



**Oweimbalo v Trax Kenya Limited (Civil Appeal 29 of 2018)  
[2023] KEHC 3384 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 29 OF 2018  
LN MUGAMBI, J  
APRIL 20, 2023**

**BETWEEN**

**MOSES MALIKA OWEIMBALO ..... APPELLANT**

**AND**

**TRAX KENYA LIMITED ..... RESPONDENT**

*(Being an appeal arising from the Judgement of the Honourable. Emily Nyongesa Ms. Senior Resident Magistrate, delivered on the 29th of July, 2021)*

**JUDGMENT**

1. The Appellant contests the judgement of the Honourable Emily Nyongesa Ms. Senior Resident Magistrate, delivered on the 29<sup>th</sup> of July, 2021 on quantum.

**Summary Pleadings**

2. The suit in the trial court was initiated by the Appellant (the Plaintiff in the trial court vide the Plaint dated 15<sup>th</sup> May, 2015 and filed on the 19<sup>th</sup> of June, 2015. He pleaded that he was employed as a mason by the Respondent (the Defendant in the trial court). That it was an implied term of the employment contract that the Respondent would take all the reasonable precautions to ensure the Appellant's safety during the course of his employment. The Appellant averred that on the 26<sup>th</sup> of November, 2014, while engaged in the ordinary course of his assigned duties, a ladder he was standing on caved in causing the Appellant to fall on an iron sheet that severely cut his left arm. He blamed the accident on negligence on the part of the Respondent particularising the same as:
  - a. Failure to take any adequate precaution for the safety of the Plaintiff;
  - b. Exposing the claimant to risk of damage of which he knew or ought to have known;
  - c. Failing to provide a safe and proper system of work at the said premises;



- d. Allowing the Plaintiff to work at the said premises;
  - e. Failing to provide adequate supervision, instructions to avert the risk of injury to the Claimant;
  - f. Causing the said accident
3. In addition, the Appellant blamed the Respondent for breaching the terms of his employment contract by:
- a. Failing to provide the Plaintiff with a safe and proper system of work;
  - b. Exposing the Plaintiff to injury or damage which was imminent;
  - c. Failing to provide the Plaintiff with protective devices; and
  - d. Failing to give precaution to avert the damage to the Plaintiff.
4. As a result of the fall, the Appellant sustained injuries as follows:
- a. Radial nerve damage;
  - b. Left hand wrist drop;
  - c. Pain and swelling and bleeding;
  - d. Deep cut wound left elbow.
5. The Appellant pleaded further that prior to his injury, he was a mason earning KShs. 1,000 per day and could not engage in any gainful occupation for a period of four months and thus claimed damages for loss of earnings and earning capacity.
6. He prayed for judgement against the Defendant for:
- a. General damages for pain and suffering and loss of amenities;
  - b. Special damages of KShs. 3,000/-;
  - c. Costs and interest.
7. In its statement of defence filed on the 13<sup>th</sup> July, 2015 the defendant denied the contents of the Plaintiff and instead pleaded negligence on the Appellant's part in particular that:
- a. Climbing a ladder without such instructions from the foreman/supervisor;
  - b. Abandoning his duties and engaging in other duties which was not an implement for use in execution of his duties;
  - c. Going on a frolic of his own to climb a ladder which was not an implement for use in execution of his duties;
  - d. Recklessly stepping on the ladder causing it to cave in;
  - e. Failing to wear protective clothing and hand gloves provided for by the defendant;
  - f. Adamantly failing to heed directions given by his supervisor on safe and extent of execution of his duties;
  - g. Climbing a ladder recklessly without caring for his own safety;
  - h. Failing to observe safety regulations prescribed by the defendant;



- i. Lack of caution and circumspection when climbing the ladder.
8. The Respondent prayed for the Appellant's case to be dismissed with costs.
9. During the hearing of the case on the 7<sup>th</sup> of June, 2016, the Appellant testified as the sole plaintiff's witness while the Respondent called two witnesses: Wambui Nyamai (DW 1) and Isaiah Wasike (DW 2). In its judgement delivered on the 18<sup>th</sup> of January, 2018 the trial court held that:

“...I have considered the nature and extent of the injuries suffered by the Plaintiff as shown by the medical evidence on record. Besides, the Plaintiff has fully recovered. I have also looked at the various case laws regarding similar injuries, some of which were referred to by the parties hereto. I find that KShs. 140,000 by way of general damages is adequate.

The special damages pleaded and proved was KShs. 3,000/=.

I therefore enter judgement for the Plaintiff in the following terms:

1. Liability 70:30
2. General damages: KShs. 140,000 less 30% contributory negligence: KShs. 98,000/=;
3. Special damages: KShs. 3,000/=;
4. The Plaintiff shall have the costs of this suit;
5. The interest on both special and general damages shall be at court rates from the date of this judgement...”

## **The Appeal**

10. In his memorandum of appeal dated 16<sup>th</sup> February, 2018 and filed on even date, the Appellant listed the grounds of appeal as:
  1. That the Learned Trial Magistrate grossly misdirected herself in tearing the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same by:
    - a. The Trial Magistrate misdirected herself in ignoring the principles applicable and the authorities which she relied on;
    - b. The learned trial magistrate proceeded on wrong principles, when assessing the damages to be awarded to the appellant;
    - c. The learned trial magistrate award was so manifestly low in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent;
    - d. The learned trial magistrate misdirected herself in ignoring the appellant's submissions;
    - e. The learned magistrate erred in law and in fact in failing to appreciate the evidence that the injuries suffered by the plaintiff were grievous in nature resulting to permanent incapacity, a fact confirmed by doctors for the appellant and the respondents.
11. The Appellant urged this Court to find merit in his appeal, allow the same and prayed that:
  - a. The judgement on quantum delivered on 18<sup>th</sup> January, 2018 b set aside;



- b. The Court be pleased to re-assess the award on general damages;
  - c. The costs of Gatundu PMCC 108 of 2015 do abide the outcome of this appeal and the same together with the costs of the appeal be borne by the Respondent.
12. On the 5<sup>th</sup> of May, 2022 the appeal was admitted for hearing and the Court directed that the Record of Appeal be filed within 45 days and the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the 8<sup>th</sup> of September, 2022 but the Court declared the same an incomplete record and ordered the Appellant to file a complete record which record was filed on the 16<sup>th</sup> of December, 2022.

### **The Appellant's Submissions**

13. The Appellant filed his submissions on the 18<sup>th</sup> of November, 2022. He submitted on a single issue for determination namely: Whether the award of KShs. 140,000 as general damages to the Appellant was inordinately low as to present a wholly erroneous estimate of the damages for the injuries sustained.
14. The Appellant outlined the duty of this Court as an appellate court as laid down in the case of *Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR* where the Court stated that:
- “...in order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or very low as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”
15. The Appellant urged this Court to interfere with the assessment by the trial court because the trial court did not appreciate the nature and extent of the injuries suffered by the Appellant in awarding damages like she did. That she failed to consider the totality of the evidence placed before her and left out irrelevant factors in arriving at her decision on quantum. He quoted *Halsbury's Laws of England 4<sup>th</sup> Edition, Vol 12(1) page 348-883* where the rationale for award of damages of pain and suffering was discussed as follows:
- “Pain and suffering damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement or suffering caused by anxiety that the plaintiff's condition may deteriorate.”
16. That comparable awards should be made for comparable injuries and that the trial court's award was not comparable to those made for comparable injuries and that she applied the wrong principles and failed to take into consideration the relevant factors. The Appellant contended that the injuries he sustained were severe and the same were classified as Grievous harm by Dr. Mwaura who assessed the degree of permanent incapacity at 20%. That the second medical opinion of Dr. Wambugu put the degree of permanent incapacity to be a 12%.
17. That the essence of awarding damages is to compensate the victim for the injury suffered and try as much as possible to restore them to the position they were in before the suffering the injury while staying alive to the fact that comparable awards need to be made for comparable injuries, the rate of inflation and the strength of the Kenyan shilling when the awards are made as was the holding in the case of *Nyambati Nyaswabu Erick vs. Toyota Kenya Limited & 2 others (2019) eKLR*.



18. The Appellant submitted further that the general damages awarded by the trial court were so inordinately low in the circumstances considering that the injury suffered involved nerve damage and extensive muscle loss in addition to soft tissue injuries. That the nature and extent of injuries sustained is a question of fact and being discretionary, a court need to exercise the same judiciously and not capriciously while taking into account the well-established principles on awarding general damages for pain, suffering and loss of amenities. That the trial court failed to consider the submissions of the appellant, comparable authorities for the injuries he sustained and relied on the wrong precedent where awards made were for different injuries unlike those sustained herein. That the magistrate left out relevant factors and made assessment away from the evidence before her.
19. That it is well settled principles that bind our courts in awarding general damages for pain, suffering and loss of amenities and the fact that the plaintiff lost income and future earning capacity as an aftermath of the accident. While relying on the cases of Dominic Mbithi vs. Agnes Mwinzi & Another (2019) eKLR and China Sichuan International Company Limited vs. Felix Ouma Odhiambo (2021) eKLR, the Appellant herein proposed that an award of KShs. 1,800,000 would be reasonable, appropriate and adequate compensation for the general damages.

### **The Respondent's Submissions**

20. The Respondents filed their submissions on the 13<sup>th</sup> of Jan, 2023. While relying on the case of Caleb Juma Nyabuto vs. Evance Otieno Magaka & another (2021) eKLR the Respondent submitted on the duty of this appellate court and cited following remarks by Justice Wendoh:

“...This Court is guided by the holding in Jane Chelagat Bor vs. Andrew Otieno Onduu (1988-92) KAR 288; (1990-1994) EA47, the Court of Appeal held that:

In effect that court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law or has misapprehended the facts, if has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is ab balance of opinion or preference. The scale must go gown heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency...”
21. On the issue of the award by the trial court, the Respondent submitted that the Appellant sustained the injuries enumerated in his plaint on page 3 of the Record of the Appeal. That the medical reports of Dr. Mwaura and Dr. Wambugu were also produced in evidence by consent. That Dr. Mwaura in his report dated 12<sup>th</sup> May, 2015 stated that the radial nerve was repaired and physiotherapy started and that there were no complaints from the Appellant. The doctor observed that there was a left-hand wrist drop and the degree of incapacity was assessed at 20%.
22. That Doctor Wambugu re-examined the Appellant on the 12<sup>th</sup> of October, 2016 and he noted that he sustained: a cut wound on the left arm distal and ventral aspect with suspected radial nerve damage. The doctor noted that the Plaintiff was managed as an inpatient on appropriate medications. That when the drop was noted, exploration of the radial nerve was done and the same was repaired and the only complaints to the doctor were the occasional headaches and weakness of the left upper limb. That the doctor noted that the Plaintiff had made adequate recovery but had residual wasting of the arms muscles which the doctor awarded him 12% as the degree for permanent incapacitation. That the Trial Court chose to be guided by the report of Dr. Wambugu and awarded KShs. 140,000.
23. The Respondent submitted that the trial magistrate cannot be faulted and that she appreciated the nature of the injuries sustained by the Respondent. That according to the medical treatment notes



and reports by both doctors, the radial nerve was repaired and the only resultant issue was wasting of the muscle. That the only reason the Appellant as admitted in hospital was for the purposes of the treatment of the nerve which nerve was fully repaired making the injuries sustained soft tissue in nature and the classification that they were grievous harm erroneous. The Respondent relied on the case of Muthamiah Isaac vs. Leah Wangui Kanyingi (2016) eKLR where the Court stated:

“...An award of damages is a matter of the trial court’s decision which discretion has to be exercised judicially and with a reason. The award should not be to inordinately high or too low. It should be commensurate to the injuries suffered. In addition, it is not meant to enrich the claimant but to restore him to the position in which he was before the injuries were suffered. Further, awards in past decisions are mere guides and each case has to depend on its own merits and facts...”

24. That the cases the Respondent cited in their submissions: Shalimar Flowers Ltd vs. Noah Muniango Matianyi (2011) eKLR, Kipkebe Tea Limited vs. Duke Nyang’au (2015) eKLR, Panner Seed (K) Ltd vs. Amos Karanja Mwangi & 2 others (2016) eKLR the Plaintiffs suffered similar injuries and the awards of KShs. 50,000, KShs. 100,000 and KShs. 80,000 were made.
25. That the Learned Magistrate did not act on the wrong principles and neither did she misapprehend the facts and she appreciated the injuries. That she was cognizant of the fact that the Appellant had made adequate recovery and was properly guided by the authorities cited.
26. The Respondent sought to distinguish the authorities cited by the Appellant and stated that the same were decided after the judgement of the trial court and that in any event they are not comparable. That in Dominic Mbithi (supra), the Plaintiff sustained head injuries which led to mild headaches, fracture comminuted cervical spine, fracture, styloid process of the (R) Ulna, nerve injuries the (R) brachial plexus which led to wrist drop, cut wound on the lateral aspects of the right eyebrows, right side of abdomen, knuckles of the 2<sup>nd</sup> and 3<sup>rd</sup> fingers of the right hand and right lateral malleolus. He also sustained trauma to the right ankle joint and foot leading to swelling and also blood loss. The Appellant lost the use of his right hand and also the right foot.
27. That in the other case of China Sichuan International Company Limited (supra), the Plaintiff sustained a fracture of the left humerus and traumatic injury to the left brachial plexus nerve bundle leading to a total paralysis of the left upper limb. The left hand was totally paralysed.
28. The Respondent submitted further that the magistrate’s judgement was also assaulted on the basis that she failed to consider the Appellant’s submissions but the Court laid down authorities cited by the counsel and she distinguished them as incomparable.
29. In conclusion, the Respondent submitted that the Learned Magistrate did not err in any way and there are therefore no grounds for interfering with her decision. It urged the Court to dismiss the appeal with costs.

## **Determination**

30. This is a first appeal and in the circumstances this Court has a duty to analyze and re-evaluate the evidence adduced in the superior court and to reconsider it to find out if it warranted the decision reached. As was stated in *Selle & Another v. Associated Motor Boat Co. Ltd.* [1968] 123 at p 126: -

“...the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the



witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally."

31. From the pleadings and submissions before this Court it is evident that the main issues for determination are:
  - a. Whether the award of general damages awarded by the Trial Court was inordinately low;
  - b. Whether the appeal has merit;
  - c. Who pays for the costs of the appeal?
32. The gravamen of the Appellant's appeal and submissions on the issue of the quantum assessed by the Trial Court. It is his position that the damages awarded are inordinately low considering the injuries he sustained. According to the Plaintiff and the medical report produced by the Appellant, he sustained the following injuries:
  - a. Radial nerve damage;
  - b. Left hand wrist drop;
  - c. Pain and swelling and bleeding; and
  - d. Deep cut wound left elbow
33. While testifying as PW1, the Appellant stated that he was at work when at about 5.30pm while carrying ballast, the wooden plank on which he was standing on broke and he fell on an iron sheet which cut his left-hand. He reported the injury to the Respondent as evidenced by the statement on page 36 of the Record or Appeal which he adopted as part of his evidence in chief before the trial court. Two medical reports were produced during trial;
  - a. Dr. Mwaura's report dated 12<sup>th</sup> May, 2015;  
He listed the injuries sustained as:
    - a. Deep cut wound left elbow
    - b. Pain and swelling and bleeding
    - c. Left hand wrist drop; and
    - d. Radial nerve damage.Both the general and systemic examination revealed healthy and normal scars and the local examination indicated healed/scars/wrist drop.  
His prognosis and opinion was that the healing was fair but with the following complications:
    - a. Left hand wrist drop(nerve damage);
    - b. There are scars-left fore-arm;
    - c. He suffered pain, swelling and blood loss;
    - d. Permanent degree of incapacity is assessed at 20% (left upper limb);
    - e. He sustained grievous harm and soft tissue injuries.



- b. Dr. Wambugu's report dated 12<sup>th</sup> October, 2016

The Doctor stated that the injuries sustained a cut wound left arm distal end ventral aspect with suspected radial nerve damage.

That the Plaintiff complained of occasional headaches and weakness in the left upper limb.

The doctor's findings were that:

The generally condition is good. The Plaintiff is predominantly right handed; The left upper limb had a healed linear cut wound ventral aspect of the arm just above the elbow joint. A surgical scar was noted over the lateral aspect. No discharging sinuses. No contracture bands. There is wasting of the biceps muscles due to possible torn biceps tendon. Elbow joint extension movements are within normal range but supination is mildly restricted. Distal sensation, circulation and motor power are normal. The thenar eminence and small muscles of the hand are normal. First formation and thence grasping ability are intact. No wrist drop.

The Opinion and Prognosis was:

Malika's injuries are consistent with those due to sharp trauma as may have occurred during the said accident. He sustained neural and soft tissue injuries as detailed above. He has since made adequate recovery but has residual wasting of the arms muscles. I do not hesitate to award him 12% as the degree of permanent incapacitation.

34. The trial court relied solely on the report by Dr. Wambugu and stated thus:

"The Medical report by Dr. Wambugu dated the 12<sup>th</sup> day of October, 2016, which was produced by consent of both parties point to the fact that the Plaintiff sustained cut wounds on the left arm distal end ventral aspect with suspected radial nerve damage. The doctor's opinion and prognosis was that the plaintiff had since the made adequate recovery but has residual wasting of the arms muscle. He awarded the Plaintiff 12% as the degree of permanent incapacitation.

This would guide this court in determining the quantum of damages to award in this particular case."

35. The Court in the case of Apex Security Services Limited vs Joel Atuti Nyaruri [2018] eKLR while relying on the case of Stephen Kinini Wang'ondou vs. The Ark Limited (2016) eKLR stated thus:

"I fully concur that expert evidence should not trump all other evidence, that it should not be considered in a vacuum and that same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the court to evaluate complex matter, the said evidence is not compelling on its own."

36. In the said case of Stephen Kinini Wangondu (supra), the Court held thus:

"Expert testimony, like all other evidence must be given only appropriate weight. It must be as influential in the overall decision making process as it deserves: no more, no less. To my mind, the weight given to expert evidence will derive from how the evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside



the knowledge and experience of those trying the case, and the court agrees to the evidence called...”

37. This being said the Trial Court ought to have considered both medical reports and weighed the same against the other before deciding which report to base its findings on. Both doctors confirmed that the Appellant suffered some degree of permanent disability: 20% and 12% respectively. Can there be a proper justification for the trial court to choose the second medical report over the first one? In my view, the trial court should have spelt its reasons for doing so. Nevertheless, it is clear that the second medical report was prepared after the Appellant was examined by Dr. Wambugu on 12<sup>th</sup> of October, 2016 which was one and a half years post the first medical report. It is possible for the injuries to have significantly healed thereby explaining the decrease in degree of permanent incapacity by the 8% at the time of the second examination. The trial Court may thus not have been wrong in relying on Dr. Wambugu’s report. After all, all said though, one thing is clear from the medical evidence presented, these were not mere soft tissue injuries that healed completely but involved nerve damage that had residual effect on the Appellant which left him with 12% degree of permanent incapacity on his left arm that affected its up and down orientation otherwise known as supination.
38. Having reviewed the above, the next question then becomes whether the award of KShs. 140,000/- was inordinately low as general damages for the pain and suffering. The Appellant relied on several decided cases to persuade this Court to have the same raised to KShs, 1,800,000. However, a look at the cases confirm that the injuries sustained by the plaintiffs in those cases were more severe and intense than those sustained by the Appellant herein. The Appellant had fully recovered and the doctor noted in his report on the 12<sup>th</sup> of October, 2016 that he was right handed most of the time hence the level of incapacitation was reduced.
39. In the case of Shalimar Flowers (supra), the damages of KShs. 120,000 were as general damages and the appellate court substituted the same with KShs. 50,000 for injuries. In the case of Kipkebe Tea Limited (supra) the Respondent therein sustained dislocation of the right wrist joint, deep cut wound on the right elbow and bruises on the left shoulder and the trial Court’s award of KShs. 120,000 was substituted with an award for KShs. 100,000 on appeal.
40. In the case of Shalimar Flowers and Kipkebe Limited (supra) which are cited above however, there was no element of permanent disability that was noted. In this case, as correctly submitted by the Appellant, the nature and extent of the injuries should also be considered alongside the period he spent admitted in hospital for the treatment. He was admitted twice first time being 26/11/2014 to 6/12/2014 and the second time being 8/1/2015 to 21/1/2015. This was over twenty days of agonising experience from the injuries sustained. In addition, one and half years later, the doctor noticed that he had suffered 12% degree of permanent incapacity which affected the left-hand supination.
41. This court finds that this appeal has merit as in assessing the damages, it finds that the trial court omitted relevant facts in reaching its decision leading to an award that was inordinately low that this court finds reason to interfere with. I thus set aside the award made by the trial court of Kshs. 140,000/- and substitute the same with an award of Kshs. 600,000/- in general damages for pain, suffering and loss of amenities.
42. I shall maintain the 70:30 percentage of liability contribution as this was not a subject of this appeal. The special damages of Kshs. 3000/- are not affected too.
43. Judgment of the trial court is thus substituted as follows:
  - a. General damages Kshs. 600,000



- less 30% contribution= Kshs. 420,000/-

b Special damages - Kshs. 3,000/-

Total Kshs. 423,000/-

c Appellant shall get the costs of this appeal and those incurred before the trial court.

d Interest on a & b above at court rates.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**L.N MUGAMBI**

**JUDGE**

**In presence of:**

**Appellant- absent**

**Respondent- absent**

**Advocate for Appellant- absent**

**Advocate for Respondent- Ngugi for Respondent**

**Court Assistant- Alice**

**Court**

**This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.**

**L.N. MUGAMBI**

**JUDGE**

**Mr. Ngugi – we apply for 30 days stay**

**Court – 30 days stay of execution granted.**

**L.N. MUGAMBI**

**JUDGE**

**20.4.23**

