



**Amukhuma v Valley Bakery Limited (Civil Appeal 46 of 2008)  
[2024] KEHC 9151 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9151 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 46 OF 2008  
HM NYAGA, J  
JULY 19, 2024**

**BETWEEN**

**BROWN O AMUKHUMA ..... APPELLANT**

**AND**

**VALLEY BAKERY LIMITED ..... RESPONDENT**

*(Being an appeal arising from the Judgment and Decree of Hon. B. Atiang  
– RM in Nakuru CMCC No.1185 of 2006 delivered on 2nd April,2008)*

**JUDGMENT**

1. This appeal arises from the judgment and decree passed by Hon. B. Atiang Resident Magistrate on 2<sup>nd</sup> April,2008 in Nakuru Chief Magistrate’s Court Civil Suit No. 1185 of 2008.
2. The Memorandum of Appeal filed on 10<sup>th</sup> April,2008 on behalf of the appellant sets out eight grounds of appeal namely that: -  
The Learned Trial Magistrate;
  - i. erred in law in failing to consider and determine the issues for determination before him.
  - ii. failed to comply with the mandatory requirements of Order xxv.4 of the Civil Procedure Rules.
  - iii. erred in Law by failing to assess General Damages in the event his finding was overturned on Appeal.
  - iv. misunderstood and/or misapplied the concept of burden of proof in the circumstances of the case
  - v. erred in finding that the Appellant had not proved “negligence” against the respondent as per the required standard of proof.



- vi. erred in disregarding the Appellant's Medical Report on record as insufficient hence arriving and/or making a wrong finding on the same.
  - vii. erred in Law and evidence in failing to consider the Appellant's written submissions together with the issues raised therein hence arriving and/or making a wrong finding all together.
3. It was the Appellant's prayer that the said judgment of the subordinate Court be set aside and judgment be entered based on evidence on record. The appellant also costs of this Appeal and in the lower court, to be borne by the Respondent.
  4. The brief facts of the case are that Appellant, vide a plaint dated 10<sup>th</sup> July,2006, sued the Respondent in respect of injuries he allegedly sustained on or about 1<sup>st</sup> July,2004 while lawfully working for the respondent. He averred that the Respondent provided him with an unsafe system of work through poorly arranged crates of bread which fell from a height and injured his left leg. He sought for general damages, special damages of Ksh. 2,500/=, costs and interests of the suit.
  5. The particulars of negligence pleaded by the Appellant were; failure to take any adequate precautions for the safety of the plaintiff while engaged in his duty; exposing the plaintiff to risk of injury or damage of which they knew or ought to have known; failing to provide and maintain a safe and proper system of work and to give proper instructions to its workmen including the plaintiff on how to follow the system; providing the plaintiff with an unsafe working environment whereby some crates of bread, poorly arranged by the Company loaders fell on and injured him; & failure to provide the plaintiff with any safety apparel e.g. Gumboots, Gloves etc.
  6. It was the Appellant's case that following the accident he sustained Deep Cut wound on the left leg and Soft tissue injuries of the left leg.
  7. The defendant/Respondent vide its defence dated 10<sup>th</sup> August, 2006 denied ever employing the Appellant. It also denied the entire claim against it and put Plaintiff/Appellant to strict proof. In the alternative, the defendant/Respondent averred that the accident was contributed wholly and substantially by the negligence of the Plaintiff. The defendant/Respondent set out the particulars of negligence on the part of the plaintiff/Appellant as being: failing to have due regard to his own safety while on duty; performing his work in an unworkmanlike manner; failing to follow the well laid instructions by the defendant; exposing himself to danger and/or injury which he ought to have known in the circumstances; engaging himself in frolics while at work; being generally negligent. The respondent also pleaded the doctrine of res ipsa loquitor.
  8. On 15<sup>th</sup> May,2007, the matter was heard. Two witnesses testified in support of the Plaintiff's/ Respondent's case while one witness testified in support of the Appellant's case.
  9. After considering the evidence on record the trial court delivered its judgment on 2<sup>nd</sup> April, 2008 dismissing the Appellant's suit for reasons that he had not proved his case to the required standard.
  10. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

11. The Appellant submitted that the evidence on record showed that he was employed by the Respondent and that he was injured while on duty at the Respondent's company as a result of the Respondent's negligence in failing to provide him with the required working apparel like gumboots which would have minimized the chances of the occurrence of the accident.



12. He faulted the trial magistrate for finding that he had not produced medical notes from Care Medical Clinic yet there was a Medical Report on record by Dr. Omuyoma which clearly showed the injuries he suffered.
13. The Appellant submitted his claim that he was injured while on duty working for the Respondent was uncontroverted. He argued that the Respondent's exhibit No. 3 could not support its assertion that he was not at work on the material day as its witness confirmed that the injury book could be filled several days later, as seen from the injury that occurred in December and was recorded in January, 2004.
14. He asserted that he was employed by the Respondent herein and not Bud and Blooms Limited.
15. Regarding non production of the treatment card, the Appellant posited that the trial magistrate's holding that failure to produce the same rendered his case fatal was erroneous as there are judicial precedents to the contrary, especially where there is other cogent medical evidence on record. He argued that evidence of Dr. Obed Omuyoma sufficiently established the injuries he sustained.
16. To buttress this position, the Appellant placed reliance on the cases of Carzan Flowers (K) Ltd Vs Edwin Ojiambo [2016] eKLR & Timsales Limited v Stanley Njihia Macharia [2016] eKLR.
17. The Appellant submitted that the Respondent was negligent and strictly liable for the injuries he sustained. For this proposition, he cited the case of [\*African Highlands and Produce Co. Ltd -vs- Collins Moses Ontweka Kericho HCCC No. 38 of 2002.\*](#) Where the court held that;
 

“failure of an employer to provide protective gear to an employee when he is working in a dangerous environment means that in the event such an employee is injured, then such employer shall be guilty of breach of statutory duty and shall be held liable. None compliance comply with anyone statutory requirement is enough to find the employer liable in negligence.”
18. For the foregoing reasons, the Appellant submitted that he proved his case to the required standard and urged this court to uphold the appeal and award him Ksh. 250,000/= as general damages for injuries sustained.

### **Respondent's Submissions**

19. Citing Section 107(1) of the [\*Evidence Act\*](#) and the cases of Kiema Muthuku v Kenya Cargo Handling Services Ltd (1991) 2 KAR 464 & Wareham t/a AF Wareham & 2 others v. Kenya Post Office Savings Bank [2004] eKLR, the Respondent submitted that the burden of proof is placed on the Plaintiff who is required to prove his case to the required standards failing which the suit will be automatically dismissed.
20. The Respondent posited that the Appellant's testimony was full of gaps and unsubstantiated by concrete evidence for reasons that: -The Appellant's testimony that he was under supervision of one Tom Mboya at the time of the accident was contradicted and disapproved by its witness one Joseph Apondi(DW1) who testified that Mr. Mboya had left its employment on 24<sup>th</sup> November, 2002 and as such he could not have supervised the Appellant two years later. The Respondent argued that the 2004 payroll produced as Dexh2 confirmed that the said Mboya was not on it. Injury book produced as Dexh4 did not contain the Appellant's name as an entry on the averred date of injury or any other date. The Appellant did not produce the initial treatment notes and the medical report produced was secondary and did not confirm whether the accident occurred during an industrial accident or the age of the injury examined.



21. In buttressing its submissions, the Respondent referred court to the cases of;
- i. Eastern Produce K. Ltd -vs- James Kipketer Ngetali (2005) KLR where the court stated that lack of such evidence (treatment notes) should have raised doubts in the trial magistrate's mind who should have found that there was no sufficient evidence to prove that the respondent was injured, and that the omission to produce the medical chit proved fatal to his case, and not able to prove the case on a balance of probability as required.
  - ii. Amalgamated Saw Mills Ltd -vs- Stephen Muturi Nguru Nakuru HCCA NO. 75 OF 2005, where the court observed that:
    - a. "The treatment card was marked for identification as MFI but was not produced. It was the duty of the Respondent to prove his case to the required standard. He should have called the relevant person to produce the said card if the same was generally issued to him ---. The respondent alleged that he was seen by Dr. Omuyoma after more than three years – from the date of the alleged accident --- the evidential value of the medical report is minimal if any."
22. In light of the above, the Respondent submitted that the appeal lacks merit and it should be dismissed with costs to it.

### **Analysis & Determination**

23. From the pleadings, the evidence and submissions on record, these issues arise for determination:
- i. Whether the appellant proved liability against the Respondent to the desired threshold.
  - ii. Whether the trial court ought to have quantified the damages.
24. This being a first appeal, this court has a duty to re-evaluate the case, and come up with its own conclusion as was held in *Jabane vs Olenja*, [1986] KLR 661, *Selle vs Associated Motor Boat Company Limited* [1968] EA 123 and *Peters vs Sunday Post* [1958] E.A. 424.
25. In *Henderson vs Henry E Jenkins & Sons* [1970] AC 282 at 301 Lord Pearson at letter D stated:
- “In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff’s action fails. The formal burden of proof does not shift.
- But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff’s favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants...”
26. The standard of proof in civil cases is on a balance of probability. The “balance of probability” was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.



27. In *Miller vs Minister of Pensions* 1947 ALL E.R 372, Lord Denning puts this standard in the following terms: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

28. In *James Muniu Mucheru vs National Bank of Kenya LTD C.A Civil Appeal No 365 of 2017* [2019 eKLR, the Court stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party’s version of the story is more believable.”

29. In the instant case, two witnesses testified in support of the Appellant’s case.

30. PW1 was the Appellant herein. He testified that he was employed by the Respondent from February 2001 until September, 2004. He said his work entailed packing bread in a polythene paper and packing them in crates. He said on the material date he went to get the crates to pack the breads and one of the crates which had a crack fell on his leg and injured him. He reported the incident to the supervisor one Tom Mboya and one of his colleagues administered first aid to him. He said in the morning he went to Kenya Medical Clinic at Karatina and subsequently to Dr. Omuyoma for examination. He stated that had the crates been arranged well then they would not have fallen on him. He blamed the company for not providing him with gumboots. He said if he had been provided with the same he would not have been injured.

31. In support of his case, he produced a letter by the Respondent’s Assistant Administration officer confirming that he was employed by the Respondent and Medical Report receipt by Dr. Obed Omuyoma as Exhibits no. 1 and 4 respectively.

32. On cross examination he said he was packing breads and on the material week he had packed 437 breads. He stated that the master roll by the Respondent i.e. Dexh. 3 did not have the name of the said Mboya. He said injury records were kept by the respondent and confirmed that his name did not appear on the Respondent’s injury sheet. He stated that the Respondent had its doctor but he was not treated by him as only employees employed on permanent basis were treated there.

33. On re-examination, he reiterated that Tom Mboya was his supervisor and he had not been shown the master roll for the year 2004. He said the accident report only contained the employees employed on permanent basis. He said casuals were not treated by the Company’s doctor.

34. PW2 was DR. Obed Omuyoma. He testified that he examined the Appellant who was involved in an industrial accident and sustained deep cut wound on the left leg and permanent soft tissue injuries. He said he classified the degree of injury as harm and he produced the medical report as Exhibit no. 3. He said the injuries were in tandem with the injuries contained in the treatment notes.



35. In cross examination, he confirmed he examined the Appellant one year after the accident. He said though he referred to the treatment notes he had not indicated that in his medical report. He confirmed he ought to have done that. He said his medical report did not concur with the treatment notes on stitching. He said his examination was physical and he only saw a scar.
36. After his testimony the Appellant's case was closed.
37. The Defence Witness one Joseph Apondi who was the transport and security manager, testified that one of his duties were keeping company's records. He stated that he kept payrolls, injury register, attendance sheet and court matters. He confirmed the Appellant was working with the respondent. He disputed that the crates fell on him. He said according to the records of 1<sup>st</sup> July,2004, the Appellant was at the wrapping section and he wrapped 124 crates. That the next day he wrapped 78 crates and on the third day he wrapped more. He said the Appellant was paid during the week of 28<sup>th</sup> June to 4<sup>th</sup> July,2004. He said he worked without sustaining any injury. He produced the attendance sheet of 1<sup>st</sup> -4<sup>th</sup> July 2004 as Dexh.1. He also produced a payroll as Dexh.2 to prove that the Appellant was paid for the work done during the week of 28<sup>th</sup> June- 4<sup>th</sup> July, 2004. He said Mboya whom the Appellant claimed was his supervisor left employment in November, 2002.
38. To prove this position, he produced the master roll of October-November 2002. It was his testimony that when a person is injured, the superior writes a letter referring him to Buds and Blooms Clinic but if the injury is serious the nurse writes a letter referring him to Provincial General Hospital and the company foots the bills. He said the company never referred its workers to Private Clinics. He said the Appellant was never injured as his name was not in the injury book of 14<sup>th</sup> to 16<sup>th</sup> July,2004. He produced the injury book as Dexh.4. He stated that the Appellant had been provided with the overall and gumboots.
39. On cross examination, he said he did not have a payroll for the year 2004 to confirm one Mboya was no longer the Respondent's employee. He did not have any proof that those injured were treated at Buds and Blooms. He said the injury book contained the names of all employees and that it also had several pages but he had only photocopied for the claim herein. He also stated that the injury could be recorded later.
40. It is clear from the above, that it is undisputable the Appellant was the employee of the Respondent and he was at work on the material day. What the Respondent mainly disputes is the purported injuries sustained by the Appellant.
41. The Appellant was therefore duty bound to prove that he was injured whilst working for the respondent. The Appellant stated that after the accident he went to Care Medical clinic for treatment. He only marked the treatment notes for identification but never produced it to buttress his case. No reasons for this were given. He relied on the medical report by Dr. Omuyoma to prove the alleged injuries. The report was prepared on 25<sup>th</sup> October 2005, one year three months after the accident. The said doctor testified that the Appellant sustained deep cut wound on the left leg and permanent soft tissue injuries, and had a permanent scar near ankle joint. He confirmed that he relied on the treatment card from Care Medical Clinic. He said the pleaded injuries were in tandem with injuries in his medical report and the treatment card.
42. The Appellant has urged this court to find that the medical report sufficiently proved the injuries sustained. He referred to the cases of Carzan Flowers (K) Ltd Vs Edwin Ojiambo (supra) & Timsales Limited v Stanley Njihia Macharia (supra).



43. In Carzan Flowers (K) Ltd Vs Edwin Ojiambo (supra) the court held as follows: -

“There is no doubt that Dr. Omuyoma while preparing the medical report relied on the treatment card. The respondent produced the said card which was marked for identification. It is also not in doubt that the respondents’ documents were taken by the police to investigate possible fake claims, this having been confirmed by the Appellants witness DW1 that documents were not returned. I am persuaded that the respondent was treated at the Rongai Health Centre and paid his bills, and that the medical report produced by Dr. Omuyoma was sufficient to prove injuries sustained by the Respondent, the Doctor having made reference to the treatment card and notes”

44. In Timsales Limited v Stanley Njihia Macharia (supra) the court of appeal concurred with the High Court judge for opining that

“Where injury is disputed, a treatment card becomes critical to bolster the claimant's words. Failure to produce treatment cards, however; does not always lead to the dismissal of injury claims.”

45. In the same case, while discussing the principles of ‘causation’ the Court cited with approval the decision by Musinga J (as he then was) in South Nyanza Sugar Co. Ltd Vs. Wilson Ongumo Nyakwemba [2008] eKLR quoting Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR) where it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence.”

46. The Appellant’s testimony on the sustained injuries were only corroborated by his witness the doctor. The doctor stated that he relied on the treatment notes and he verified the injuries therein. The appellant did not produce the said medical document to bolster his case. It is not clear why the appellant chose not to produce such a crucial document, which would have established that he was injured on the material day.

47. The Respondent’s witness’s testimony was that the appellant was at work on the material day but he was not injured as alleged. He added that injured employees were normally referred to Buds and Blooms clinic. He conceded that some injuries were normally reported later and thereafter recorded in the injury book, although he opted to only photocopy the page of the date of injury. That said, without the medical notes to show when the plaintiff was treated, there is insufficient evidence to link the injuries seen by Dr. Omuyoma and the alleged accident. The appellant stated that he left employment in 2004. The injuries seen by the doctor could have arisen at any time end even after the appellant left employment with the respondent.

48. In light of the above, I agree with the finding of the trial court that the plaintiff had failed to prove his case, on a balance of probabilities, that he sustained the pleaded injuries while working for the Respondent on the material day.

49. The other ground of appeal was that after dismissing the Appellant’s suit, the trial court failed to quantify damages. That is a valid point.



50. It is trite law that a trial court is under a duty to assess the general damages awardable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of *Mordekai Mwangi Nandwa vs Bhogals Garage Ltd (CA)* [1993] KLR 448 where the court held as follows;

“The judge was clearly under a legal to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court’s then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment”.

Similarly, in *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR it was observed thus:

“There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issues of damages in this case is a serious indictment on the part of the trial court.

Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”

51. Also, in the case of *Matiya Byabaloma & Others vs Uganda Transport Co. Ltd* Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138 the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.
52. Therefore, in as much as this court may agree with the trial court on the issue of liability, it is also desirable that it abides by the above authorities. In doing so I have looked at the evidence adduced. The Appellant pleaded that he sustained Deep cut wound on the left leg and Soft Tissue injuries on the left leg.
53. The Appellant has prayed for general damages of Ksh. 250,000/= but before the lower court he had prayed for Ksh. 120,000/=. He relied on the cases of *Nairobi HCCC No. 2164 of 1991: Vincent Oduor – vs – K.P.&L. Co. Ltd.* where the plaintiff suffered soft tissue injuries involving bruises and cuts. He was rendered unconscious for about one hour following a bang on his head and had fully recovered without permanent incapacity. Also cited was *Charles Maingi Muriithi Vs John Muthee Kamau & Ano HCCC No. 4191 of 1989 Nairobi* where the plaintiff was awarded General Damages for a deep cut wound to his right hand thumb, multiple lacerations on the scalp and chest injury. The cut wound on the right thumb left a big scar with contractures of the joint making it difficult to write with the right hand.
54. The Court of Appeal in *Arrow Car Limited Vs. Elijah Shamalla Bimomo & 2 others* [2004] eKLR held that
- “It is our view that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases”
55. The cases cited by the Appellant are not relevant since the injuries sustained by the claimants therein were more serious than those sustained by the Appellant herein.



56. I have considered the following authorities;
- a. *Richard Mungai Gichuhi vs Peter Ngilu Kabia & K. K. Promote Ltd (NRB HCCC NO. 2654 OF 1997)* – decided in 2002 damages for multiple tissue injuries were awarded at shs 180,000/=.
  - b. *Josephine Angwenyi vs Samuel Ochilo, Kisii HCA No. 125 of 2008* – damages for shs 70,000/= were awarded for soft tissue injuries and
  - c. *Fast Choice Co. Ltd & Another vs. Hellen Mungare Ngore* [2011] eKLR – an award of sh 180,000/= was made for soft tissue injuries to the chest.
57. The Appellant herein suffered soft tissue injuries. Dr. Omuyoma classified the degree of his injury as “harm”.
58. Accordingly, it is my considered view that an award of Kshs 100,000/= would have been adequate compensation for the Appellant.
59. On special damages, these should be specifically pleaded and strictly proved. The Appellant pleaded special damages of Kshs. 2,500/= and he produced a receipts of the said amount. I would have allowed this amount.
60. The upshot is that the judgment of the Trial Court is upheld and the appeal is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU 19<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE.**

In the presence of;

Mr. Ombayo holding brief for Odoyo for Respondent

Ms. Mwathe holding brief for Githiru for Appellant

