



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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 532 OF 2010**

*FROM THE ORIGINAL CONVICTION AND SENTENCE IN MILIMANI CM CIVIL SUIT NO. 6877 OF 2006 OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI BEFORE A. IRERI (MS) ON 15<sup>TH</sup> NOVEMBER, 2010)*

**DANIEL MWANDIKWA KITHEKA.....APPELLANT**

**V E R S U S**

**EMKEY BUILDERS LIMITED.....RESPONDENT**

**JUDGMENT**

This is an appeal by the plaintiff in the lower court against the liability and quantum of damages. The Appellant's claim was based on negligence and/or breach of statutory duty. The plaintiff had suffered injury to his person in an industrial accident while in the course of his duties.

There are three grounds of appeal set out in the memorandum:-

- i. That the learned Magistrate erred in failing to make an award for lost earnings and future capacity earning
- ii. That the learned Magistrate erred in awarding Kshs. 35,000/- as future medical costs when the appellant had pleaded for Kshs. 60,000/- and led medical evidence on the said sum,
- iii. That the learned Magistrate erred in apportioning liability at 70%:30% when the Respondent offered no evidence.

The appeal was heard by way of written submissions from both parties.

**Liability**

In terms of apportionment of liability, it is expected that an employer ought to provide a safe working environment for its employees. The Appellant's case is that the Respondent failed to provide him with safe working environment, gumboots and a leeway for their water as the slab was wet when he fell and got injured. The Respondent on its part led no evidence on how it provided reasonable protection to prevent injury. The severe wrist injury could have been minimized had the Respondent erected scaffolds which would have prevented the Appellant from falling over.

As was held by the Court of Appeal in **Mumende v Nyali Golf & Country Club [1991]eKLR -**

***“Just because an employee accepts to do a job which happens to be inherently dangerous is, in***

***my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and endure the existence of minimum reasonable measures of protection.”***

The Respondent was thus 100% negligent in not providing the Appellant with gumboots and failing to erect scaffolds in the construction site.

An appellate court will disturb an award of damages only where the trial court has taken into account a factor it ought not to have, or failed to take into account something it ought to have, or if the award is so high or so low as to amount to a wholly erroneous estimate. See the Court of Appeal decision in **Kitavi v Coastal Bottlers Limited [1985] KLR 470**.

### **Lost earnings and Reduced capacity to work in future**

In the present case there is no gainsaying that the Appellant suffered fairly serious injuries. He had fallen down from a height at a construction site. He had a fracture on his right wrist joint. It is not clear whether he was hospitalized or not. His mode of treatment included closed reduction and immobilisation of fracture in plaster cast while analgesics and antibiotics were administered. Full resolution was anticipated in about eighteen months. Though no permanent incapacity was expected in the future, the Doctor (PW1) insisted that the Appellant was 100% likely to suffer from arthritis in the future. At the time of the trial he said he had fully healed but had not resumed work.

The principles to be considered in determining whether an injured person is entitled to damages under this head were settled in the Court of Appeal in **Butler vs Butler [1984] KLR 225**. It was held there as follows -

- “1. A Person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.***
- 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.***
- 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.***
- 4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.***
- 5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.***
- 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”***

The appellant worked as a mason before the accident. There is no evidence that he could not have continued to perform the same or similar duty after the eighteen months incapacity predicted by PW1. Apart from that, the Appellant did not persuade the Court that he has fully lost his future earning capacity on account of his injury save for the fact that in future if he were to develop arthritis, he would be

incapacitated to a certain extent.

For the eighteen months he was incapacitated, and having led evidence showing the minimum monthly wage of a mason according to **Legal Notice No. 42 of 2005**, was Kshs. 6,261/- it would amount to –

Kshs. 6,261/- X 18 = **Kshs. 112, 698/-**

**Future medical costs**

On future medical costs, the learned Magistrate should not have disputed the opinion of a medical doctor (Exhibit 1a) to reduce the estimated medical costs from Kshs. 60,000/- to Kshs. 35,000/-. The Doctor's opinion was uncontroverted as the Respondent did not lead or call any evidence. Furthermore, she did not give reasons for such reduction.

In the end this appeal succeeds in terms set out hereinabove. The appellant shall also have the costs of the appeal.

Orders accordingly.

**Dated, Signed and Delivered at Nairobi this 3<sup>rd</sup> Day of March, 2015.**

**A. MBOGHOLI MSAGHA**

**JUDGE**