



**Unilever Tea (K) Limited v Munai (Civil Appeal 41 of 2018)
[2023] KEHC 17949 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 41 OF 2018**

JK SERGON, J

MAY 16, 2023

BETWEEN

UNILEVER TEA (K) LIMITED APPELLANT

AND

BENARD MUNAI RESPONDENT

(Being an Appeal from the judgment of the Honourable Chief Magistrate, Hon. Mokuu dated 27th November, 2018 in the Chief Magistrate's Court, Civil Suit No. 346 of 2012 at Kericho)

JUDGMENT

1. On or about the May 21, 2012, the Plaintiff/ Respondent while at work and in the scope of his employment at the Defendant/Appellant's premises, was bitten by a caterpillar and as a result, his right index finger was amputated. The Plaintiff/Respondent attributed the injury to breach of statutory duty and to negligence and/or breach of contract on the part of the Defendant/Appellant. The Plaintiff/Respondent subsequently filed a suit against the Defendant/Appellant for general and special damages plus costs and interests arising as a result of the said injury vide Kericho CMCC No 346 of 2012, the matter was heard and judgment delivered on November 27, 2018.
2. The Appellant herein being aggrieved by the judgment dated November 27, 2018 in Chief Magistrate's Court Civil Suit No 346 of 2012 preferred this instant appeal and put forward the following grounds as contained in the memorandum of appeal dated December 8, 2018 seeking to have the judgment and/or decree set aside and/or quashed;
 - (i) The learned trial magistrate erred in law and fact in finding that the Appellant as the Defendant contributed 100% to the alleged accident yet evidence on record shows that injury did not occur in their premise and therefore they were not to blame.



- (ii) The learned trial magistrate erred in law and fact in failing to consider both the testimony and submissions of the Appellant in arriving at the judgment.
 - (iii) The learned trial magistrate erred in law in awarding sums in damages which was/is manifestly and/or inordinately high, thus connoting an error in principle, taking into account past decisions of the court and the current trend of awards
 - (iv) The judgment of the learned trial magistrate was/is against the weight of evidence
3. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and found the issues for determination put forward by both parties to be as follows:
 - (i) Whether the trial court was right in finding the Appellant was 100% liable
 - (ii) Whether the trial court was right in awarding a sum of Kshs 300,000/= as general damages and Kshs 5,000/= as special damages
4. The Appellant submitted that it would be relying on its submissions in the lower court in its entirety.
5. The Appellants argued that the trial court relied on the Respondent's version of events on the material day and that he did not call any witnesses to corroborate the claim that he was injured at work on the specified date despite having testified to the fact that there were 60 other men working with him on the material day he asserts he was bitten by the caterpillar. The Appellants further argued that according to defence witnesses, specifically, Henry Kipngetich Rotich (DW 1) and Johnstone Kipgneo Langat (DW 2) when PW 1 reported to work on May 21, 2012, his hand was bandaged with a handkerchief and he stated to his supervisor (DW 1) that he had been injured while at home the previous day which was a Sunday and he was not required to report to work and further that PW 1 recorded a statement in which he endorsed that the saint injury was a non-work related injury.
6. The Appellants argued that on cross examination PW 1 stated that he did not expect that dangerous insects would be in the soil and conceded that even the Defendants would not have known of the insect's presence in the hole he was digging, he further conceded that it was an unfortunate accident. The Appellants therefore argued that the incidence was a remote and/or totally unforeseeable occurrence. The Appellants reiterated that the law on negligence is well settled and that there must be a breach of the duty of care, which is the direct cause of injury, loss or damage and the duty of care did not extend to include unforeseen incidents caused by negligence of the employee himself and cited *DWA Estate Limited v Daniel Ayiro Osieko v Nairobi Civil Appeal No 559 of 2005*.
7. The Appellants submitted that it was mandatory for all employees working in PW 1's section to wear gloves which were provided, additionally, PW 1 was using a coffee digger (DExh.1) and therefore his hand was not meant to touch the ground whilst using it. The Appellant therefore argued that an employer's duty of care does not apply where the employee is acting negligently, carelessly or recklessly and that he was solely to blame for his injury if indeed it was sustained while at work which they maintained it was not.
8. On the issue of liability, the Appellants in its submissions, whilst contending liability, faulted the Respondent for failing to prove a casual link between negligence on its part and the Respondent's injury, they cited the following cases in support of their case *Edward Wasamba Onyango (suing as the next of friend of a minor COW v The Chairman Board of Directors Agoro & Yombe Secondary*



School [2018] eKLR, *Statpack Industries v James Mbiti* in Nairobi Civil Appeal No. 152 of 2003 & *Mutbuku Kiema v Kenya Cargo Hauling Services Ltd* [1991] 2 KAR in which the Court of Appeal held that “there is no liability without a fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.” The Appellant reiterated that fault must be established if liability is to be proven.

9. The Appellant contended that the Plaintiff in the lower court did not establish a clear connection between the alleged negligence and his injury, thereby failing to show that his employer was in breach of its statutory or common duty of care.
10. The Appellant faulted the Respondent for failing to prove his case on a balance of probabilities. The Appellant contended that the evidence adduced did not show that the caterpillar/insect bite was caused by breach of statutory duty of care on its part or negligence on its part thereby causing the Respondent to sustain an injury.
11. The Appellant faulted the trial magistrate for finding it wholly liable whereas the evidence adduced was insufficient.
12. The Appellant contended that the general damages in the sum of Kshs. 300,000/= awarded for soft tissue injuries and right index finger amputation pain were excessive and inordinately high, connotes an error in principle considering past decisions and the current trend of awards for similar injuries and therefore warranted the courts interference. The Appellant contended that in the event liability had been established the Respondent was entitled to no more than Kshs. 80,000/= while citing the finding in *Ken-Knit Company Limited v David Barasa Wakoli* [2018] eKLR.
13. The Appellant faulted the Respondent for failing to prove his case on a balance of probabilities as required under section 107 (1) of the *Evidence Act*, cap 80. The Appellant therefore urged the court to allow the instant appeal with costs.
14. On the issue of liability, the Respondent contended that he had proven his case on a balance of probabilities and in an endeavour to prove his case against the appellant had called four witnesses.
15. The Respondent (Pw 1) had testified that he was an employee of the Appellant, he was assigned duties of digging holes at Chebon Estate for purpose of tea planting. The Respondent maintained that on May 21, 2012 while in the process of removing soil while working he was bitten by a caterpillar, he reported the incident to the supervisor and later went to Seretut Dispensary where he received treatment. The Respondent did not recover, he went back to said dispensary where he was referred to Kapkatet District Hospital and his right hand index finger amputated as it had become gangrenous.
16. The Respondent in his submissions faulted the Appellant for neglecting and /or renegeing to provide him with a safe system of work to wit provision with protective gloves and/or gear which would have prevented the said injury. The Respondent maintained that he had been bitten by the caterpillar while on duty and reported the same to the team leader Henry Rotich after the itch persisted. The Respondent vehemently denied the Appellant’s allegation that he had told the supervisor Rotich that his hand was itching in the morning before he was assigned duties.
17. The Respondent submitted that Pw 2 a nurse at Seretut Dispensary corroborated the Respondent’s evidence that the Respondent had visited the said dispensary with a swollen finger complaining he had been bitten by a caterpillar, the respondent was diagnosed and the wound treated and dressed. Pw 2 further testified that the Respondent returned with the same complainy and was diagnosed with a septic wound due to insect bite, the Respondent was treated and referred to Kapkatet District Hospital.



18. Pw. 3 a medical records officer at Kapkatet District Hospital testified and confirmed that the discharge summary was from the said hospital, he confirmed that the Respondent had previously received treatment at another facility before visiting Kapkatet District Hospital. He further confirmed that the Respondent's right index finger had gangrenous injuries and the same was amputated at the said hospital.
19. The Respondent argued that he had established a prima facie case against the Appellant, whereupon the burden of proof shifted to the Appellant to establish facts negating its liability while citing Civil Appeal E045 of 2021, *Wabinya v Lucheveleli* [2022] KEHC 13762. It was therefore incumbent for Appellant to demonstrate that the injury sustained by the Respondent was a non-work related injury and that it had taken precautionary measures including providing the Respondent with gloves and other protective equipment. Furthermore, the trial court faulted the Appellant for failing to demonstrate via records, showing provision of protective gear as demonstrated in other areas where the Appellant kept records.
20. The Respondent disputed the contents of the alleged statement, he stated that he was not privy to its contents as the same was recorded in English yet he had made his statement in Kiswahili as he was illiterate, furthermore, the manager had asked him to thumbprint the statement which was to be used by the insurance company.
21. The Respondent argued that he had proven his case on a balance of probability as required by the law, and the trial court was right in finding the Appellant 100% liable for the incident. The Respondent reiterated that the Appellant having failed to provide sufficient evidence to negate the Respondent's evidence, cannot therefore purport to fault the finding of the trial court on liability.
22. On the issue of quantum, the Respondent contended that the quantum awarded by the court was neither excessive and manifestly or inordinately high to warrant the courts interference. PW 4 Dr. Kibos Ezekiel, testified and produced a medical report as evidence in court confirming that the Respondent had sustained injuries on his right index finger due to a caterpillar bite which later become gangrenous leading to its amputation, permanent disability was assessed at 5%. Furthermore, the Appellant did not call any evidence to challenge and/or controvert the evidence of the Respondent, therefore the Respondent's evidence as to the injuries sustained remained unchallenged and uncontroverted.
23. The Respondent reiterated that the trial court took into consideration the parties submissions and evidence on record and therefore arrived at a sound judgment on quantum. Furthermore, the trial court in arriving at quantum relied on several cases with comparative injuries to wit Homabay Civil Appeal No. 59 *Sinohydro Corporation Ltd v Daniel Arela Kamuda* & Nairobi HCCC No 98 of 2011 *Kennedy Mutinda Nzoka v Basco Ltd* where the courts awarded general damages of Kshs 600,000/= and Kshs 210,000/= consecutively for injuries similar to those suffered by the Respondent herein.
24. The Respondent submitted that the trial magistrate did not err in law and in fact, in awarding Kshs. 300,000/= as general damages as the same was neither manifestly and/or inordinately high to warrant the courts interference and furthermore, that Kshs. 5,000/= awarded as special damages had been specifically pleaded for and sufficiently proven.
25. The Respondent reiterated that it is trite law that the assessment of damages is an exercise of discretion of the trial court and that the appellate court cannot interfere with the exercise of this discretion except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages and cited the Court of Appeal case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR & *Kemfro Africa Limited T/A Meru Express Services & Another v AM Lubia & another (No 2)* [1982-88] KAR 727.



26. The Respondent therefore urged the court to make a finding that the instant appeal lacks merit and dismiss the same with costs and interest to the Respondent.
27. This being a first appeal, the duty by the 1st Appellate court is to re –evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see and examine the witnesses.
28. Therefore, as the first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. This duty is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to:

‘... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’

This was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic* [1984] KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

29. On the issue of liability, I find that the Respondent’s case remains unchallenged and uncontroverted. The Appellant’s failed to to ably demonstrate that the Respondent was not injured in the course of duty and that they had taken all the required precautionary measures to provide a safe system of work to wit the provision of gloves and/or protective gear by means of records. The Appellants have not offered this court a plausible explanation for the injuries sustained by the Respondent herein. Furthermore, the Respondent’s case is cogent and supported by the evidence of Pw 2 a nurse at Seretut Dispensary confirmed to the court that on 21st May, 2012 the Respondent visited Seretut Dispensary with a swollen finger complaining that he had been bitten by a caterpillar, when the said injury failed to improve, he was referred to Kapkatet District Hospital. Pw 3 a record officer at Kapkatet District Hospital whilst relying on the contents of the discharge summary confirmed to the court that the Respondent had previously received treatment at another facility before visiting Kapkatet District Hospital. He further confirmed that the Respondent’s right index finger had gangrenous injuries and the same was amputated at the said hospital. I hereby concur with the trial courts findings, I find that the Respondent proved its case on a balance of probability and that the Appellant herein is 100% liable.
30. On the issue of quantum, I have considered comparable awards for similar injuries, in *Sinohydro Corporation Ltd v Daniel Odhiambo Nyaura* [2016] eKLR an award of Kshs 250,000/- was made for an injury in 2013 leading to amputation of the 4th finger of the right hand. I find that the trial magistrate did not err in law and in fact, in awarding Kshs 300,000/= as general damages as the same was neither manifestly and/or inordinately high to warrant the courts interference and furthermore, that Kshs. 5,000/= awarded as special damages had been specifically pleaded for and sufficiently proven.
31. Accordingly, I find that this appeal lacks merit. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 16TH DAY OF MAY, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

No Appearance for the Appellant

No Appearance for the Respondent

