



REPUBLIC OF KENYA



**Twiga Construction Company Limited v Mutule (Civil Appeal
299 of 2017) [2023] KEHC 18793 (KLR) (Civ) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 299 OF 2017

AN ONGERI, J

JUNE 13, 2023

BETWEEN

TWIGA CONSTRUCTION COMPANY LIMITED APPELLANT

AND

MWENDA MUTULE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. E. K. Usui
(SPM) in Milimani CMCC 6656 of 2010 delivered on 17/5/2017)*

JUDGMENT

1. The respondent filed a plaint dated 11/10/2010 against the appellant seeking general damages and special damages for negligence in Milimani CMCC No. 6656 of 2010.
2. The claim arose out of an accident that occurred on or about the 5/9/2010 while the respondent was lawfully working for the appellant when he was putting chatter on first floor when the respondent fell down and sustained the following injuries;
 - i. Cerebral concussion
 - ii. Cut wound to the head
 - iii. Blunt trauma injury to the cervical spine
 - iv. Blunt traumatic injury to the left shoulder
3. The plaintiff testified as PW 1. He also called one witness Dr. Kimani Mwaura who produced a report dated 23/9/2010.



4. The defendant did not call any witnesses but the medical report of Dr. Wokabi was produced by consent.
5. The trial court assessed damages as follows;
Liability 100%
Damages for pain & suffering 300,000
Special damages 2,000
Plus costs and interest
Total 302,000
6. The appellant who is aggrieved with the said decree has filed this appeal on the following grounds;
 - a. The learned magistrate erred in law and in fact by finding that the respondent was the appellant's employee when there was no evidence to support.
 - b. The learned magistrate erred in law and in fact in entering judgement against the appellant and finding that the appellant was 100% negligent when the respondent had not proved his case on a balance of probabilities.
 - c. The learned magistrate erred in law and in fact in awarding the respondent a sum of Kshs. 300,000 in respect of general damages which award is inordinately high considering the injuries sustained by the respondent.
 - d. The learned magistrate erred in law in failing to consider that the injuries sustained by the respondent were soft tissue injuries which had fully healed and thereby arrived at an award that it is inordinately excessive.
 - e. The learned magistrate erred in law and in fact in failing to consider the medical report of Dr. W.M. Wokabi dated April 8, 2015 which was produced in court by consent of appellant and respondent as defendant exhibit No. 1.
 - f. The learned magistrate erred in law and in fact by applying an erroneous standard of proof and failed to appreciate that the respondent had failed to discharge the burden of proof placed upon him as a matter of law.
 - g. The learned magistrate erred in law and in fact in failing to consider submissions by the appellant
 - h. The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.
7. The parties filed written submissions as follows; the appellants submitted that the respondent blamed the appellant for the injuries he sustained at the workplace on the basis that the respondent by its director or supervisor negligently and in breach of its statutory duty assigned the plaintiff duties of putting chatter in 1st floor when he fell down as a consequence whereby he sustained severe bodily injuries, loss and damage. It was the Respondent evidence, together with others were fixing a shutter, and they stepped on trappers. He stepped on one and it gave way and he fell on the floor. The respondent confirmed that he did not have any prove that he ever requested for any protective gear. It was his further confirmation that they had strapped on trappers about 10 people and he is the only one who fell, however he confirmed that he did not have an independent witness to corroborate his story.



8. It was the appellant's argument that based on the evidence adduced it was clear that the respondent was fully aware of the importance of wearing protective gear while at work but he opted not to as there was no evidence that the respondent ever requested for any protective clothing.
9. The appellant argued that the respondent had a duty to show the casual link between the injury he sustained and the appellant's negligence but failed to do so. It was argued that the respondent voluntarily exposed himself to danger by agreeing to work without protective clothing and therefore he was to blame for his injuries.
10. The respondent submitted that he was employed by the appellant in August 2010 at a construction site the appellant owned in Westlands. The respondent indicated that he had not been provided with safety belt that would have held and hoisted him from falling into the ground despite requesting for it. That under the provisions of section 13 (I) (c) of the [Occupational Safety and Health Act](#), the duty of providing protective equipment or clothing is placed on the employer.
11. The respondent argued that the appellant failed to provide a safe working environment and that exposed the respondent to danger. That the appellant did not call any witnesses to show that the respondent was negligent in any way.
12. This being a first appeal, the duty of this court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that trial court had an opportunity to see the witnesses.
13. The issues for determination in this appeal are as follows
 - i. Whether the trial court was right in finding the appellant 100% liable.
 - ii. Whether the award of general damages was inordinately high.
 - iii. Who pays the costs of this appeal.
14. On the issue as to whether the court was right in finding the appellant 100% liable, I find that the appellant did not call witnesses to say how the accident occurred. The trial court found that the appellant owed the respondent a duty of care, there was breach of that duty and subsequently the respondent suffered damages.
15. On the issue as to whether the award of damages was excessively high, I find that the trial court relied on comparable cases. The appellant indicated that an award of Kshs. 100,000 would suffice and relied on the following cases;
 - i. [Lilian Anyango Otieno v Philip Mugoya Ogila](#) [2022] eKLR wherein the sum of Kshs. 100,000 was substituted with Kshs. 150,000 on Appeal where the plaintiff sustained the following injuries;
 - a. Head injury, with dislocation of cervical spine of the neck.
 - b. Chest injury, with damage of the rib cage and blunt abdominal injury.
 - c. Tissue injuries of both upper limbs with dislocated wrist and elbow joint.
 - d. Dislocated pelvic frame involving both hip joints and damage of the right lower limb, with dislocation.
16. The respondent relied on the following cases;



- i. Naivasha Civil Appeal No 36 Of 2017 *Lake Naivasha Growers v Muigai Tbuka* where the respondent suffered soft tissue injuries to the left thigh and soft tissue injuries to the left leg. He was awarded Kshs. 250,000 as general damages by the lower court. The appeal challenging the award of general damages as excessive was dismissed on October 19, 2020.
 - ii. Machakos High Court Civil Appeal No. 102 Of 2008 *Samuel Muthama v Kenneth Maundo Muindi* where the plaintiff in that case sustained blunt injury to the neck, scalp, head and lower back. He was awarded Kshs.380,000/- as general damages by the lower court, a position that was confirmed by the High court on appeal on July 1, 2009.
17. The respondent suffered the following injuries
- i. Cerebral concussion with loss of consciousness
 - ii. Deep cut on the head
 - iii. Blunt traumatic injury to the cervical spine
 - iv. Blunt traumatic injury to the left shoulder
18. I find that there were soft tissue injuries and an award of 300,000 is reasonable.
19. I find that the appeal herein lacks in merit and I accordingly dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH JUNE, 2023.

A. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

