



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 222 OF 2012

**CITY ENGINEERING WORKS (K)
LTD.....APPELLANT**

VERSUS

**VENATSIO MUTUA
WAMBUA.....RESPONDENT**

(Appeal from the original judgment and decree of Hon. T.W.C Wamae (CM) in Milimani Commercial Courts, CMCC No. 7732 of 2011, delivered on 13th April, 2012)

JUDGEMENT

1. The Respondent, **Venatsio Mutua Wambua**, sued **City Engineering Works (K) Ltd, the Appellant**, seeking, for workman's compensation following injuries he suffered on 25th February, 2010 when he was assisting the workers to adjust or set the rollers for a rolling machine. The operator is said to have pressed the foot pedal causing the rollers to roll on the respondent's left hand as a result of which his fingers were crushed leading to amputation of the fingers. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. The dispute was heard by the trial court which recorded a liability consent of 75:25% in favour of the respondent. On quantum, the Magistrate awarded the Respondent damages amounting to Kshs 1,614,300/=.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal in which it put forward the following grounds:

- 1. The Learned Magistrate erred in law and in fact in failing to find and hold that the respondent had failed his duty to mitigate his damage;***
- 2. The Learned Magistrate erred in law and in fact by making an award of damages for diminished earning capacity in the sum of kshs 1,614,300/= for loss of left hand fingers which award was so inordinately high and amounts to an erroneous estimate and discloses an error of principle;***
- 3. The Learned Magistrate erred in law and in fact by acting on the wrong principles and applying 85% degree of permanent incapacity on the left hand when calculating the amount awarded as the damages for diminished earning capacity when estimate by Dr. Ashwin Madhiwalla and Dr. Wokabi was 40 and 45% respectively;***

4. *The Learned Magistrate erred in law and in fact by making an award of kshs 600,000/= in general damages for pain and suffering which award is so inordinately high and amounts to an erroneous estimate considering the nature of injuries sustained by the respondent and past decided cases;*
5. *The Learned Magistrate erred in law in making an award that goes against the weight of the evidence and precedents;*
6. *The Learned Magistrate erred in law and in fact in failing to take into account statutory deductions and the fact of accelerated payment in making the award for general damages and damages for diminished earning capacity;*
7. *The Learned Magistrate erred in law and in fact in adopting a multiplier of 20 years and failing to take into account that the amount of general damages and damages for diminished earning capacity was to be paid lump sum.*

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held inter alia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

4. The Appellant's case was that, on 25th January 2010, he was at work at the appellant's premises when his left hand was injured. He testified that four of his fingers were chopped off and has not succeeded in getting a job due to the disability. He added that he is 24 years of age and has been forced to depend on his parents for his upkeep since he suffered the injuries.

5. The respondent during trial did not submit any evidence and only filed its submissions.

6. I have re-evaluated the evidence as adduced in the lower court and I have considered the submissions of the parties as filed in this court. I note that the parties consented on liability and the same is not an issue in this appeal. The only issue is the quantum which the appellants consider to be inordinately high.

7. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will first address the first and sixth grounds of appeal where the appellant claims that the Magistrate erred in failing to hold that the respondent failed in his duty to mitigate his damage and failed in taking into account statutory deductions in making the award. I am not sure what the appellant meant by the respondent mitigating the damage suffered. The respondent was injured and the parties addressed that in liability through a consent order. On the issue of statutory deductions, the multiplicand of Kshs 7,600/= used here being an estimate of the respondent salary was less than the required amount in taxation under the Income Tax Act. Subsequently, the award cannot be subjected to taxation.

8. In the second, third, fourth, fifth and seventh grounds of appeal, the appellant has complained that learned magistrate erred in making an award of damages for diminished earning capacity in the sum of kshs 1,614,300/= for loss of left hand fingers that goes against the weight of the evidence and precedents, which award was so inordinately high and by applying 85% degree of permanent incapacity on the left hand when calculating the amount awarded as the damages for diminished earning capacity when it was estimated by **Dr. Ashwin Madhiwalla and Dr. Wokabi** as 40 and 45% respectively.

9. I wish to echo the words of the Court of appeal in the case of **Arkay**

Industries Limited –vs- Amani [1990]KLR 309, where the court stated that: *"The assessment of damages is essentially a matter of judicial discretion as was observed by Nyarangi JA in the case*

of Nyambura Kigaragari –vs- Angripina Mary Aya, Civil appeal No. 85 of 1983 (unreported) following a similar observation in the case of Idi Ayub Shabani –vs- City Council of Nairobi & Anor, Civil Appeal No. 52 of 1994 (unreported);

"For this court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or it was manifestly excessive or inadequate that a wrong principle may be inferred."

This court can only therefore interfere with the decision of the lower court if wrong principles were applied in arriving at its decision or if the damages awarded were very high or very low.

10. I have looked at the decision of the learned trial Magistrate. I note that she took into consideration the reports by the two doctors which reports assessed the permanent disability at 45% and 40%. The appellant claims that the Magistrate wrongly applied 85% degree of permanent capacity to calculate the diminished earnings. Indeed the Magistrate for some reason decided to add the two percentages and used a percentage of 85% to calculate diminished earnings. Having said that, the question arising thereof is whether the total of kshs 1,614,300/= was inordinately high, to establish this I will deal with each head separately.

Diminished capacity.

11. The appellant submitted that the use of a multiplier of 20 years was high and proposed a multiplier of 10 years since the respondent incapacity affected his left hand yet he is right handed. It relied on the case of **Boniface Kisamwa vs Blanket Industries (2005) eKLR**, where the court used a multiplier of 10 years for a plaintiff aged 25 years for loss of earning capacity. The respondent on the other hand proposed that since the respondent was 24 years at the time when he was injured, a multiplier of 31 years would be adequate. I believe that he would have carried out the manual work until the age of 40 years when he would not be in a position to undertake the manual labour any longer. In the circumstances, I believe a multiplier of 15 years would be favourable. I also wish to point out at this juncture that, the fact that it was his left hand that was injured and not his right is not enough a reason to award less damages. I appreciate that he would need both hands to effectively perform his duties.

12. I note that there was no contention as far as the earnings of kshs 7,600 are concerned. I will therefore uphold the magistrates decision to use a multiplicand of Kshs 7,600. In total I will award Kshs 1,368,000/= (7,600X15X12)

Pain and Suffering.

13. The appellant submitted that the sum of kshs 600,000/= awarded for pain and suffering was very high. It proposed that sum of kshs 300,000 would have been adequate upon relying on the cases of **Simba Posho Mills Ltd vs Fred Michira Onguti [2005] eKLR** where the respondent who had suffered amputated distal Phalanx and communicated fracture of the right index finger of the right hand, degloving minor injury pulp of the middle finger of the right hand and a cut wound on the right thumb was awarded kshs 180,000/=. He also referred to the case of **Kimatu Mbuvi t/a Kimatu & Bros vs Augustine Munyao Kioko [2006]eKLR** where the respondent who suffered injuries on the flexion tendons of the thumb, index and middle finger of the left arm, injuries on the left forearm, fracture of left radius and ulna bones and multiples bruises on the forehead was awarded Kshs 300,000/=. The respondent on the other hand submitted that kshs 2,000,000/= would be appropriate. He relied on **Barry proud foot vs Cost Broadway Company Limited & Anor, HCCC 1265 of 1997** where an award of kshs 800,000/= was made for severe injury to the fingers rendering the hand almost useless though not amputated. In **Frida Kimotho vs Earnest Maina, HCCC 3270 of 1995**, the claimant had fractured clavicle and two fingers amputated and was awarded kshs 880,000. He further referred to **Geoffrey Otieno Ongondo vs Kenya Bus Service Limited & Anor HCCC 767 of 2004**, where an award of Kshs 1,200,000/= was awarded for an amputated arm.

14. From the medical reports of **Dr. Ashwin Madhiwalla and Dr. Wokabi**, it is evident that the

respondent suffered loss of two fingers and the other two are incapable of any function. The doctors opined that by loss of the fingers, the respondent lost the left hand which is not capable of any function. They opined that the loss of the distal phalanx will remain a permanent feature and disability was estimated at 40%- 45%. The injuries were thus severe and taking into consideration the nature of employment of the respondent as a general or manual worker, he would need his left hand. I have looked at the authorities referred to by the parties. Though the parties claim that the Magistrate pulled awards from the air, I am persuaded that even if I was to assess the damages under this head in reference to the authorities quoted by the parties, an award of kshs 600,000/= would be appropriate. The award was neither inordinately high nor inordinately low as to amount to an application of the wrong principles of the law.

15. There was no contention on the special damages payable, I will uphold the Lower Courts judgement on the same.

16. In summary, I enter judgment on quantum of Kshs. 1,477,500/=

made up as follows:-

(a) General damages for pain and suffering....	Kshs 600,000/=
(b) General damages Diminished earnings	Kshs. 1,368,000/=
(c) Special damages	<u>Kshs 2,000/=</u>
Total	<u>Ksh.1,970,000/=</u>
Less 25%	Kshs 492,500/=
<u>Net Total</u>	<u>Kshs 1,477,500/=</u>

17. I therefore set aside the trial court judgment and substitute it with a sum of Kshs 1,477,500/=to the respondent .The above sum shall carry interest at court rates from the date hereof till payment in full. The respondent shall also have the costs of the appeal and suit.

Dated and delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent