/2023 (Ougo, J), with regard to incompetency of an appeal for lack of a decree.

8. The appeal turns on only 2 principle issues, its competency and the matter of loss of earning capacity.
9. Let me start with the matter of the competency of the appeal, given that it is a preliminary issue, for, if I decide that the suit is incompetent, there would be no basis to consider the other issue.
10. The matter, as to whether the appeal is competent, is a non-issue. Once that issue was raised by the respondent, in its written submissions, dated 24th November 2025, the appellant moved quickly, and filed a supplementary record of appeal, dated 5th February 2026, to place a copy of the decree on record.
11. Even then, even without a copy of the extracted formal decree, the appeal would still have been competent, for the decree of the court is in the judgement, which the trial court pronounced on 21st August 2024. A copy of that judgement is in the record of appeal, filed on 8th August 2025. The formal decree is extracted from the judgement. The decree is part of the judgement. The object of filing the decree is to disclose to the appellate court the final orders made in the judgement, and which are the basis for the judgement. Once the impugned judgement forms part of the record of appeal, the fact that a formal decree, as extracted from that judgement, is not exhibited in that record of appeal, that would not be fatal to the appeal.
12. The current judicial thinking is espoused in such cases as *Emmanuel Ngade Nyoka vs. Kitheka Mutisya Ngala* [2017] eKLR [2017] KECA 353 (KLR) (Makhandia, Ouko & M'Inoti, JJA) and *Bildad vs. Rentwork East Africa Limited* [2024] KECA 1133 (KLR) (Karanja, Kimaru & Muchelule, JJA), to effect that

no prejudice would be suffered, if the decree or order is not attached, so long as there is a judgement or ruling on record, or so long as the appellate court is able to access the original trial court records, which have copies of the decree or order, or the judgement or ruling from which the decree or order is to be extracted.

13. I have before me the original trial court record, which has the original of the judgement that was delivered on 21st August 2024. I also have the record of appeal, which has a copy of the same judgement, but without the certified decree, extracted from that judgement. I also have a supplementary record of appeal, with a certified copy of the decree, as extracted from that judgement.
14. On loss of earning capacity, the appellant had, in his plaint, prayed for “General damages for pain suffering and loss of amenities, damages for diminishing earning capacity, future nursing and domestic work expenses.” Those are 2 prayers in 1. The one is for pain suffering and loss of amenities; while the other is for damages for diminishing earning capacity, future nursing and domestic work expenses.
15. In the plaint, at paragraph 8, the appellant averred that, at the time of the accident, he was working as a peasant farmer and businessman, which activities, he averred, he could no longer, after the accident, engage in, hence the prayer for damages for diminishing earning capacity. That averment was replicated in the witness statement, filed together with the plaint.
16. At the trial, the appellant stated that he was a farmer and a businessman. He went on to adopt his witness statement. He was not cross-examined on issues around what he did for a living. The respondent did not present a witness, so the material that he was a farmer and a

businessman was not controverted. Burden of proof was not at the standard of proof beyond reasonable doubt, but on a balance of probability, as the proceedings, that the trial court was conducting. were civil in nature.

17. A peasant farmer usually has nothing, by way of material evidence, to prove that he engages in subsistence farming. Only a farmer, engaged in agribusiness, would have something to show for it, in terms of records on the sale of his produce. Subsistence agriculture is what ordinary Kenyans would engage in, even after retirement from gainful employment. I would agree, that whether one was a businessman could be proved, by evidence of licences and permits, and the like.
18. The courts, in *Jacob Ayiga Maruja & another vs. Simeone Obayo* [2005] eKLR (Omolo, Tunoi & Githinji, JJA) and *Mumias Sugar Company Limited vs. Wanalo* [2007] KECA 485 (KLR) (Bosire, O’Kubasu & Githinji, JJA), pointed out that one did not even have to be in employment or farming, to be entitled to an award for loss of earning capacity. The appellant was in his 60s, but that was not of itself evidence that he had no capacity to work. He had capacity to cycle, suggesting that he had energy to work, even if it meant in his farm, to produce food for sustenance. He could be awarded for loss of that capacity.
19. I note, though, that in *Mumias Sugar Company Limited vs. Wanalo* [2007] KECA 485 (KLR) (Bosire, O’Kubasu & Githinji, JJA), the court indicated that loss of earning capacity could be claimed and awarded, as part of general damages for pain, suffering and loss of amenities; or as a separate head of damages. The appellant, in his plaint, sought general damages for pain suffering and loss of amenities, and also damages for loss of earning capacity. That would mean that he sought to recover loss of earning capacity in both prayers.

20. How did the trial court handle it? The court awarded the prayer for general damages, but not the other prayer for damages for loss of earning capacity. The court sought guidance in *Crown Bus Services Ltd & 2 others vs. BM (minor suing through his mother & next friend SMA [2020] eKLR*, in making the award of Kshs. 2,500,000.00 as general damages. In *Crown Bus Services Ltd & 2 others vs. BM (minor suing through his mother & next friend SMA [2020] eKLR*, the court had made an award of Kshs. 2,500,000.00 general damages for pain and suffering, and loss of amenities. It would appear that the trial court, herein, took care of the aspect of loss of earning capacity, in making the award of Kshs. 2,500,000.00. There was really no need, in the circumstances, to consider the separate prayer for damages for loss of earning capacity.
21. Overall, it is my finding that the appeal lacks merit, for the reasons given, and I hereby dismiss the same. Each party shall bear its own costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA, ON THIS 10TH DAY OF APRIL 2026.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Mukisu, instructed by Mukisu & Company, Advocates for the appellant.

Mr. Akwala, instructed by Akwala & Company, Advocates for the respondent.