**Tononoka Rolling Mills Limited v Mutuku (Appeal 64 of 2023)**
**[2024] KEELRC 2069 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2069 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL 64 OF 2023**

**K OCHARO, J**

**JULY 26, 2024**

**BETWEEN**

**TONONOKA ROLLING MILLS LIMITED ..... APPELLANT**

**AND**

**ALBERT KIOKO MUTUKU ..... RESPONDENT**

***(Being an appeal against the Judgment and Decree of the Senior Resident Magistrate's Court (Hon. D.A. Ocharo) delivered on 29th January 2018 in Milimani CMCC Suit No. 939 of 2016)***

**JUDGMENT**

## Introduction

1. The appeal herein which has been instituted vide a Memorandum of Appeal dated 12th February 2018 challenges the Judgment and Decree of the Honorable Senior Resident Magistrate (Hon. D.A. Ocharo (Mr.)) in the above-mentioned cause, putting forth principal grounds that he erred in law and fact;

    (a) When he found the Appellant 100% liable vicariously for the injuries sustained by the Respondent and therefore arrived at a wrong conclusion;

    (b) By misdirecting himself on the exact nature of the Respondent's injuries thereby erring in law in his assessment of general damages at Kshs.600,000/- against the weight of the evidence on record;

    (c) By awarding special damages of Kshs. 10,000/- yet the same were not specifically pleaded and thus ought not to have been awarded;

    (d) By failing to appreciate the principles applicable in the award of damages thereby awarding damages that are grossly and manifestly excessive and inordinately high as to amount to a miscarriage of justice;

e) Arriving at a judgment not founded on a good or proper basis.

2. On the above grounds, the Appellant prayed for orders that: -

1. The Appeal herein be allowed.

2. That the Judgment of the lower court delivered on 29th January 2018 be set aside and substituted with the Judgment of this Honourable court in favour of the Appellant.

3. That costs in the lower court and of this Appeal be granted to the Appellant.

3. When the matter came up for directions on the appeal on 26th September 2023, this Court ordered that the appeal be canvassed by way of written submissions. The Appellant filed Written Submissions dated 22nd November 2023, and the Respondent filed his dated 15th November 2023.

**The case before the Trial Court**

4. The suit before the Trial Court was founded on the tort of negligence. Through a Plaint dated 17th February 2016, the Respondent herein contended that he was a casual labourer working for the Appellant as a rolling mill cleaner. On 1st April 2015, he sustained injuries while cleaning the rolling mill in the course of his ordinary duties, after stepping on a metal rod that had been left lying on the floor, losing his balance and falling on a fan. As a result, he sustained injuries to his left index and middle fingers which were cut/crushed causing him to lose one and a half digits from each of the two fingers.

5. As a result of the accident, he was admitted at the Guru Nanak Ramgarhia Sikh Hospital for 4 days. He didn't fully heal. He still experienced pain in the stumps and could not carry or lift things with the two affected fingers. He suffered 15% permanent disability from the injuries. Preparation of a medical report for cost him d Kshs. 2,000/-.

6. The Respondent blamed the Appellant for failing to provide a safe working environment, failing to provide him with effective protective gear fitting the work environment and the Respondent's work description, causing the Claimant to carry out his work without adequate safety gear while knowing that the work was dangerous, exposing him to the risk of injury or damage of which it knew or ought to have known, causing the accident, and causing the Respondent to carry out the work without proper training.

7. He sought general damages for pain and suffering, blood loss, and permanent disability; special damages of Kshs. 2,000/-, costs of the suit, and interest.

8. In his evidence before the trial court, PW1, the Consultant Surgeon, testified that he examined the Respondent on 22nd September 2015 and confirmed that he lost 1 and a half digits of the left index and the middle finger following a machine injury. He confirmed that the Respondent suffered 15% disability. He stated that he charged Kshs. 2,000/- for the report and Kshs. 10,000/- for the court attendance, and produced receipts evidencing the foregoing.

9. On its part, the Appellant resisted the Respondent's claim through a Statement of Defence dated 12th April 2016 wherein it denied that the Respondent was discharging his duties at the Appellant's premises on the material day and at the material time. It also denied the allegation of negligence that was levelled against asserting that if an accident occurred, it was caused or substantially caused and/or contributed to by the negligence of the Respondent who failed to take any or reasonable care of himself while carrying out his tasks.

10. In particular, the Appellant blamed the Respondent for failing to wear his duly provided safety gear while carrying out his duties including gloves; exposing himself to the risk of danger and injury, failing to take care of his own safety, failing to take precautions for his safety, and failing to adhere to the Appellant's safety work system and safety training. The Appellant relied on the doctrine of volenti nonfit injuria in defense of the claim.

11. The Appellant's witness, Samson Nzioka Magoka testified on the events of the material day. Further, the rolling mill, that the Respondent and he were cleaning on the material day, is stationed underground and is covered by a metal plate. It is adjacent to the heating section and there is a fan to help with ventilation.

12. The accident occurred when they had finished cleaning the rolling mill, and were in the process of replacing the metal cover/plate. He accidentally stepped on the metal plate, slipped and grabbed at the fan in a bid to regain his balance. Since the fan was still running, it cut his fingers. The matter was reported to their supervisor who organized to transport the Claimant to the hospital. Further, the Respondent had worked for the Appellant for a few months before the incident and was therefore familiar with the working area and the dangers of his work. He had been trained on the safety measures to be taken while engaged in his work and had been provided with safety gloves.

13. After hearing the Appellant's witness and the Respondent, the Learned Magistrate pronounced himself on the matter on 29th January 2018. On liability, the Learned Magistrate held that the Appellant had a duty of care to the Respondent to ensure the safety of the Respondent by providing an appropriate and safe system of work which could not expose him to unreasonable risk. He found that the Respondent had breached this duty of care. On the quantum of damages, the Learned Magistrate relied on the evidence of Dr. Washington Wokabi, PW2, to find that the Respondent had suffered injuries on the left hand which resulted in amputation of the left index and middle fingers and the middle phalanges (1 and a half digits). He noted that the doctor assessed the degree of permanent disability at 15%, and in light of the injuries suffered, he assessed damages at Kshs. 600,000/-, and special damages Kshs. 12,000/-.

**The Appeal.**

14. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out hereinabove.

**Analysis and Determination**

15. It is trite law that as a first Appellate Court, this Court is enjoined to, reconsider and re-evaluate the evidence and material that was placed before the trial Court and come to its own independent findings and conclusions. This position was set out elaborately in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123); see also (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

16. In *The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018* (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Honourable Court of Appeal held that: -

> "A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

17. Bearing in mind the above-stated mandate, and upon a careful analysis of the material that was placed before the lower court, and the submissions filed herein by the parties, the following issues fall for determination in this appeal: -

    i. Whether the Appellant was wholly to blame for the occurrence of the accident and injury suffered by the Respondent.;

    ii. Whether the award of Kshs. 600,000/- as general damages and Kshs.12,000/- was reasonable in the circumstances.

    Whether the award of Kshs. 600,000/- as general damages, and Kshs. 12,000/- as special damages was reasonable in the circumstances.

18. It is not in dispute that the Respondent was an employee of the Appellant, serving as a mill cleaner at the material time. It is also not in dispute that the Respondent suffered a workplace injury while discharging his duties at the Appellant's premises on 1st April 2015. Following the injury, the Respondent received treatment at Guru Nanak Ramgarhia Sikh Hospital. Undeniably, he suffered the injuries stated hereinabove.

19. However, there is a dispute regarding who was to blame for the occurrence of the accident and therefore whether or not the Learned Trial Magistrate was right in the assessment of liability against the Appellant as he did at 100%. To support its position that the accident was a result of the Respondent's negligence, the Appellant submits that the Respondent's testimony in the trial court was that he slipped on a wet floor and fell. While attempting to prevent the fall, he held on to the fan which was still spinning and his fingers were crushed/cut. As a cleaner, it was his duty to ensure that the floor was dry and safe to walk on.

20. I have carefully considered the evidence by the Respondent when he testified before the Trial Court, and note that he did not mention that the floor was wet, hence the fall. He stated that the floor was slippery. In my view, a floor might not be slippery because of wetness alone, but as a result of other

factors like the floor having come into contact with oily products, or any other slippery thing. In his statement [adopted as evidence in chief], the Respondent stated;

> " ..... while in the process of cleaning the miller, I stepped on some metal that had been left lying on the floor as a result of which I lost my balance and fell on the fan....."

21. The Appellant's witness in his statement stated;

> " ..... As we had come up from the underground hole in which the rolling machine is stationed and were subsequently covering the whole with the metal plate, the plaintiff stepped on the metal plate, slid and grapped at the fan for stability to avoid the fall. ...."

In my view, this statement supports the Respondent's. Consequently, I am not persuaded by the submission by Counsel for the Appellant.

22. The Appellant contended that it provided the Respondent with safety gear/apparatus including industrial gloves, and trained him on safety at the workplace. In my view, this was with great respect a bare assertion. There was no sufficient evidence tendered to prove the fact.

23. Section 109 of the *Evidence Act* provides as follows:

> " Proof of particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. Sections 74 of the *Employment Act* No. 11 of 2007 and 8 of the *Work Injury Benefits Act* No. 13 of 2007, place upon the employer a mandatory statutory obligation to keep records relating to employment. Nothing would have been easier for the Appellant herein than to produce employment records to show that the Respondent was supplied with safety equipment/gear and trained as alleged.

25. Section 6 of the *Occupational Safety and Health Act* No. 15 of 2007 which provides: -

**Duties of occupiers**

1. Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.
2. Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—
   (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
   (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
   (c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;

(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees' welfare at work;

(f) informing all persons employed of—

(i) any risks from new technologies; and

(ii) imminent danger; and

(g) ensuring that every person employed participates in the application and review of safety and health measures.

(3) Every occupier shall carry out appropriate risk assessments in relation to the safety and health of persons employed and, on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and processes under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in this Act.

(4) Every occupier shall send a copy of a report of risk assessment carried out under this section to the area occupational safety and health officer.

(5) Every occupier shall take immediate steps to stop any operation or activity where there is an imminent and serious danger to safety and health and to evacuate all persons employed as appropriate.

(6) It is the duty of every occupier to register his workplace unless such workplace is excepted from registration under this Act.

(7) An occupier who fails to comply with a duty imposed

26. By reason of the premises, I conclude that the Appellant didn't prove the Appellant didn't place sufficient evidence before the Trial Magistrate to prove the particulars of negligence or contributory negligence it pleaded. The alleged negligence on the part of the Respondent was not proved. However, considering the evidence of the Respondent and that of the Appellant's witness, on how the accident occurred, I do not hesitate to find that he, on a balance of probabilities proved that the same was a consequence of the Appellant's negligence and breach of duty of care.

Whether the injury suffered by the Respondent is wholly attributable to the Appellant; and Whether the Appellant breached he duty care owed to the Respondent.

49. The Appellant seeks that this Court disturbs the Learned Trial Magistrate's award on general and special damages, alleging that, first, the general damages awarded were excessive, second, the special damages awarded were not specifically pleaded. There cannot be any doubt that an award of damages is discretionarily made. The same can only be disturbed on appeal, if the

appellant establishes those legally acknowledged conditions as the Court of Appeal in Gicheru vs Morton and Another (2005) 2 KLR 333, elaborated, thus: -

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

27. Similarly, in *Denshire Muteti Wambua Vs KPLC CA 60 of 2004* citing with approval the case of Kemfro Africa Ltd T/A Meru Express Service & Gathogo Kanini Vs A.M.M. Lubia & Another (1982-988) KAR 777 at P. 730 the Court of Appeal held that: -

> " The principles to be considered by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Lango vs Manyoka (1961) EA 705, 709, 713, Lukenya Ranching & Farming Co-operative Society Ltd Vs Kavoloto (1970) EA 414, 418, 419."

28. This Court hasn't lost sight of the fact that comparable injuries should as far as possible attract similar awards. In Arrow Car Ltd vs Bimomo & 2 others (2004) 2KLR 101 the Court found: -

> " Comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar awards."

29. The Appellant argues that the Trial Magistrate should have awarded the Respondent general damages of Kshs. 400,000/- being guided by the awards for similar injuries in West Kenya Sugar Co Ltd vs Joseph Sore Shirambula [2021] eKLR and Peter Kibe Waweru vs Moses Maina [2022] eKLR. On the other hand, the Respondent argues that the award issued by the Learned Magistrate was not so inordinately high so as to represent an entirely erroneous estimate to warrant interference by this Court. He submits that instead, the Court should rely on the awards in Pietro Canobbio vs Joseph Amani Hinzano [2016] eKLR and Bwauna Construction Ltd vs Joseph Karuri Mwangi, Nakuru Civil Appeal Number 110 of 2006, where the Plaintiffs suffered similar degrees of disability to his.

30. I have reviewed the authorities cited by the parties. I note that in reaching the present award, the Learned Magistrate relied on cases where the Plaintiffs suffered comparable injuries, namely, Bivauna Construction Limited vs Joseph Karuri Mwangi (Supra) and Pyramid Packaging Limited vs Humphrey W. Wanjala [2012] eKLR. In both cases, the Plaintiffs suffered amputation of multiple phalanges. In the Bivauna case, the Plaintiff's permanent disability was assessed at 10% and he was awarded general damages of Kshs. 500,000/-. In the Pyramid Packaging Limited case, the Plaintiff was left-handed hence the injury rendered him incapable of working and he was awarded Kshs. 650,000/- as general damages.

31. It is evident that the Trial Magistrate carefully considered the Respondent's injuries, the degree of permanent disability, and cases of comparable injuries, before reaching his decision. The Trial Magistrate's award of general damages was not inordinately high. I therefore see no reason to interfere with the same.

32. Special damages must not only be specifically pleaded but should also be strictly proved: See Herbert Hahn –vs- Amrik Singh (1982 –88)1 KAR 738; and Corporate Insurance Co. Ltd. –Vs- Loice Wanjiru Wachira C.A. No.151 of 1995 C.A. The sum of Kshs. 2,000/- being the fee for the Medical Report was pleaded and proved through the production of an official receipt. Consequently, I hold that this is the only amount that can be availed to the Respondent under this head. The Learned Trial Magistrate erred in law in awarding the sum of KShs. 10,000 that hadn't been pleaded.

33. In the upshot, I find the Appellant's appeal substantially lacking in merit. It only succeeds to the very limited extent that special damages of Kshs. 12,000/- awarded are reduced to Kshs. 2,000/-.

34. The costs of this appeal shall be in favour of the Respondent.

35. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 26th DAY OF JULY, 2024.**

**OCHARO KEBIRA.**

**JUDGE**

In the presence of:

Mr. Aura for the Appellant.

No Appearance for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**