



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Timsales Limited v Wainaina (Civil Appeal 65 of 2022)
[2025] KEHC 9721 (KLR) (2 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 65 OF 2022
PN GICHOHI, J
JULY 2, 2025**

BETWEEN

TIMSALES LIMITED APPELLANT

AND

JACOB NJOROGE WAINAINA RESPONDENT

(An Appeal from the Judgement and Decree of the Senior Magistrate, Hon A Mukenga delivered on 27th April, 2022 in Molo Magistrate's Court Civil Suit Number 128 of 2018)

JUDGMENT

1. The background of this Appeal is that the Respondent herein had sued the Appellant vide a Plaint dated 11th April, 2018, seeking judgement for:-
 - a. General damages for pain and suffering and loss of anatomical structure.
 - b. General damages for diminished / loss of future earning capacity and or amenities.
 - c. Cost of domestic help at Kshs. 500 per week or any other sum for such a period/time that this Honourable Court shall deem fit.
 - d. Special damages of Kshs. 9,000.
 - e. Costs of this suit.
 - f. Interest on all the above at Court rates.
 - g. Any other relief that this Honourable Court might deem fit to grant.
2. The Respondent, a former employee of the Appellant at its Elburgon factory, stated that on 22nd April, 2015, while arranging timber, a machine operator allegedly switched on a machine without observing



warning indicators, causing severe injuries to his hand that led to the amputation of all his right-hand fingers.

3. The Appellant filed a Defence dated 30th May 2018 and denied the claim, contending that the Respondent was responsible for his injuries. The trial court found the Appellant 80% liable and awarded Kshs. 950,000/= for general damages, Kshs. 1,561,996/= for loss of future earning capacity, and Kshs. 8,000 special damages.
4. Dissatisfied with the judgment, the Appellant lodged this Appeal vide a Memorandum of Appeal dated 13rd May, 2022 and amended on 23rd May 2022, based on the following grounds:-
 1. The learned Magistrate erred in law and fact by failing to take into consideration and make a determination on the issue of jurisdiction raised by the Appellant in its submissions.
 2. The learned Magistrate erred in law and fact and misdirected herself in shifting the burden of proof to the Appellant.
 3. The learned Magistrate erred in law and fact not taking into account the the Defence by the Appellant to the Plaintiff's case. delivering a judgment in favour of the plaintiff when the Plaintiff failed to prove his case to the required standard.
 4. The magistrate erred in law and fact by shifting the burden of proof to the Appellant.
 5. The magistrate erred in law and fact by not considering the defence advanced by the Appellant.
 6. The magistrate erred in law and fact by finding the Defendant 80% liable when evidence showed the Plaintiff was wholly or to a greater degree blameworthy.
 7. The magistrate erred in law by awarding the Plaintiff Kshs. 950,000/= for general damages, which was excessive.
 8. The magistrate erred in law and fact by granting an award for loss of future earning capacity of Kshs 1,561,996/= without adequate proof or proper basis, and which was excessively high.
 9. The magistrate erred in law and fact by not considering the Appellant's submissions, particularly on loss of earning capacity.
 10. The decision was based on wrong principles of law, was unjust, and against the weight of evidence.
5. The Appellant seeks to have the Appeal allowed and the trial Court's judgment of April 27, 2022, reversed or set aside.

Appellant's Submissions

6. In his submissions dated 19th December 2024, the Appellant emphasised on the duty of the first Appellate court to re-evaluate evidence, bearing in mind that it never saw or heard witnesses testify and law to reach a fair decision.
7. The Appellant submitted that the magistrate erred by failing to determine the issue of jurisdiction. Reliance was placed on Chumo v Christina Cheptoo Chumo [2021] eKLR, which M.C. Oundo J, referenced Owners of the Motor Vessel "Lillian S" case that Jurisdiction is everything and without it, a Court has no power to make one more step.



8. It was further emphasised that a court without jurisdiction should cease proceedings. In this, reliance was placed in the case of Law Society of Kenya -vs- Attorney General & Another (Supreme court Petition Number 4 of 2019).
9. On the burden of proof, the Appellant argued that the trial magistrate erred by making a finding when the Plaintiff failed to prove his case on a balance of probability and did not establish a causal link between his injuries and the Appellant's negligence. It cited the case of African Highlands Produce Co. Limited-Vs-Wilfred Otieno Odhiambo HCCA 95 OF 2008, where Wendo J, held that the burden of proof is on the plaintiff to prove the employer failed to discharge their common law duty of care and to show a link between the injury and the employer's negligence.
10. The Appellant further made reference to Winfield and Jolowicz book on Tort 13th Edition at P.203, stating that the burden of proving negligence rests with the Plaintiff workman throughout the case, and if a failure to provide a reasonably safe system is alleged, the Plaintiff must plead and prove what the proper system was and how it was not observed.
11. Additionally, the Appellant relied on the case of Statpack Industries -vs- James Mbithi Munyao (NBI HCCC NO. 15 OF 2003) which Alnashir Visram J (As he then was) held that an employer's common law duty is to take reasonable steps for employee safety, but not to constantly babysit.
12. On liability apportionment, the Appellant submitted that the magistrate erred in shifting the burden of proof and in finding the Appellant 80% liable, as evidence suggested the Respondent contributed to his injuries through careless conduct. In this reliance was placed in the case of Kirugi & Another-Vs- Kabiya & 3 others [1987] KLR 347 which held that the burden is always on the Plaintiff to prove their case on a balance of probabilities.
13. As regards quantum of damages, the Appellant sought to have the awards for pain and suffering, diminished earnings, and special damages set aside and reviewed downwards as excessive, given the injuries were to the fingers. In support of this position, reliance was placed in the case of Joseph Wando Aketch v Corrugated Sheet Limited [2002] eKLR where Onyango Otieno J awarded Kshs. 420,000/= for the loss of five fingers and loss of amenities.
14. On loss of earning capacity, the Appellant relied on the Court of Appeal decision in Butler vs. Butler [1984] EKLR where it was held that loss of earning capacity occurs when an injury lessens future chances of work in the labour market or work as well-paying as before the accident. The factors to consider were enumerated to include age, qualifications, remaining working life, disabilities, and previous service.
15. On the method for assessing loss of earning capacity, reliance was placed on the Court of Appeal case of James Mukatui V M. A. Bayusuf & sons Limited [2013] eKLR, where the Court stated that calculation of this award involves taking the claimant's present annual earnings minus what they can now earn annually, multiplied by a discounted multiplier representing the years of loss of earning power, with adjustments for other contingencies.
16. In conclusion, the Appellant requested the court to re-evaluate the evidence and reverse or set aside the Magistrate's judgment. It also prayed for costs of the Appeal.



Respondent's Submissions

17. The Respondent submitted on an appellate court's approach to a first appeal, as summarized in *Peters vs. Sunday Post Limited* [1958] EA 424, that:-

“an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact.”

18. On jurisdiction, the Respondent contended that the issue was not pleaded but only mentioned in submissions and therefore, it was not for determination as it was not pleaded. Reliance was placed in *Salama Ngome Mpingano v Alice Nyawela Kamathi* [2021] eKLR where D.O. Chepkwony J, stated that courts will not grant unapplied remedies or determine unpleaded issues, as parties set the agenda through pleadings for certainty and finality.
19. It was further submitted that the Appellant admitted to the lower court's jurisdiction in its defence and therefore, it is estopped from arguing otherwise. In any event, that a court is bound by pleadings and cannot go beyond them to determine an undisputed issue. For this argument, reliance was placed on *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the Court of Appeal held that a court is bound by pleadings and its duty is to adjudicate on specific matters in dispute and that entering into unpleaded claims would be speculation and a denial of justice.



20. The Respondent further argued that submissions are marketing language and cannot form the basis of a case or substitute pleadings or evidence and on this, the Respondent relied on the case of PMM (minor suing through the mother and next friend MNM v Family Bank Limited & another [2018] eKLR, where G.V Odunga J (as he then was) stated that submissions do not constitute evidence, but crystallise the case, evidence, and law and that submissions are not necessarily the case and can be dispensed with.
21. To further buttress its argument, the Respondent also relied on the Supreme Court decision in Law Society of Kenya v Attorney General & Another (December 3, 2019), which ousted magistrates' courts' jurisdiction over WIBA claims but allowed matters already filed to continue under the doctrine of legitimate expectation. He therefore argued that since this matter was filed in 2018, it falls within this category, and the lower court had jurisdiction. It was further argued that the Chief Justice clarified that the Supreme Court judgment affected matters filed after the judgment, directing those filed before to be heard by Magistrates Courts as per Kenya Gazette Notice Volume CXXV - No.99 of 28/4/2023.
22. The Respondent therefore, submitted that the trial magistrate did not err in not determining jurisdiction, as it was not in dispute, and the lower court had jurisdiction.
23. On proving the case, the Respondent submitted that while the plaintiff bears the legal burden, every party bears the evidentiary burden for facts they want the court to believe. In this, reliance is placed on the case of Kyalo Elly Joy v Samuel Gitahi Kanyeri [2021] eKLR where G.V Odunga (As he then was) stated that under Section 107(1) of the *Evidence Act*, the legal burden lies on the party asserting the affirmative, while Section 109 and 112 address the evidential burden to prove particular facts. That the initial burden is on the plaintiff, but it may shift.
24. On that basis, the Respondent highlighted that the Appellant's witness (DW-1) was not present at the accident, leaving the Respondent's evidence on how the accident occurred uncontroverted, thus sufficing as proof on a balance of probabilities. Reliance is placed on the case of William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLR 526 that defined the balance of probabilities as persuading the court that pleaded allegations are more likely than not to have occurred (51% vs. 49%).
25. It was also argued that under Section 143 of the *Evidence Act*, no particular number of witnesses is required for proof of any fact. Further that an employer has a common law and statutory duty to provide a safe work system, protective clothing, and training, and the Appellant bore the evidential burden to prove compliance, which they failed, as rightly held by the trial court. In support of this, reliance is placed in the case of Regina Wangechi vs. Eldoret Express Company Ltd [2008] eKLR where M. Koome J, (as she then was) held that while the plaintiff bears the burden of proving negligence, a prima facie inference of negligence shifts the burden to the defendant to displace it.
26. On alleged excessive general damages, the Respondent argued that the Kshs. 950,000/= award for Pain and Suffering was reasonable, merited, consistent with the injuries, and on the lower end of the bracket. He submitted that he suffered very severe injuries, including amputation of all fingers of his right (dominant) hand, leading to 60% permanent disability, confirmed by Dr. Kiamba's uncontroverted medical report. Thus, the award is not excessive and falls within the range established by decided cases.
27. On reasonableness of the award, reliance was placed on the case of Kenya Power V Denis Kabuna Nyatundo [2020] eKLR, where AG Ndung'u J, awarded Kshs 1,300,000 to a victim with amputation of 4 fingers and 45% permanent disability in 2020. The Respondent then argued that given his more severe injuries (amputation of all 5 fingers, 60% permanent disability), Kshs. 950,000/= is not excessive.



28. Further reliance was placed on the case of *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR where D.N. Musyoka J upheld an award of Kshs. 300,000/=, noting that the trend for comparable injuries is Kshs. 300,000 to Kshs. 500,000.
29. On diminished/loss of future earning capacity, the Respondent submitted that evidence showed he cannot work with his right hand and has not worked since 2017, making this award deserving. *Janet Mwova V Muriithi Martin* [2011] eKLR where J.V Juma J, held that a plaintiff who has establishing diminished earning capacity is entitled to damages for loss of future earning capacity.
30. On the formula used to arrive at the award, the Respondent submitted that the trial magistrate's formula aligns with authorities like *Butler V Butler* (Supra) and *James Mukatui v M.A.Bayusuf*, and *Loise Awuor Maseno V Deacons (K) Limited T/A Sun-City Bus Services* [2009] eKLR, where High Court explained that loss of earning capacity occurs when injury lessens future chances of getting work as well-paid as before. Factors considered include age, income, qualifications, remaining working life, disabilities, and other relevant factors.
31. Lastly, reliance was placed on the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR where the Court of Appeal summarised the applicable principles 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 future or in case he loses the job, his diminution of chances of getting an alternative 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 future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. 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 factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

32. In conclusion, the Respondent urged the court to consider both parties' submissions from the lower court and dismiss the Appeal with costs to the Respondent, as provided in Section 27 of The *Civil Procedure Act*.

Analysis and Determination

33. Based on the material placed before this Court, the main issues for determination are:
 - i. Whether the Molo Magistrate's Court had jurisdiction to hear and determine the original suit, particularly regarding claims under the *Work Injury Benefits Act* (WIBA).
 - ii. Whether the Respondent proved his case of negligence against the Appellant to the required standard, and whether the trial magistrate erred by shifting the burden of proof to the Appellant.
 - iii. Whether the trial magistrate correctly assessed and apportioned liability at 80% against the Appellant, or if the Respondent was wholly or to a greater degree blameworthy for his injuries.



- iv. Whether the awards for general damages for pain and suffering and for loss of future earning capacity were excessive and lacked proper proof or basis.
34. On jurisdiction, it is a fundamental principle that jurisdiction is everything, and without it, a court cannot proceed. An objection to jurisdiction can be raised at any stage, including on appeal, regardless of whether it was raised in the lower court as was reiterated in *Governor, County Government of Kakamega & 4 others v Omweno & 12 others (Civil Appeal E176, E177 & E179 of 2024 (Consolidated))* [2025] KECA 190 (KLR) when Where the Court of Appeal Court held that:-
- “So important was the issue of jurisdiction that it could be raised at any time in the proceedings – including on appeal even if it was not raised earlier.”
35. It is settled that the Director of Occupational Safety and Health Services (DOSHS) has primary jurisdiction over work injury claims under the *Work Injury Benefits Act* (WIBA), 2007. The Employment and Labour Relations Court (ELRC) has appellate and supervisory jurisdiction over DOSHS decisions. Initially, the Magistrates Court were vested with the powers to hear and determine these Claims before the enactment of the WIBA Act.
36. Recently, however, the Magistrates' Courts was divested of jurisdiction over work injury claims, and the High Court, equally, lacks appellate jurisdiction in these matters, as they fall under the specialized jurisdiction of the ELRC as per Article 162 (2) of *the Constitution*.
37. In *Law Society of Kenya (LSK) v. Attorney General & Another* [2019] eKLR (Supreme Court Petition No. 4 of 2019), the Supreme Court affirmed DOSHS's primary jurisdiction and the ELRC's appellate and supervisory role, curtailing magistrates' courts' original jurisdiction.
38. Further the Kenya Gazette Notice Volume CXXV - No. 99 of 28th April, 2023, provided Practice Directions on WIBA matters, reiterating the Supreme Court's decision but acknowledging the legitimate expectation of claimants whose cases were pending prior to the ruling.
39. Accordingly, the Magistrates' Courts can handle WIBA matters filed before 3rd December, 2019 based on legitimate expectation. For matters filed after this date, primary jurisdiction lies with DOSHS with appeals to the ELRC and therefore, since the trial court case was filed on 12th April, 2018, the Magistrate's Court had jurisdiction to hear and determine it.
40. At this point, this Court notes that when parties appeared on 16th October 2024 for directions on the Appeal, they recorded a consent for disposal of the same by way of written submissions and were given timelines for compliance on 5th February 2025.
41. Come that date and Mr. Njuguna for the Respondent orally sought that the matter be transferred to the Employment and Labour Relations Court for reasons that from the Memorandum of Appeal, it was clear that the Appellant was injured in the course of duty. In response to that, Ms Njoki for the Appellant opposed transfer on the grounds that she believed this Court has jurisdiction to hear the matter and that she had already filed her submissions. It was also confirmed that the Appellant had filed his. They ultimately sought and were granted a date for judgment in this appeal.
42. The issue of suit transfer, though orally mentioned by the Respondent, was not formally pursued through any application, nor was it substantively addressed in the parties' written submissions. This significant omission, combined with the casual manner it was initially brought up, clearly indicates a lack of procedural diligence and conviction in the request for transfer. Consequently, the Court views this unpursued request as an afterthought, lacking the necessary seriousness for this Court's consideration. In any event the law is now settled that a Court will not transfer a matter filed in court



without jurisdiction to another Court of competent jurisdiction as was held in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR by Asike-Makhandia, W. Ouko & K. M’Inoti, JJA, that :-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

43. In the circumstances , this appeal would be for striking out.
44. On the burden of proof, it is undisputed that the Respondent’s right-hand fingers were amputated due to injuries sustained by the Hot-press machine at the Appellant’s employment. The Respondent blamed the machine operator for switching on the machine while he was still arranging the plywood. The Respondent, argued that he was employed as a casual worker and tasked with sweeping for the first two days before being assigned to tend to the hot-press machine on the third day without any training on how to operate the machine or given any protective gear.
45. The Appellant’s witness admitted assigning the work but insisted that the Respondent was wearing gloves. On the same breath, he admitted that he was not present when the Respondent was injured by the said machine and was only called afterwards.
46. Section 10 of the *Work Injury Benefits Act* provides for compensation in the following terms:-
 - “(1) An employee who is involved in an accident resulting in the employee’s disablement or death is subject to the provisions of this Act, and entitled to the benefits provided for under this Act.
 - (2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work.
 - (3) An employee is not entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and wilful misconduct of the employee.
 - (4) For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting—



- (a) in contravention of any law or any instructions by or on behalf of his employer;
 - (b) or without any instructions from his employer.
- (5) For the purposes of this Act, the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided by the employer for the purpose of conveying employees is deemed to be in the course of the employee's employment.
- (6) For the purposes of this section, an injury shall only be deemed to result in serious disablement if the employee suffers a degree of permanent disablement of forty percent or more.”
47. The above provision of the law establishes an employee's right to compensation for work-related disablement or death, holding the employer liable regardless of fault, even when the employee's own misconduct is involved. Provided that the injury arose out of and in the course of employment.
48. In essence, the elements that must be proved by an employee in WIBA claims are:-
- i. Being an employee as defined by the Act.
 - ii. That they suffered a personal injury or occupational disease.
 - iii. The injury or disease arose out of and in the course of employment.
49. In this case, the Respondent established that he was an employee of the Respondent and his right-hand fingers were all amputated due to injury sustained while he was operating the Appellant's machine. Therefore, all required elements for compensation to be awarded under WIBA were met.
50. On apportionment of liability, the Appellant submitted that the trial magistrate erred in finding them 80% liable, arguing that the Respondent contributed to his injuries through careless conduct. The Respondent on the other hand focused on the employer's duty of care and the uncontroverted accident details, supporting the liability apportionment.
51. While WIBA focuses on compensation, the *Occupational Safety and Health Act* (OSHA), 2007 aims at preventing injuries. Section 13 of the Act outlines general duties of employees thus:-
- “(a) To take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at the workplace. (b) To cooperate with the employer and any other person in the discharge of any duty or the fulfilment of any requirement imposed on the employer or any other person by this Act or any regulation made thereunder. (c) To use any appliance or equipment provided for his protection by the employer in pursuance of any requirement under this Act or any regulation made thereunder. ..”
52. On that basis, it is evident that in as much as the employer is required to take precautionary measures in ensuring safety of its employees, the Employee is equally required under OSHA to ensure their safety



and report risks, as reiterated by the Court of Appeal in *Purity Wambui Mureithi v Highlands Mineral Water Co. Ltd* [2015] eKLR that:-

“Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.”

53. The Respondent admitted during trial that he was not wearing protective gear such as gloves, while the Appellant maintained it provides PPEs to all employees. This admission, without stating that none was provided, demonstrates negligence on the Respondent's part. Equally, the Appellant was largely negligent in failing to supervise the machine operations, especially considering the Respondent was a casual worker tasked with cleaning and without any proven knowledge of machine operations.
54. Moreover, no evidence was presented to support the Respondent's training on operating the hot-press machine or any other machine thereof. The Appellant ought to have demonstrated it trained its employees on operating such lethal machines and ensured supervision to prevent such accidents. In light of this evidence, the apportionment of liability is well-reasoned and there is no reason to disturb it.
55. In regard to quantum of damages, the injuries sustained herein involved the amputation of all five fingers of the Respondent's dominant right hand, with a 60% disability assessment. In *City Engineering Works (K) Ltd v Venatsio Mutua Wambua* [2016] KEHC 6553 (KLR), *Sergon J* upheld an award of Kshs 600,000 for general damages for a respondent who suffered loss of two fingers and rendered two others incapable of function, with a 40%-45% disability.
56. In *Blowplast Ltd v. Julius Ondari Mose* [2018] eKLR, where the respondent's fingers were chopped off while cleaning a blow moulding machine, *C.M Kariuki J*, awarded Kshs. 600,000 as general damages for pain and suffering.
57. Considering these comparable cases and the fact that the Respondent's dominant hand was amputated resulting in 60% degree of disability, the trial court's award of Kshs. 950,000 is within acceptable limits, taking inflation into account.
58. Regarding the award of diminished earning capacity award, the Court of Appeal in *S J v Francesco Di Nello & another* [2015] eKLR clarified the difference between loss of future earnings and loss of earning capacity in the following terms:-

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”
59. In this case, the Respondent contended the accident diminished his earning capacity. He stated that at termination, he earned Kshs. 7,748 per month, as evidenced by DOSH Form-1. The trial court calculated diminished earning capacity as $Kshs. 7,748 \times 12 \times 28 \times 60\% = Kshs. 1,561,996.80$, using a multiplier of 28 years (based on his age of 19 at the time of the accident) and a cap of 60% disability. This Court finds the award justified in the circumstances herein.
60. On special damages, the claim was strictly pleaded and proved and hence upheld.
61. In regard to costs, it is settled law that such award is within the discretion of the Court.



62. In conclusion, and the circumstances herein, the Appeal is hereby dismissed. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms. Njoki for Appellant

Ms Kulele for Njuguna for Respondent

Ruto, Court Assistant

