



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO 116 OF 2017**

**SUPA HAULIERS LIMITED..... APPELLANT**

**VERSUS**

**TITUS WAMBUA MATANO.... RESPONDENT**

**(Appeal from the Judgment and Decree of Hon. S. Atambo – SPM dated 22<sup>nd</sup> February 2017 in Nairobi CMCC No. 4234 of 2012)**

**JUDGEMENT**

1. **Titus Wambua Matano**, the respondent herein, filed a suit before the trial court on 27<sup>th</sup> July 2012 against **Supa Hauliers Limited**, the appellant. He claims that on 4<sup>th</sup> February 2011 he was instructed by the appellant to prepare the welding machine and to start welding. While joining the electric wire he was electrocuted and sustained injuries as a result.

2. The appellant filed its written statement of defence and denied the allegations of the plaintiff in regard to his employment and accident leading to the injuries. In the alternative the appellant avers that the respondent was injured as alleged then the relevant statute to be applied should be the Work Injury Benefits Act. They further pleaded that the respondent injury was as a result of his conduct and solely contributed to his injuries. The trial court upon hearing the case found the appellant to be 100% liable and after considering the parties submissions made an award of Kshs 1,500,000/- in general damages and Kshs 3,160/- as special damages.

3. The appellant dissatisfied with the judgment of the trial court has now lodged this instant appeal on the following grounds;

1. The Learned Magistrate erred in fact and law by disregarding the Authorities of the Appellant which stipulates the rationale for arriving at the appropriate quantum of damages.
2. That the Learned Magistrate erred in fact and law awarding exorbitant and excessive quantum of damages not based on any authority.
3. The Learned Magistrate erred in fact and in law by holding the Appellant liable for the injuries occasioned to the Respondent herein.
4. That the Learned Magistrate erred in fact and law by disregarding the authorities of the Appellant stipulating the rationale for arriving at the appropriate decision on liability.

4. The appeal was canvassed by way of written submissions. The appellant contends that the respondent failed to call additional witnesses or independent witness to corroborate his testimony citing the case of **Sally Kibii & Another v Francis Ogaro[2012]**. They advanced that the respondent had been employed as a welder from 2007 to 2011 and was aware of the risk he was exposing himself to and it indicates negligence on his part. They advanced that the respondent failed in his duty to prove that the appellant owed him a duty of care, that the duty was breached and based on the Plaintiff's evidence the accident happened as a result of his own negligent action. The respondent was to adduce evidence as what happened and a mere allegation cannot be sufficient citing **Tombe Tea Factory v Samuel Momani [2010] eKLR, Civil Appeal No 300 of 2006**. They urged that if the court is to apportion liability, then it should adopt the doctrine of *volenti non fit injuria* based on the respondents statement. They contend that the award of damages was excessive warranting this court to disturb the award. It was their case that the respondent should bear the cost of the appeal. They also relied on the cases of **Abdalla Baya Mwanyule v Swalahadin Said Civil Appeal No. 211 of 2002**, **West H & Sons Ltd versus Shephard 1964 ac 326**, **William J Butler v Maura Kathleen Butler and Kenya Sugar Board vs Ndungu Githinji Civil Case No 558 of 2005** to advance its case.

5. The respondent advanced that although the damages awarded by the trial court were inadequate, they were appropriate and proportionate to the injuries sustained. They submitted that the respondent since the accident has not been involved in gainful employment due to his inability to work after being electrocuted. They advanced that the appellant is fully liable for causation of the Respondent's injuries loss and damage and urged this court to enhance the award by the trial court.

6. As this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126***).

7. **Titus Wambua Matano** (PW 1) testified that he is a WELDER by profession and that the appellant is his employer. He then adopted his statement dated 27<sup>th</sup> July 2012. He told court that he blamed the appellant for the accident as it did not provide him with proper gear. He testified that he suffers chest aches whenever it is cold and gets dizzy when it is hot. **Dr W Wokabi** testified as PW2. He told court that he examined PW 1 on 26<sup>th</sup> June 2012 who had a history of electrocution. He formed the opinion that PW 1 suffered shock affecting the body generally and that the plaintiff is disabled generally. The respondent closed his case at that. The appellant closed the defence case without calling of any witnesses.

8. I have had occasion to consider the record of appeal and submissions on record. I have had due regard to the proceedings at the lower court.

9. For determination is whether the appellant was 100% liable for injuries suffered by the respondent and based on the answer thereof, whether the award of Kshs, 1,500,000 in damages was excessive warranting this court to disturb it.

10. On liability, the evidence on record is that of the respondent and the doctor who examined him and prepared a medical report. It was the respondent's testimony that he was at his place of employment with the appellant when he was instructed by his manager to prepare the welding machine and to start welding. In compliance, the respondent removed the electrical plug from the wall where it had been connected and started joining wires to the plug. Before he finished joining the wires, another employee of the appellant under instructions of the manager went and put the plug back to the socket while the respondent was connecting the wires to the machine. He was electrocuted in the process. He came to at a hospital bed.

11. PW 2 Dr. W. Wokabi testified that on examination of the respondent, he found that he had suffered severe shock affecting the body generally. The injury was severe as the respondent is disabled generally. The disability cannot be specifically identified. It is a general condition affecting the general body.

12. The appellant, in its statement of defence denied that the respondent was its employee. It denied that any task was assigned to the respondent. It denied any negligence or breach of statutory duty. In the alternative, it pleaded that if the respondent was injured, he was the sole author of his own misfortune or he contributed to it. It pleaded particulars of negligence on the part of the respondent.

13. The appellant called no evidence to support the allegations in the statement of defence or to controvert the evidence of the respondent. The respondent's narration of the sequence of events leading to his injury which is confirmed by PW 2 remains firm and unshaken by any other alternative evidence.

14. In the circumstances, the defence filed remains a mere statement of fact since it is not substantiated by evidence. In **Trust bank Ltd – Vs- Paramount Universal Bank Ltd & 2 Others [2009]eKLR**, the court held;

“The 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant closed their cases without calling a witness, it is trite law that where a party fails to call evidence in support of its case, that party's pleading remain mere statement of fact since in so doing the party fails to substantiate its pleadings. In the same view the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

15. In light of the evidence on record, the case of **Tombe Tea factory –Vs- Samuel Momanyi [2010]eKLR** cannot come to the aid of the respondent. Negligence on the part of the appellant is proved by the evidence that in breach of duty of care to the respondent, the manager of the appellant instructed another worker to put the electric plug back to the socket at a time when the respondent was connecting wires to a welding machine as per instructions of the same manager earlier on.

16. I find no grounds upon which to fault the finding of the trial court on liability.

17. As regards the quantum of damages, I have had due regard to the nature of injuries suffered by the respondent as seen from the medical report and the authorities cited at trial.

18. The principles upon which an appellate court would interfere with the quantum of damages awarded are well settled. In **Butt –Vs- Khan [1981]eKLR 349** it was stated;

“An appellate court will not disturb an award of damages unless it is so 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 on a figure which was either inordinately high or low.”

19. The respondent sought 2,000,000 in general damages. He relied on the decisions in **Charles Kimani Ng'ang'a –Vs- PL&LC Co. Ltd [2006]eKLR** where a minor was awarded Kshs. 2.5 million and **Joseph Koskei –Vs- KP&LC Co. Ltd [2010]eKLR** where Sh. 3,326,000 for

*general, special and future medical expenses were awarded.*

The injuries in the Charles Kimani case above were;

- i. Bruises on both hands.
- ii. Blisters on right leg.
- iii. Blisters on left leg.
- iv. Infection of left leg.
- v. Scars on both hands.
- vi. Scars on left leg.
- vii. Wounds on left leg.
- viii. Wounds on both hands.
- ix. Loss of memory.
- x. Inclination of fairly
- xi. Loss of concentration.

**20.** In the Koskei case (above) the plaintiff suffered 40% 3<sup>rd</sup> degree burns covering his upper limbs, trunk and back. The right upper limb and right shoulder had post burns hypertrophic scars which are both of hypo and hyper pigmentations. He had contracture on the posterior side of the right shoulder with limitation of movement. Surgery was required to release the contracture and improve the use of his right arm. Dr. Kimani Wanjeu opined that the plaintiff had been maimed and his life will never be the same again.

**21.** No doubt, the injuries suffered in these two cases were more serious than the ones suffered by the respondent herein. In the first case Sh. 2,500,000 in general damages was awarded. In the second case Sh. 1,200,000 in general damages was awarded. The trial magistrate indicates in her judgement that she considered the submissions and authorities cited in reaching her finding on quantum.

**22.** On the whole, the assessment of general damages at 1,500,000 appears to me whimsical and the trial magistrate failed to consider the recent awards in comparable cases so as to achieve uniformity in awards. The injuries of the respondent as seen in the medical report are highly generalized and nowhere near the severity of the injuries in the cited cases.

**23.** Am persuaded that though this court ought to be slow to reverse the trial magistrate's finding on assessment of damages, the trial court failed to take into consideration matters it ought to have considered and I am inclined to disturb the award of damages.

**24.** With the result that I partially allow the appeal and make the following orders;

1. The appeal is partially allowed.
2. The judgement on liability is upheld.
3. The award of Sh 1,500,000 in general damages is set aside and substituted thereof with an award of Kshs. 1,200,000.
4. Special damages are confirmed at 3,160.
5. The respondent shall half the costs of this appeal.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of January, 2020.**

**A. K. NDUNG'U**

**JUDGE**