



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

**CIVIL APPEAL NO. 670 OF 2003**

**BONIFACE MUTHAMA KAVITA.....APPELLANT**

**VERSUS**

**CARTON MANUFACTURERS LIMITED.....RESPONDENT**

**J U D G M E N T**

The Appellant instituted proceedings in the Chief Magistrate's Court at Nairobi against the Respondent claiming general and special damages arising out of an industrial accident which occurred on 2/2/2002. The Appellant was employed by the Respondent as a machine attendant. He sustained injuries while removing waste from a printing machine. His left hand was pulled by the rotating conveyor belt causing injuries. He went to Avenue Hospital for treatment and his left ring and little fingers were completely amputated.

The Respondent denied that the Appellant was injured in the course of employment or that he suffered any damages. The matter went for hearing and both parties called witnesses. The Appellant gave his side of the case while the Respondent called Fredrick Ochieng who was working with the Appellant at the time of accident. The court delivered its judgment on 11/9/2003 apportioning liability at the ratio of 80:20 and awarded general damages of Ksh.350,000 and special damages of Kshs.3000.

The Appellant was aggrieved by the decision of the Senior Resident Magistrate and appealed to this court on the following grounds:

1. *That the learned magistrate erred in fact and in law by holding or finding that the appellant was guilty of contributory negligence in the face of the evidence adduced by the defendant.*
2. *That the learned magistrate erred in fact and in law by apportioning liability and damages in the proportion of 80:20 in the absence of any material of basis for such an apportionment.*
3. *That the learned magistrate erred in fact and in law in her assessment of general damages which were inordinately low having regard to the unchallenged medical evidence.*
4. *That the learned magistrate erred in fact and in law in failing to find that the Appellant is fully incapacitated from the injury sustained.*
5. *That the learned magistrate erred in fact and in law in failing to award any loss of future earnings in the face of evidence adduced.*
6. *That the learned magistrate erred in fact and in law in failing to find that loss of future earnings was pleaded and proved.*

The appeal was prosecuted by way of written submissions. The Appellant filed his submissions and served the Respondent together with the hearing notice although the Respondent did not file any response or even attend court.

On ground 1 and 2 the Appellant submitted that according to the testimony of the Appellant and the Respondent witnesses the trial court erred in apportioning liability to the Appellant as it was clear that the Respondent was to be blamed for not providing protective gear. The Appellant further submitted that the learned magistrate instead of being an impartial arbiter became a witness for the Defendant by apportioning liability when there was nothing on record to warrant a finding of any liability on the part of the Appellant.

On ground 3, 4, 5, and 6 the Appellant submitted that the magistrate failed to take account the physical incapacitation suffered by the Appellant when the medical evidence was unchallenged. He stated that the medical report by the Dr Wambugu and Dr Okere clearly showed that he lost four fingers therefore the award of Ksh.350,000/- was low and was not commensurate with the injuries suffered.

The Appellant also submitted that the magistrate did not consider his testimony in regard to loss of earning. He stated that he pleaded in his plaint that he was 23 years and his earning per month was Ksh.4,080. As a result of the incapacitation occasioned by the injuries he could no longer do manual work. The Appellant relied on the court of appeal decision in the case of **Mumias Sugar Company Limited Vs Francis Wanalo Civil Appeal No. 191 of 2003**, to the effect that justification for an award for loss of earnings capacity when the party is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses his job presently. The Appellant urged the court to substitute the finding on liability at 100% and also make an award of Ksh.1,000,000 as general damages for pain and suffering and an award of Kshs.600,000 as general damages for loss of earning capacity.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which I have carefully considered together with all the above documents. The issue for determination therefore, ***is whether or not the Trial Magistrate was entitled to arrive at the conclusions she did.***

This being a first appeal, it is the duty of this court to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. The court must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion.

On liability, the learned magistrate held that the Appellant contributed to the accident. The Appellant testimony was that his Indian boss was standing by his side telling him to move fast. He told the court that he was not given a pair of scissors to remove the board which could not be removed when the machine was off. He further testified that he was never trained how to use the machine and he did not know whether the machine would injure him. DW1 who also works for the Respondent testified that he witnessed the accident. He stated that the Appellant was trying to remove waste from the vibrators using his hand. He explained that the machine was not on but the conveyor was still running. He blamed his employer the Respondent for the accident since the Indian bosses harassed them to work faster.

From the above I make the conclusion that the Appellant was an employee of the Respondent and he was injured while in the course of his duties as an employee of the Respondent and the accident is attributed to the negligence of the Respondent. The question begs whether the Appellant was negligent?

In **Halsbury's, Laws of England, 4th Edition** it is stated at paragraph 662 (p. 476) as follows:-

***“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of***

***some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”***

The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not to expose the employee to an unreasonable risk.

According to **Winfield and Jolowicz on Tort 13<sup>th</sup> Edn.p.203** ...Employers liability is defined: -.

***“At common law the employers duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed.”***

In the instant case, the Appellant in his plaint pleaded that the Respondent breached his statutory duty of not providing the Appellant with safe and proper working system. DW1 during cross examination confirmed that their employer did not provide them with safety gears like gloves. The witness also stated that there were many other people who have been hurt at the factory.

The Respondent knowing very well the nature of work done by the Plaintiff ought to have provided the Respondent with safety gears and in this case gloves. I find that the Appellant did not take any reasonable step to provide protective clothing and instruct the employees on safety methods of work. The breach of duty on the part of the Respondent is the cause of injury in this case. The Respondent is liable 100% for damage. The learned magistrate therefore erred in apportioning liability at the ratio of 80:20 when there was no evidence supporting.

On the issue of damages, it is trite law that an appellate Court can only interfere with an award of damages where the award was either based on wrong principle or is so inordinately high or low as to be a wholly erroneous estimate.

In this case the Appellant complained that the trial magistrate granted too low an award of general damages for pain and suffering and failed to take account of the seriousness of the injuries the Appellant had suffered. He also complained that the court failed to assess the loss of future earning capacity.

I have examined the Appellants pleadings in the plaint and his evidence in court during the trial. He had pleaded that he was 23 years old at the time of the accident and that he was then earning a monthly salary of Ksh.4,080/- from the Respondent. The pleadings were buttressed by the evidence adduced by the Appellant during the trial when he testified that he was no longer in employment.

For some reason however, the trial court made no finding over this heading in respect of which the evidence adduced thereto, was not in any way challenged nor contradicted. As stated in the case of **Mumias Sugar Company Vs Franics Wanalo Kisumu Civil Appeal No. 191 of 2003 eKLR.**

***“The award for loss of earning capacity can be made both when the Plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when Plaintiff is employed is to compensate the Plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the Plaintiff is not employed at the date of trial is to compensate the Plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain and suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formular for loss of***

*earning capacity.*

**Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the Plaintiff had suffered as a result of incapacity.” (The stress is mine)**

In this case the trial court erred in law and fact in ignoring the claim of “**earning capacity**” although it was clearly pleaded and satisfactorily proved. The trial magistrate thus failed to follow the law and the practice of courts in relation to awarding of loss of employment damages. This court will accordingly, assess the damages since it is within its powers as a first Appellate court to do so.

The Plaintiff was working at the time of the accident, earning Ksh.4,080/= per month although by the time of the trial he had lost the job with the Defendant due to the incapacity that was brought about by the accident. Presuming that he would have worked for another 32 years to reach the retiring age of 55 years, he would have managed to earn a minimum of Ksh.1,566,720/- ignoring probable promotions which would lead to higher monthly earnings. Two thirds of those gross-earnings might have ended in the direct use and benefit of the Plaintiff that is to say about Ksh.1,044,480/-. The Plaintiff had urged the trial and this court to award a sum of Ksh.1,000,000/- under this head and Ksh.600,000/- under general damages. I award the sum of Ksh.1,000,000/- under loss of future earning capacity” as sought. I do not interfere with the amount of Ksh.350,000/- awarded by the trial court as general damages for pain and suffering. That would make the total award to be Ksh.1,350,000/- with costs. Special damages of Kshs.3,000/- remain as awarded making the total award to be Kshs.1,353,000/-

The end result is that this appeal succeeds to the extent indicated above. Costs of the appeal are also to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 11<sup>th</sup> day of March, 2015.

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**D A ONYANCHA**

**JUDGE**