



**Jumbo North (E.A) v Obonyo (Civil Appeal 119 of 2018)
[2024] KEHC 3422 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 119 OF 2018
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

JUMBO NORTH (E.A) APPELLANT

AND

SIMON PETER OBONYO RESPONDENT

*(Appeal from the judgment and decree of Hon. C.
Obulutsa delivered in Eldoret CMCC No. 315 of 2016.)*

JUDGMENT

1. The present appeal arises from the judgment and decree of Hon. C. Obulutsa delivered in Eldoret CMCC No. 315 of 2016. The respondent instituted the suit in the trial court vide an amended plaint dated 25th July 2016. The Respondent's claim was premised on the fact that at all material times, he was employed by the defendant as a mill fitter and, that on or about 9th May 2012 or thereabout he was lawfully engaged on duty when he was hit and burnt by a red-hot metal bar at the right foot and as result ,he sustained injuries. The Respondent blamed the Appellant for his injuries, alleging negligence on the part of the Appellant and/or its agents, servants or other employees for his injuries.
2. The Appellant filed an amended Defence dated 9th May 2016. The matter proceeded to full trial.

Hearing at the Trial Court

3. The respondent testified as PW1. It was his evidence that he was on duty at the premises of the appellant on 9th May 2013, when a piece of metal pierced and went through his right foot. He was treated at Moi Teaching and Referral Hospital and he produced his discharge summary and radiology request as evidence. Further, he stated that the appellant herein paid for his treatment. He stated that he was examined by Dr. Sokobe and he produced the medical report as evidence. He also produced a receipt as evidence that he paid Kshs. 6,000/-. He was never refunded the money despite being told that the



insurance was following up on the payments. He blamed the company as he had informed them of the need of an alchemist to control the metal. Further, he had only been given gumboots.

4. PW2 was Dr Rono of Moi Teaching and Referral Hospital who prepared the discharge summary for the plaintiff and x-ray requirements. He stated that there was no disability noted.
5. Dr. Sokobe testified as PW3 and stated that he examined the plaintiff on 26th May 2016 and he produced the report he prepared and testified that there was 5% permanent disability suffered by the plaintiff.
6. The defendant produced one witness, Zacharia Ngaira, who stated that the plaintiff was issued with safety gear but that the gumboots were not sufficient.
7. Upon consideration of the testimonies and the evidence tendered in court, the trial magistrate found the appellant 100% liable and awarded the respondent Kshs. 200,000/= in general damages and Kshs.7,200/= as special damages.
8. Being aggrieved by that decision, the Appellant lodged this appeal vide Memorandum of Appeal dated 8th October 2018 on the grounds that; -
 - i. That the learned trial magistrate erred in law and fact in holding the Appellant herein 100% liable in negligence without considering the evidence which pointed to the fact that the accident was solely caused by the respondent.
 - ii. That the learned trial magistrate erred in law and fact in holding that the respondent had established a case against the appellant contrary to the evidence on record.
 - iii. That the learned trial magistrate erred in law and fact in failing to make a finding as to whether or not the issue of liability was adequately proved.
 - iv. That the learned trial magistrate erred in law and in fact in entering judgement for the respondent without considering the credible evidence by the defence witness.
 - v. That the learned trial magistrate failed to consider the submissions and authorities filed by appellant hence an erroneous judgement.
 - vi. That the learned trial magistrate erred in law and in fact in holding the Appellant wholly liable for the accident.
 - vii. That the learned trial magistrate failed to hold that the suit was statute barred by virtue of the *Limitations of Actions Act* Cap 22 laws of Kenya.
 - viii. That the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's claim with costs for want of proof.
 - ix. That the learned trial magistrate erred in law and in fact in awarding damages to the respondent without any basis and which damages were inordinately high as to amount to gross overstatement of the loss suffered.
 - x. That the learned trial magistrate erred in law and in fact in awarding damages to the respondent without any basis and which damages were inordinately high considering the injuries and authorities cited for comparable injuries.
 - xi. That the learned trial magistrate erred in law and in fact in failing to consider the provisions of Order 21 rule 4 of the *Civil Procedure Rules 2010* and other provisions as required by the law.



- xiii. That the learned trial Magistrate erred in law and in fact in failing to capture and/or record all the evidence and/or the testimonies adduce in court thereby omitting important material which were necessary for the determination of the issues in question.

Parties were directed to prosecute the appeal vide written submissions.

Appellant's Case

9. The appellant filed submissions through the firm of Nyairo & Company Advocates. Counsel submitted that the suit before the trial court was filed outside the three years limitation period as provided under Section 4 (2) of the *Limitation of Actions Act*, Cap 22. The Respondent filed the said suit on 25th July 2016 for injuries sustained on or about 9th May, 2012. The cause of action arose on 9th May, 2012. The last day to bring the suit would have been 9th May, 2015. Three (3) years lapsed on 9th May, 2015 and therefore there is no doubt that the suit was barred. The most prudent thing the trial court would have done is to strike out the suit with costs to the Appellant. The Respondent did not seek leave to file the suit out of time and/or leave to validate the suit filed out of time and thus the suit before the trial court ought to have been struck out as a matter of law for being statute barred. Counsel urged that the *Limitation of Actions Act* is not and/or was not meant for decorative purposes but parties who seek legal redress must specifically abide by the legal requirements and therefore the Respondent having failed to abide by the set timelines by statutes, the suit before court ought not have been allowed to see the light of day.
10. It is the appellant's case that there is no doubt that the suit before court is a tort. The Respondent's claim is anchored on the tort of negligence. This is based on the substance of the claim as set out in the pleadings. The Respondent has particularized the negligence and/or breach of duty of care on the part of the Defendant/Applicant under paragraph 6 of the Amended Plaintiff which makes it clear that the claim is based on tort and ought to have been instituted within three (3) years from the date the cause of action arose. Counsel cited the case of *Alfred Mutinda Mutua v C.F.C Stanbic Bank (K) Limited* Civil Appeal No. 150 of 2016 in support of this submission.
11. Counsel for the appellant submitted that the respondent, in his pleadings, attributed the occurrence of the accident to the negligence on the part of the Appellant; allegedly for failing to take precaution to ensure his safety while at work. By virtue of sections 107 and 108 of the *Evidence Act* Cap 80, it is the duty of the Respondent to adduce evidence before court to prove the particulars of negligence itemized in the plaint. He urged that at the close of the Respondent's case this duty had not been discharged to standards required in law and the court erred in finding the Appellant liable. Counsel cited the case of *Kiema Mutuku v Kenya Cargo Handling Services Limited* Mombasa HCCA No. 94 of 1990 in support of the submission that liability must come with fault. Further, that in the instant case, negligence demands that it should be foreseeable to the Appellant that failing to do something the Respondent will be injured. One may pose a question, did the Appellant foresee the accident at all in this present suit? He urged that there is no way the Appellant was negligent for the alleged accident of the Respondent. This was because the Respondent was employed as Mill Fitter and his employment was based on his experience and qualification as a Mill Fitter. At the time of employment, the Respondent was well aware of the danger based on the nature of the duties he was expected to carry out. He was well aware that he needed to be careful while carrying out his duties and having failed to do so,, he cannot turn around and blame the Appellant for the occurrence of the accident.
12. It is the appellant's case that the court erred in failing to hold that it was incumbent upon the Respondent to ensure his safety knowing that the metals could cause injury at any time and thus one needed to be careful at all times. Further, that the Respondent did not adduce any evidence that at



the time of the accident he was under instructions by the Appellant and/or his supervisor. Further, in his testimony there was no evidence led to show that the Appellant failed to provide a safe working environment at the time of the accident like presence of report that the machine was faulty, metal bars, ropes, litter among others around the working surrounding to warrant his injuries. Moreover, nowhere in the Respondent's evidence did he state that he had expressed any reservations in performing the task assigned for a holding of foreseeability to issue. The Respondent's case is based on the tort of negligence and as per the law for one to succeed in such a claim; the Respondent must prove each and every particulars of negligence stated in the plaint. In this matter herein the Respondent has not proved any of the particulars.

13. The Respondent admitted to being issued with protective apparel while he was at work. The Appellant took all the necessary steps to ensure a safe working environment for all of its workers the Respondent included. The Appellant cannot therefore be blamed for the occurrence of the accident. Counsel placed reliance on the case of [Statpack Industries vs. James Mbithi Munyao](#) Nairobi HC Civil Appeal No. 152 of 2003 and urged that the Respondent has not proved liability against the Appellant.
14. It is the appellant's case that the subordinate court erred in failing to hold that the Respondent did not establish the link between the accident and the Appellant negligence or breach of contract or statutory duty. He cite the case of [Statpack Industries vs. James Mbithi Munyao](#) Nairobi HC Civil Appeal No. 152 of 2003 (*supra*), and the case of [Gideon K. Kemboi v Nyayo Tea Zone](#) (2015) eKLR and proceed to dismiss the suit with costs to the Appellant.
15. The appellant invoked the doctrine of volenti non-fit injuria and urged that the Appellant acknowledged during the cross-examination that all workers usually undergo training before being redeployed in any department. This evidence was not controverted by the Respondent. Therefore, the Respondent ought to have known the ins and out of what it entails while performing his duties. He knew the risks and proceeded to carry out the duties. Counsel maintained that the court erred in failing to hold that the Respondent knew of the risk of not being attentive and careful while performing his duties as a Mill Fitter resulting to him getting injured.
16. Counsel submitted that the Respondent in his pleadings, claimed to have sustained the following injuries;
 - i. Penetrating injury to the right foot from the lateral to the medial aspect.
 - ii. Bum wounds on the right foot.
17. On account of the above injuries the Respondent sought award of General damages and Special damages together with costs of the suit and interest. In a bid to prove his case, two doctors who both confirmed that the Respondent sustained soft tissue injuries which had healed at the time of trial. He urged that the court in reversing the magistrate court decision in [Devki Steel Mill Limited v Evans Barasa Walwanda](#) (2010) eKLR held that although the injuries suffered by the Respondent had some residual effect, the Respondent did not suffer any fractures and the element of permanent incapacity was minimal. Further, he stated that the Respondent confirmed during the hearing that he had recovered and the treating doctor confirmed that there was no permanent incapacity assessed. Therefore, the court erred in its finding on incapacity as none existed. He stated that strangely, the trial court held that the Appellant did not file submissions when the same were actually filed. Consequently, the Appellant's submissions authorities cited by the Appellant were therefore not considered and thus the award by the court was excessive. By failing to consider the magistrate court erred in its award



and the laid down principle that highlighted in the Court of Appeal case of *Odinga Jacktone Ouma v Moureen Achieng' Odera* (2016) eKLR in which the court stated that

" comparable injuries should attract comparable awards"

18. The authorities cited by the Appellant mirrored the injuries sustained by the respondent, which the court disregarded and went ahead to award general damages of Kshs. 300,000/= without any legal basis and especially when the injuries in issue were soft tissue injuries which had healed without any permanent incapacity.
19. The appellant urged that the award ought to be set aside for being manifestly excessive and against the comparable awards which reveal that such injuries ought not to attract awards not more than Kshs. 100,000/=. Counsel urged the court to be persuaded by a more recent case of *Edward Muteyu Maithya and another v Edwin Nyamweya* Civil Appeal No. E42 of 2021 (2022) where the High Court at Homabay awarded Kshs. 100,000/= for similar injuries. However, in light of earlier submission on liability, the appellant maintained that the Respondent is not entitled to any award on quantum.

Counsel urged the court to allow the appeal as prayed.

Respondent's Case

20. The respondent filed submissions through the firm of Mukabane & Kagunza Advocates. Counsel urged that in Common Law, an employer owes a duty of care to his employee. He cited *Halsbury's Laws of England*, 4th Edition, Volume 15 at paragraph 560 in support of this submission. Further, that in Kenya the employer's statutory obligation to ensure safety at the workplace is domiciled in the *Occupational Safety and Health Act* (Chapter 514 of the Laws of Kenya). Additionally, he submitted that Section 6 (1) and (2) of the *Occupational Safety and Health Act* that an employer's duty of providing a safe working environment is not restricted only to its areas of control. Counsel referred to the Court of Appeal decision in *Purity Wambui Muriithi vs Highlands Mineral Water Co. Ltd.* [2015] eKLR in support of the submission that it follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety.
21. It is not in dispute that the respondent was employed by the appellant and that he was injured while on duty on 9.05.2012. Counsel submitted that the trial magistrate correctly held that the Respondent had proved negligence against the appellant. Further, that the Respondent proved negligence as required by section 107 and 109 of the *Evidence Act* given that the Appellant had failed to provide a safe working environment and safety apparels. DW-1 testified that the respondent had been provided with safety gears but did not produce any documentary evidence to show that the respondent had been provided with safety gears like gumboots and overall. It was abundantly clear that for the kind of work the respondent was engaged in, he required gumboots. He was not provided with any. There is no counter evidence from the appellant to the effect that the gumboots were not an absolute necessity.
22. Taking all issues into consideration, we submit that the work that was being performed by the respondent's was the appellant's work within the appellant's premises, the machine that threw the metal which hit and injured the respondent belonged to the appellant and that it was incumbent on the appellant to ensure that the working environment for the respondent was a safe as owed a duty to the respondent which it breached. He cited the case of *Eastern Produce Limited (Kibwara Tea Estate) vs Salome Cheptabut Chebangu* [2017] eKLR duty of care, negligence and breach of duty was defined. He maintained that it was demonstrated during trial that the appellant failed to meet its obligations as it failed to provide the respondent with a safe system and procedures of work.



23. As to the issue of whether the award of Kshs 300,000/= as general damages by the trial court was justified, counsel submitted that the said award was reasonable in the circumstances noting that the penetrating injury to the right foot from the lateral to the medial aspect and burn wounds on the right foot were more serious. For the Court to interfere with the award, the appellant must show that the award was either too high or too low as to reveal that the trial Court did not apply itself properly to the facts of the case or took into consideration irrelevant facts which has not been demonstrated by the appellant.
24. On the issue of whether the suit was time barred, counsel submitted that the suit was not time barred. The issue was considered by the trial on 8.05.2017 where the trial court rightly found that the respondent's Claim arose from a contractual relation and the limitation period thereof was six years where given that the respondent's accident occurred in 2012, the period was expected to lapse in 2018. In his finding, the trial court relied on the case of *Kiamokamo Tea Factory* where it was held that an action in negligence and breach of contract are both actions in tort. The trial court also relied on the case of *Maize Milling vs Jackton Otina* (2016) eKLR where the court held that

" an employee has the option to public a claim under tort o breach of contract where there is an implemented term of contract imposing a duty of care on the employer.

Counsel submitted that this issue was raised vide a preliminary objection in the trial court and the same was determined. The appellant is attempting to appeal the same through the backdoor. Further, that the appellant, in preparation of the record of appeal mischievously omitted the respondents' written submissions for ulterior motives.

The respondent urged the court to dismiss the appeal for lack of merit.

Analysis & Determination

25. The duty an appellate court was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

26. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

27. Upon considering the memorandum of appeal, submissions and responses, the following issues arise for determination;
- i. Whether the suit was time barred
 - ii. Whether the trial court erred in its finding on liability
 - iii. Whether the trial court erred in its award of damages



Whether the Suit was Time Barred

28. I note that this issue arose in the trial court vide a preliminary objection which the court delivered a ruling on 8th May 2017. The respondent herein had sought to claim general and special damages arising from injuries sustained as an employee of the appellant at his premises. He succinctly stated that there were implied and express terms of the contract between the plaintiff and the defendant that it would take reasonable precautions for the safety of the plaintiff while engaged in work. Evidently, the claim was based on breach of contractual terms which breach exposed the plaintiff to injuries.
29. Despite the issue being raised as a preliminary objection, the same is before this court as a ground of appeal. Notably, the appellant did not appeal against the preliminary objection ruling in the trial court. It follows that this issue having been determined by the trial court, and the appellant failing to appeal to the same, the issue is *res judicata* as it was determined by a court of competent jurisdiction. Section 7 of the [Civil Procedure Code](#) states as follows;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Whether the Trial Court Erred in its Finding on Liability

30. It is not in dispute that the respondent was working on the appellants' premises on the material date. Further, it is not in dispute that he was an employee of the appellant. The [Occupational Safety and Health Acts](#) provides as follows;

"occupier" means the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer;

31. Section 6 provides as follows;

- (1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.



- (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—
- (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
 - (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
 - (c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;
 - (d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
 - (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employee's welfare at work;
 - (f) informing all persons employed of—
 - (i) any risks from new technologies; and
 - (ii) imminent danger; and
 - (g) ensuring that every person employed participates in the application and review of safety and health measures.

32. It follows that the appellant was under duty to provide a safe environment for the respondent. It was the evidence of the defence witness that the respondent was provided with gumboots only. Further, that the same was not sufficient protection for the work done. I have considered the evidence tendered and it is my considered view that the trial court was correct in its apportionment of liability. The respondent was not provided with adequate protective equipment that would have mitigated the extent of his injuries. The appellant failed to prove that there was a safe environment provided for the employees.

Whether the Trial Court Erred in its Award of Damages

33. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.



34. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkubee v Nyamuro [1983] KLR at 403, where Kneller JA & Hancox Ag JJA held that-
- “ A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
35. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that
- “comparable injuries should attract comparable awards.”
36. In Shabani vs City Council of Nairobi (1985) KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:
- There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.
37. The respondent sustained a penetrating injury to the right foot with 5% permanent disability. The appellant referred the court to the case of Edward Mutevu Maithya & Anor v Edwin Nyamweya – Civil Appeal No. E42 of 2021 where the court awarded Kshs. 100,000/- I find that the said authority is irrelevant as the respondent therein sustained soft tissue injuries which were less severe than in the present suit.
38. In the premises, the appeal fails in its entirety and is hereby dismissed with costs to the respondent.
39. It is so ordered.
40. Interim stay for 15 days is granted.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF APRIL 2024

In the Presence of
Kiplagat for Kagunza
Orwa for the Appellant

