REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 263 OF 2006

OLUOCH ERIC GOGO……APPELLANT

VERSUS

UNIVERSAL CORPORATION LIMITED……..RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the judgment and decree of Hon. ***M.W. Murage, Principal Magistrate*** dated 24th March, 2006 in Kikuyu Principal Magistrates Court Civil Suit No. 265 of 2005.

The appellant herein, Oluoch Eric Gogo was the plaintiff in Kikuyu PM CMCC 265 of 2005. The appellant instituted suit in the court below against the respondent Universal Corporation Ltd seeking for General and special damages arising out of an industrial accident. The appellant alleged that on 5th September 2005 as he was performing his duties at the respondent's premises in Kikuyu he was involved in an industrial accident thereby sustaining severe injuries due to the respondent's negligence. The respondent denied the claim and pleaded contributory negligence on the part of the appellant. The matter was heard and the court delivered its judgment in which the court found that the appellant was injured through his own carelessness and that he did not prove negligence on the part of the respondent.

Being aggrieved, the appellant lodged this appeal in this court challenging the judgment of the trial court on the following five (5) grounds:

1. ***That the trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arrived at a wrong conclusion that the accident in question was wholly caused by the appellant through his own carelessness.***
2. ***That the trial magistrate erred in law and in fact in failing to appreciate the law and /or the duty imposed upon the respondent towards the appellant while on duty and thereby arrived at a wrong conclusion all together.***
3. ***That the trial magistrate erred in law and in fact in falling to consider the appellant's submissions both on quantum and liability and entirely relied on that of the respondent thereby making a wrong judgment.***
4. ***That the trial magistrate erred in law and in fact in not assessing quantum of damages even after dismissing the appellant's case.***
5. ***That the trial magistrate erred in law and in fact by not apportioning liability between the parties herein if any.***

The appellant prayed that judgment of the learned magistrate be set aside and this court do assess damages and appropriate judgment made thereof. Mr. Matoke advocate for the appellant and Mr. Kibor Advocate for the respondent agreed to have the appeal herein disposed of b way of written submissions

which they dutifully filed in time to support their clients' respective rival positions and this court is now called upon to determine the appeal based on those submissions applying both statutory and case law.

The appellant in his submissions categorized grounds 1, 2 and 5 together and ground 3 and 4 combined. The appellant submitted that the evidence on record which was acknowledged by both appellant and the respondent was that the machine had broken down. That the machine was part and parcel of the appellant's tools of work. The appellant stated that in his testimony in the lower court he was working on a machine which broke down and as a rule of procedure, he had to call the technician to repair it. He therefore called DW1 to repair the machine. He stated that the technician needed help and requested the appellant to assist him. The appellant submitted that it is trite law and principle developed over time that an employer has to take reasonable precautions to ensure the safety of employees. That the duty of care imposed by the law on the employer is not optional but mandatory and a breach of the same leads to damages payable by the employer. The appellant submitted that the respondent had a duty of care towards the appellant which he failed and ignored. He submitted that he was only trained on how to attend to the machine while in the cause of his work, and not to repair it when it breaks down. He submitted that DW1 negligently switched off the machine without due consideration of the appellant's safety and knowing he had requested the appellant to check the loose chains as he repaired the machine.

The appellant also submitted that the accident occurred while he was on duty and at his usual place of work. The appellant complained that the court gave weight to the respondent's submissions and relied on the same to arrive at the judgment.that the trial magistrate was under duty to assess quantum of damages which she did not even when the respondent in their submission had opined for sum of Ksh 60,000. The appellant maintained that he was injured while on duty and the same is uncontroverted. He stated that the medical report by Dr Jacinta Maina dated 20th September 2005 clearly showed that the appellant was injured. He also submitted that the medical report by Dr R.P shah noted that the appellant was injured at his workplace and the same report highlighted the injuries and treatment to be given. The appellant submitted that he had the right to know what would be the reasonable amount of quantum to fairly compensate him despite the dismissal of his case.

In response, the respondent submitted on ground 1, 2,3,& 5 together and ground 4 separately. The respondent submitted that the accident happened when the appellant handled the machine while DW1 was undertaking repairs. According to the evidence of DW2 who was the appellant's supervisor the appellant was never assigned any duty to operate the machine at all and that if the machine broke down he was instructed to call for help. The respondent submitted that the appellant did not posses any skills to operate the offending machine. The respondent submitted that by handling the machine the appellant was voluntarily assuming risk by being close to the machine. The respondent submitted that the appellant did not prove on the balance of probability that the respondent contributed to the occurrence of the accident. The respondent relied on the case of **STAT PACK INDUSTRIES VS JAMES MBITHI MUNYAO NAIROBI HCC NO. 152 OF 2005** where the court stated that:

"an employer's duty at common law is to take all reasonable steps to ensure the employee's safety but he cannot baby sit an employee. He is not expected to watch over the employee constantly"

On quantum, the respondent urged the court not to disturb the findings by the trial court. The respondent submitted that the court did not err in arriving at her decision and that the court took into account the relevant factors. The court was referred to the decision in **KENYA BUS SERVICE LIMITED VS JANEKARAMBUGITUMA CIVIL APPEAL NO.241 OF 2000, AND THE CATHOLIC DIOCESE OF MERUVS OBADIAH MWANGIKARIUKI (2007) EKLR** Where the Court of Appeal reiterated the principles to be followed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court.

The respondent supported the ground 4 that indeed the trial court should have assessed damages payable had she found the appellant liable. It conceded that that omission was erroneous as both the trial court and this court are not courts of the last resort.

I have carefully perused the record including the lower court pleadings and the ruling. I have also

carefully considered the grounds of appeal, and the parties' respective rival submissions, taking into account case law and common law principles enunciated over a period of time by our courts.

The main issue for determination in this appeal is ***whether or not the Trial Magistrate erred on matters of fact or law, or whether she was entitled to arrive at the conclusions she did.***

As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **SELLE&ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD &ANOTHER (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." **(See also LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

Evaluating the evidence, **PW1** testified on oath that he was employed by the respondent as a machine attendant. His duty was to fill bottles with syrup medicine. The gear system had a problem and he asked for assistance from the technician. The technician came to repair the machine and asked the appellant to assist him. The technician put on the machine and the appellant sustained injuries on his finger. The technician did not alert the appellant while he was putting the machine on. At the time of the accident the appellant did not have any protective gear. The appellant was not also trained to use the machine.

DW1 testified that he was a technician with the respondent. He told the court that he was called to attend to the machine which had broken down. He inquired what the problem was and he was told that the noodles were not filling the bottles. He opened the guard and hitched the machine to test on the movement. He stated that he did not ask for any assistance. He stated that the appellant was observing what DW1 was doing. When he hitched the second time he heard the appellant screaming and he noticed his thumb went with V belt. He maintained that he did not ask the appellant to help him repair the machine.

DW2 testified that he was the respondent production supervisor. He stated that the appellant was a machine attendant filling section and oral medication. His duty was to see flow of empty bottles to filling area and keep the machine clean and the floor. He stated that the machine broke down and the technician was called. He stated that the appellant was told what to do if the machine breaks down. That the appellant was trained on switches and told to report any breakdown.

From the foregoing, it is not disputed that the appellant was the employee of the respondent and he was injured at his work place. What is in dispute is whether the appellant 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.

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."

In **BONIFACE MUTHAMA KAVITA V CARTON MANUFACTURERS LIMITED CIVILAPPEAL NO. 670 OF 2003[2015]eKLR Onyancha J** observed that:

"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 13th 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."

The principle of law emerging from the above cases is also applicable to the facts of this case and I shall apply accordingly. The appellant pleaded that he sustained injuries due to the negligence of the respondent and stated the particulars of breach of statutory duty. These are:-

1. *Failing to make or keep safe the plaintiff's place of work;*
2. *Failing to provide and maintain safe means of access at the defendant's place of work;*
3. *employing the plaintiff without instructing him of the dangers likely to arise in connection with his work, or without providing him with sufficient training in work or without providing any and /or adequate supervision;*
4. *In the premises failing to provide a safe system of work and /or suitable working equipment.*

The appellant also pleaded particulars of negligence and or breach of contract against the respondent whose particulars are:

1. *Failing to make any or any adequate precautions for safety of the plaintiff while engaged upon the said work;*
2. *Failing to provide or maintain adequate or suitable appliances and in particular with any gloves and or protective gears to carry out the said work in safety or to protect the plaintiff's hands while he was carrying out the said work;*
3. *Directing and requiring the plaintiff to carry out the said work without providing him with suitable protective clothing, gloves or otherwise to protect his hands;*
4. *Employing untrained staff or employees;*
5. *Exposing the plaintiff to danger which the defendant knew or ought to have known*
6. *Assigning the plaintiff duties in unsafe place;*
7. *Instructing, assigning and or forcing the plaintiff to do his duties while the machine was in motion.*

For the appellant to succeed in his claim, he had to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment with the defendant. This is so because the appellant conceded that his duties did not involve repairing machines and that the technician had been brought to repair the faulty machine to enable the appellant carry out his work.

Further, the appellant had to prove any one or more of the particulars of breach of statutory duty, negligence or breach of contract pleaded as against the respondent employer.

The trial magistrate in dismissing the appellants claim found that the appellant was not trained to repair the machine otherwise there was no need for him to call the technician to repair it. She found that the appellant was injured through his own carelessness.

According to the appellant, the trial magistrate wrongly evaluated evidence and as a result, arrived at a wrong conclusion. The question here is whether the employee was doing something to the benefit of the employer. In this case, the appellant was, even if he were not the technician, was the subject machine attendant and when it broke down, he called the technician to repair it. What the respondent persuaded the magistrate to accept is that the appellant, not being a technician, could not have been found assisting the technician. I disagree. In my view, it would be different if the appellant was doing something completely outside his site of duty and unrelated to his assignment, and that which was no longer considered or related to his work. There is no basis upon which the trial magistrate found the appellant negligent as the technician denied that the appellant was assisting him to do the work. The technician did not adduce any evidence on what the appellant was doing, in a negligent manner that caused him the injury. The said technician also denied that he ever called on the appellant to assist him as he repaired the machine.

This court infers that the appellant as an employee who was working with the machine which had developed fault, it is not expected that he would just stand there, curiously observing what the technician was doing and refuse to do something as requested by the technician simply because it was not in his job description to assist the technician. Further, this court is of the view that it is not uncommon for co-workers to help each other out if they need some aid while engaged in their duties. It is on record that the appellant was a casual worker, and it is expected that a casual worker would be available for all kinds of support at his workplace, particularly where the assignment relates to his own work.

In my view, it would be unjust and unfair not to allow benefit by way of an insurance cover to such employees who are simply good employees. The appellant, undeniably, was injured while performing a work related activity to his daily job as a machine attendant and as it has not been shown that he was negligent in the manner in which he assisted the technician, I find the technician's denial unbelievable in the circumstances as there was no evidence to show that the appellant was provided with a manual of instructions to the effect that he should never accept to provide any assistance to any related work while engaged in his place of work on the specified duties. If that were so, then as a machine attendant, he had no business cleaning the floor as the technician wished the court to believe since the appellant's job description was not that of a floor cleaner.

It was also not disputed that the machine which the appellant had called the technician to repair was one which the appellant ordinarily operated while filling medicine syrup into the bottles. The appellant did not leave his usual place of work to and go to purport to assist in a different site altogether, to engage in work which was completely outside his scope of duties. The injury having occurred as a result of an accident arising out of and in the course of the appellant's employment and work location, under common law, the employer and not the employee himself will be held liable for the conduct of their employees. This is true even if the employer had no intention to cause harm and or played no physical role in the harm. The basic underlying principle and rationale for this is that first, employers direct the behavior of their employees and accordingly, must share in the good as well as the bad results of that behavior. By the same token that an employer is legally entitled to the reward of an employee's labour and profit, an employer also has the legal liability if that same behavior results in harm. Second, when a worker is hurt, or injured while on duty, he needs to be compensated and the most likely to pay is the employer and not a fellow employee. The legal system is thus interested in making the victim whole, and assigning liability to the employer rather than employee who has the best chance of meeting that goal. The key factor is that **"the employee must have sustained the injury in the course of his employment."**

For an act to be considered to be within the course of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible.

In this case, it was not shown that the appellant's injury was sustained while he was engaged on his own frolic or that he refused to heed the technician's warning not to assist him in any way while the technician was repairing the machine. In **HCCCA 65 OF 2002 SIMBA POSHO MILLS LTD VS FRED MICHIRA ONGUTI 2005 EKLR**, the plaintiff general worker was injured by a machine roller when his supervisor asked him to push maize into a new machine which had just been installed. His right fingers were caught by the machine. The respondent blamed the appellant for his own negligence as the machine's installation had not been completed and a certificate of competence of new machine had also not been issued. It was contended that the appellant was not allowed to fiddle the machines. The trial magistrate apportioned liability and on appeal, **Kimaru J** allowed the appeal and held the employer wholly to blame for the accident and for breach of the statutory duty under the Factories Act.

In this case, the appellant may have detoured or deviated from explicit instructions but the work and place of work he was doing was so closely connected to the original instructions or authorization that the employer must be held liable where negligence or breach of statutory or common law duty of care is proved.

Furthermore, albeit it was a fellow employee, DW1 who was alleged to have switched on the machine without alerting the appellant thereby crushing his finger, the technician was also acting within the scope of his work when the accident occurred and therefore the respondent would no doubt be responsible for the accident, for the acts of its employee, DW1.

Although DW1 and DW2 testified and stated that the appellant was neither called to assist DW1 the technician nor allowed to repair the machine because he was not trained, in my view the defence witnesses were stating so to escape from blame and protecting their employer's interests, noting that at that time of the hearing, the appellant who had been a casual employee, had already lost his job after the injury, while the defence witnesses were still in the employment of the defendant/respondent herein.

Besides, DW1 being the appellants' boss, it cannot be expected that the appellant would disobey him upon request to assist in the work since they were not in equal position to bargain. What the DW2 did not say is whether he considered the appellant to have left his work place without authority and gone to **'curiously'** observe and meddle into what the technician was engaged in.

The appellant's evidence which was on oath, concerning how the accident happened was not challenged and remained uncontroverted even in cross examination. On the other hand, I find the evidence of DW1 incapable of belief that the appellant was just standing there watching what DW1 was doing when suddenly he was injured. In my most considered opinion, accidents do not just happen. There must be some explanation on the cause, even if it is an act of God or by inevitable act or omission what the respondent wishes this court to believe, by DW1's testimony is that the appellant's injury was mysterious. ***The Court of Appeal in EMBU PUBLIC ROAD SERVICES LTD VS RIIMI(1968)EA 22 stated that***

" where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence

DW1 tended to make it appear as if there was no accident that injured the appellant, simply because he had not called upon the appellant to assist him on the machine. The witness at the same time stated that he saw the appellant getting injured and that it was his fault that he was injured by a V belt. This court does not believe those two versions. Accidents do not just happen and it is not possible that an injury accident like the one the appellant was involved in, could have been due to an act of God. It may have been inevitable yes, but there must have been a cause, nonetheless.

Secondly, the DW1 does not say that the appellant placed his hand on the machine while DW1 was repairing it. If that were the case, nothing prevented the DW1 from warning the appellant **not** to move near or to touch the machine. This court finds DW1's evidence full of gaps begging for answers.

This court, on the basis of the evidence adduced and taken as a whole finds that the appellant was injured while assisting the technician to repair the machine and at the technicians' request, as there is nothing on record to suggest that the trial magistrate found the appellant to be an untruthful witness.

The appellant was clear in his testimony that DW1 asked him to assist as he repaired the machine and that without any warning, he switched on the machine which crushed the appellant's finger. In my view, the accident occurred due to the negligence of the DW1's act of switching on the machine without warning the appellant as DW1 does not state that he informed the appellant to stay away while he repaired the machine. And since DW1 was lawfully engaged on the duty that he had specifically been called upon to do, that being his job description to repair machines, the respondent employer is liable for acts of DW1 who was its employee and who instructed the appellant to assist him as he repaired the machine. DW1, in my view, knew or ought to have known that the appellant was not trained to repair the machine and should therefore have been more instructive and cautious in engaging the appellant's helping hand. The respondent, in my view, therefore, failed to perform the duty of care to the appellant and as a result, the appellant sustained injuries.

DW2's evidence in my view was beside the point as he did not witness the accident in question. He only testified to confirm that the appellant was the machine attendant and that the machine had been broken down and DW1 called upon to repair it. Further, that the company trained workers on the switches and emphasis on the workers not to move from one section to another, and that the technician did not ask for help from the appellant. His evidence was in my view of no material value. He did not say that the appellant had moved from his section of work to another, or that the appellant failed to apply his skills acquired from the training in handling the machine. Since he was not present during the repairs, he was not competent to tell the court what the appellant did or did not do at the material time of accident.

The evidence on record taken as a whole point to the fact that the appellant was at his usual place of work. The machine which was being repaired and which injured him is the one he was working with while filling bottles with medicine syrup. It is him who had reported the breakdown to the technician to come and repair the machine. And the technician requested the appellant to assist as he repaired the machine.

In **Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 OF 1987, Gichuhi, Masime and Gicheru JJA HELD:**

> ***" An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."***

The above decision of the Court of Appeal reminds the respondent of its statutory duty of care, to provide a safe working environment for its workers. In my view, the respondent in this case failed to observe common law duty of care by an employer of ensuring that all reasonable steps are taken to ensure that the appellant was safe while engaged upon the work of handling the machine which was being repaired by DW1 with the assistance and support of the appellant at the request of DW1 the technician.

Albeit DW2 stated that the company had trained staff not to do work they were not supposed to do, in this case, it was not proved that the appellant was a volunteer without authority. Furthermore, the appellant's testimony was clear that the technician asked/requested the appellant to **'assist'** him as he, the technician repaired the machine. I therefore, find that the learned trial Magistrate misapprehended the evidence as a whole when she held that *:*

*"**Since it was the appellant/ plaintiff who had called DW1 when he discovered the fault in the machine, there would have been no reason for a technician to ask the plaintiff to help him since the plaintiff was not trained at that, and that if it was something that the plaintiff could have done by himself, there would have been no reason to call the technician".***

The above conclusion was made by the trial court oblivious of the fact that there was no evidence

tendered to the effect that the appellant was injured when on his own accord embarked on the task of repairing the faulty machine.

It was not shown that on the evidence available, it was an absolute impossibility for the appellant to assist the technician, or that there was no way the technician could have sought assistance from the appellant .

In **HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL 28 PARA 88.** It was stated that:

" where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."

Nyarangi JA echoing the above words in **MAKALA MAILU MUMENDE VSNYALI GOLF COUNTRY CLUB (1991) KLR 13** had this to say:

"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee" It is the employer's responsibility to ensure a safe working place for its employees."

I agree with the above holdings and propositions and add that in this case, I find that albeit the appellant took upon himself the risks incidental to his employment, this was subject to the employer's duty to take reasonable care of him, in as much as that care is not absolute.

I therefore find that the trial magistrate misdirected herself in the assessing the evidence on record and thereby arrived at a wrong conclusion that the appellant was careless and therefore responsible for the accident.

In my view, the appellant proved, on a balance of probability that the respondent had a statutory duty and obligation to provide a safe working environment which included not exposing him to tasks which could result in injury or loss. The respondent is liable for any injury that its employee, the appellant, sustains in the course of employment. In this case, the DW1 without warning switched on the machine after asking the appellant to check if the chain was loose as a result the appellant's hand was trapped by the conveyor belt thereby injuring him.

I therefore find and hold the respondent wholly liable for the accident and injury occasioned to the appellant while he was engaged upon the work of assisting the technician to repair the machine. Consequently, I allow this appeal, set aside the order of the trial magistrate dismissing the appellant's suit with costs and substitute thereto with judgment for the appellant on liability at 100%.

On quantum, the appellant submitted that even if his claim on liability was dismissed the court ought to have assessed the reasonable amount of quantum that would fairly compensate him. I do agree with the appellant's submission to the extent that a trial court and this court are not courts of last resort. They must assess damages even where the party claiming is unsuccessful in a claim for general damages. In **LEI MASAKU V KALPAMA BUILDERS LTD CIVIL APPEAL NO. 40 OF 2007[2014] EKLR** Mabeya J held that:

> ***There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial***

court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.

In this case, the appellant submitted that he sustained injuries involving ***crushed injury to the left thumb with fracture of mid phalanx*** as stated in the plaint. He produced treatment notes from PCEA Kikuyu Hospital showing that he was treated there for the said injuries. X-rays taken confirm that injury. This was supported by the medical reports produced as examined by Dr Jacinta Maina and Dr. R.P Shah. In his submission in the lower court the appellant proposed Ksh 250,000 general damages to adequately compensate him taking into account the injuries sustained.

Kimaru J **In HCC CA 65 OF 2002 SIMBA POSHO MILLS LTD VS FRED MICHIRA ONGUTI 2005 EKLR relying on ARKAY INDUSTRIES LTD VS ABDALLA AMANI NKR CA 22/88** awarded ksh.180, 000 general damages on 20/1/2005 where the appellant suffered amputated distal phalanx and comminuted fracture of right index finger, degloving minor injury on the pulp of middle of right finger and cut wound on the right thumb.

In BONIFACE MUTHAMA KAVITA V CARTON MANUFACTURERS LIMITED HCCA 670 OF 2003 ON 11th March, 2015 Hon. ONYANCHA J upheld the lower court decision where the appellant was awarded Ksh 350,000 for injuries sustained on his finger while working as a machine attendant when removing waste from a printing machine and his left hand pulled by a conveyor belt.

Taking into account the extent of the Appellant's injuries, the rate of inflation on the Kenyan Shilling vis a vis the age of this case and comparing those injuries with the ones sustained in the cited authorities, I award the appellant Ksh200,000 as general damages for pain and suffering and loss of amenities. This will carry interest from date of judgment in the lower court until payment in full.

The appellant also prayed for Kshs1, 800 special damages for medical report and medical expenses. He however only produced a receipt for ksh300 for medical expense at PCEA Kikuyu Hospital. The Invoice for ksh.1500 from Silverdine Medical Centre is not a receipt of evidence of payment albeit it had a revenue stamp. I decline to grant the amount. Special damages must be specifically pleaded and strictly proved. The sum of Ksh 1,500 for medical report was pleaded but there is no proof. An invoice does not become a receipt by simply crossing it out and inserting cash as is the case with PEx 6 produced by the plaintiff/appellant. I award him special damages of Ksh 300 which will carry interest from date of filing suit in the lower court until payment in full.

In the end, I enter judgment for the appellant against the respondent on liability at 100%, general damages Ksh 200,000, special damages Ksh 300.00, interest on general damages from date of judgment in the lower court and interest on specials from date of filing suit. I also award costs of the suit in the trial court and of this appeal to the appellant.

Dated, signed and delivered at NAIROBI this 7th day of May, 2015

R.E.ABURILI

JUDGE