



**Njuguna v Mungai (Civil Appeal 270 of 2018)
[2023] KEHC 27112 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 270 OF 2018

DAS MAJANJA, J

DECEMBER 22, 2023

BETWEEN

DAVID NJUGUNA APPELLANT

AND

BONIFACE MUNGAI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. W. Mburu, PM dated 25th May 2018 at Magistrates Court at Nairobi, Milimani in CMCC No. 2396 of 2016)

JUDGMENT

1. The Appellant's appeal is against the Judgment of the Subordinate Court dated 25.05.2018 where the court found the Appellant fully liable and awarded the Respondent Kshs. 1,500,000.00 and Kshs. 62,000.00 as general and special damages.
2. In the Amended Memorandum of Appeal dated 20.07.2022, the Appellant complains that the trial Court found the Appellant liable as an employer without any documentary documents. That the trial Court shifted the burden of proof to the Appellant and found him liable without the Respondent discharging the burden of proof. He further contends that the trial magistrate disregarded the totality of evidence including the testimony of the witnesses and thus erred in finding him liable. He assails the award of general damages on the ground that it is excessive and unjustified in the circumstances.
3. Whether the Appellant was liable or not is a question of fact. The Court on a first appeal is therefore entitled to render the entire evidence independently and reach its own conclusion bearing in mind that it neither heard nor saw the witnesses testify (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).



4. The Respondent testified that he was working at the Appellant's premises as a casual worker. He stated that on 07.02.2015, he was standing on a ladder while looking at the plumb line, he fell down and got injured as the wall collapsed.
5. The Appellant's defence was that he did not employ the Respondent at the site and that in any event, the accident did not take place as alleged. The Appellant (DW 1) told the court that he did not know the Respondent and had never employed him. That on the material day, he was informed by his foreman that an accident had taken place. He instructed the foreman to ensure the worker is taken for treatment at the hospital on humanitarian grounds. Simon Maina Kamau, (DW 2) and John Irere Mbuko (DW 3) told the Court that on the material day as they were at the site, a man who appeared drunk came to the site looking for one of the masons. A quarrel ensued and the man fell after being pushed.
6. Based on the evidence, the trial magistrate relied on section 6 (2) of the [Occupational Safety and Health Act](#), 2007 and found the Appellant liable for failing to provide a safe working environment. The trial magistrate disregarded the testimony of DW2 and DW3 on the ground that the testimony appeared to have been coached on several grounds. First, that the written statements of the two witnesses were identical, which could only mean that one copied from the other or that the statements were manufactured for the purpose of this case. That the two witnesses did not have anything to prove that they were employees of the Appellant at the site. That they stated that they had never seen the Respondent and could not recognize him in court hence they could not relate their evidence to the Respondent who they had not seen at the site. The court doubted the evidence of all the Appellant's witnesses who alleged that the Respondent was pushed from the building yet they did not give the name of the mason who allegedly pushed him and who was working at the site. The trial magistrate expressed surprise that the incident was never reported to the Police yet the alleged stranger sustained very serious injuries. Based on these facts, the trial magistrate concluded that the Appellant had colluded with his witnesses in a bid to conceal the truth and defeat the course of justice. The court therefore held that the Respondent was working at the Appellant's site and sustained injuries after falling off the building in the course of his duties.
7. The thrust of the Appellant's case is that the Respondent was not his employee hence he could not be liable in the circumstances. DW 1 told the Court that he did not know the people who work on the site as this was information provided by the foreman. He also stated that he did not keep any records. He further stated that his foreman disappeared when the accident happened. Under section 8 of the [Employment Act](#), a contract for employment may be oral or in writing. If it has to be in writing, then it is the employee who has the obligation to ensure that it is recorded.
8. DW 1 and DW 2 both told the court that a stranger came to the site looking for a mason. This confirms and corroborates the fact that there was an accident at the site on the material day. If the Appellant's witnesses were to be believed, they would have identified the victim of the very serious incident as a person other than the Respondent. Moreover, the Appellant would have the full details of the accident that took place at his site. The trial magistrate gave cogent reasons why he disbelieved the Appellant and his witnesses and on this aspect, the appellate court will not interfere unless such a finding was inconsistent with the evidence. The trial magistrate therefore came to the correct conclusion that the Respondent was an employee of the Appellant and that the accident took place at the Appellant's site and that the Appellant was liable for the wall that collapsed and resulted in the Respondent being injured. I would add that a wall collapsing at the Appellant's construction site is a matter that he only can explain and without an explanation he remains liable.
9. As a result of the accident, the Respondent was admitted at Kenyatta National Hospital ("KNH") on 07.02.2015 and discharged on 23.02.2015 as shown in the Hospital Discharge Summary dated



23.05.2015. He was examined by Dr A. K. Mwaura on 10.07.2015 who confirmed that the Respondent sustained several injuries; deep cut wound to the right frontal temporal parietal occipital region, fracture of the right frontal temporal parietal occipital region, hematoma in the right temporal parietal occipital, severe head injury with loss of consciousness for more than 13 days, fracture of the left scapula and the right tibia and fibula, deep cut wound to the right ankle joint, dislocation of the right shoulder joint, bilateral sphenoid sinus, left mastoid bone fracture with sinus. At the time he was examined, the Respondent complained of recurrent headaches and was unable to walk without crutches. Dr Mwaura classified the injury as grievous harm. He noted that the injuries had healed leaving recurrent headaches, swelling and tenderness of the right ankle joint which would lead to development of post traumatic epilepsy and osteoarthritis of the right tibia and fibula as well as arthritis of the right ankle joint. He assessed incapacity at 20%.

10. The Respondent urged the trial court to award him Kshs. 2,000,000.00 as general damages based on [*Kirinyaga District Co-operative Union and Another v Eustace Macheru Wilson \[2014\]*](#) eKLR where the plaintiff sustained a compound fracture of the right elbow joint, transverse fracture of the upper 1/3 right femur and dislocation of the right hip joint. The appellate court affirmed an award of Kshs. 1,400,000.00 as general damages. Since the Appellant prayed that the suit be dismissed, he did not make any submissions on the quantum of damages.
11. The trial court has discretion to award general damages hence this court can only intervene in certain circumstances outlined by the Court of Appeal in [*Gitobu Imanyara and 2 Others v Attorney General \[2016\]*](#) eKLR as follows:

[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

12. In this case, the nature and extent of injuries was not dispute, the issue is the level of compensation the Respondent was entitled to. General damages are damages at large and in assessing the appropriate award, the court considers the nature and gravity of the injuries alongside awards in cases with comparable injuries to ensure that similar injuries are compensated with comparable awards bearing in mind that no two cases are exactly alike. As the Court of Appeal stated in [*Simon Taveta v Mercy Mutitu Njeru \[2014\]*](#) eKLR:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

Lord Morris of Borth-y-Gest in *West (H) & Son Ltd v Shepherd [1964] AC. 326,345*, emphasised the same point when he stated that:

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.



13. The nature and extent of the Respondent injuries were not contested; it was therefore incumbent on the advocates on record to cite appropriate decisions of the superior courts to enable the trial court reach an award that is fair. The Appellant did not cite any decision while the Respondent cited a single decision which was decided in 2014 where the injuries appeared to be serious. Taking into account the fractures and serious head injuries and the level of disability assessed I cannot say that the award warrants interference.
14. For the reasons I have outlined, I hold that the Appellant's appeal fails and is dismissed. The Appellant shall pay the Respondent costs of Kshs. 40,000.000.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.

D.S. MAJANJA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Ms Ngugi instructed by Wanjiru Theuri and Company Advocates for the Appellant.

Mr Kamau instructed by Mwaura Kamau and Company Advocates for the Respondent.

