



**DPL Festive Limited v Kii (Appeal 65 of 2023)
[2024] KEELRC 2180 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 65 OF 2023
NJ ABUODHA, J
SEPTEMBER 6, 2024**

BETWEEN

DPL FESTIVE LIMITED APPELLANT

AND

JOSEPH MUTHIANI KIIO RESPONDENT

JUDGMENT

1. Through the Memorandum of Appeal dated April 12, 2017, the Appellant appeals against the Judgment of Hon. I. Orange (Mr.) delivered on 22nd September, 2017 in Milimani Chief Magistrates Court Civil Case No. 632 of 2013.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in fact and law by disregarding the Authorities of the Appellant which stipulate the rationale for arriving at the appropriate quantum of damages.
 - ii. The Learned Magistrate erred in fact and law awarding exorbitant and excessive quantum of damages not based on any authority.
 - iii. The Learned Magistrate erred in fact and law by holding the Appellant liable for the injuries occasioned to the Respondent herein.
 - iv. The Learned Magistrate erred in fact and law by disregarding the authorities of the Appellant stipulating the rational for arriving at the appropriate decision on liability.
3. The Appellant prayed that the appeal be allowed and the Judgment and decree of the Chief Magistrates Court Civil Case No. 632 of 2013 be set aside with costs.
4. The Appeal was disposed of by written submissions.



Appellants' Submissions

5. The Appellant filed written submissions dated 14th October, 2022 and submitted on the duty of the appellate court while relying on the case of *Mbogo v Shab* 91968) EA 93 and [*Peter Kanithi Kimunya v Aden Guyo Haro*\(2014\) eKLR](#).
6. On the issue of whether the trial court erred in finding the Appellant to be 100% liable for the accident, the appellant submitted on burden of proof under sections 107 and 108 of the [*Evidence Act*](#). The Respondent blamed the Appellant for injuries sustained at workplace on the basis that the Appellant failed to take adequate precautions for the safety of the Respondent. That on the day of the accident he was assigned duties of offloading wheat bags and arranging them in the store when suddenly the bags fell on him from a height and he sustained injuries.
7. The Appellant submitted that even though the Respondent started working with the Appellant from 2006 he had nothing to show for it as he was a casual laborer. The Appellant relied on the [*Black's Law Dictionary*](#) and the case of [*Blyth v Birmingham Company*](#) [1856] 11 Exch on definition of negligence and submitted that the Respondent ought to have proved the elements of negligence which were the duty of care, breach of that duty of care, the result of which the Respondent suffered loss and damage. The appellant relied on the case of [*Nandwa v Kenya Kazi Ltd*](#)[1988] eKLR on the same.
8. The Appellant submitted that even though an employer has a duty to ensure safety of employees that duty was not absolute. The appellant relied in support on the case of [*Eastern Produce \(K\) Limited v Allan Okisai Wasike*](#)(2014) eKLR. The Appellant submitted that the Respondent was fully aware of the dangers he faced hence the author of his own misfortunes. According to the appellant, the Respondent had been doing the same job for four years yet he was never injured. He had the necessary skill, Knowledge and expertise to do the job and avoid any foreseeable danger.
9. The Appellant submitted that no evidence was led to show that any thing changed on that particular day or any omission to led to the accident. The Respondent never complained to the Appellant or his supervisor of unsafe working conditions for those four years. That even though the Appellant did not have witnesses to controvert the Respondent's allegations the trial court's award of 100% liability was against the standard of proof in civil cases which was on a balance of probabilities.
10. The Appellant submitted that the Respondent had a duty to show the causal link between the injury he sustained and the Appellant's negligence. That the Appellant raised contributory negligence based on the Respondent's knowledge of the dangers of being a casual laborer if caution is thrown to the wind. That the Respondent never gave explanation of any precaution he took to ensure or minimize the occurrence of the accident having worked for 4 years. The Appellant relied on among other cases the case of [*Barrack Ofulo Otiemo v Instarect Limited*](#) [2017]eKLR.
11. The Appellant submitted that the Respondent was equally to blame for the injuries sustained. That he bore greater responsibility of ensuring that he averted the danger. The Appellant proposed the liability to be 20:80 as against the Appellant to the Respondent.
12. On the issue of whether the award of Kshs 700,000/= was inordinately high the Appellant submitted that the Respondent suffered dislocation of the left knee joint, blunt chest injury with a bruise, blunt injury to the left shoulder and bruise on the left ankle. That according to Dr. Cyprianus Okoth's medical report it was his opinion that the injuries sustained by the Respondent could be classified as grievous harm. That the knee joint may develop an osteoarthritis in future.
13. The Appellant submitted that according to the medical report by Dr. Madhiwala it was his opinion that the Respondent suffered from injuries indicated which had healed well and left no permanent



disability. That temporary disability was for two weeks since the Respondent was examined by Dr. Okoth a month after the accident while Dr. Madhiwala three years after the accident when the Respondent had completely healed.

14. The Appellant on the case of *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia*(1982-88) IKAR 727 & another on the circumstances when the appellate court would interfere if the award is inordinately high. The Appellant therefore submitted that the cases relied upon by the Respondent, the injuries were severe hence against the principle of comparable injuries to attract comparable awards. That the cases relied on by the Appellant were more probable in guiding the trial court in determining the awardable damages even if the Respondent's injuries were classified as grievous harm by Dr. Okoth.
15. The Appellant submitted that the trial court gave inordinately high award and this court should reassess the same while being guided by the case of *Carolyn Indasi Mwanyonyo v Kenya Bus Service Ltd* Civil Appeal No. 17 of 2007 [2012] eKLR where court awarded Kshs 350,000/= for soft tissue injuries and dislocation of knee joint.
16. The Appellant also proposed the case of *Mara Tea Factory Limited v Joshua Makworo Onkoba* (2021) eKLR where an award of Kshs 300,000/= for head injury with cut wound on the temporal region and optical area, tenderness of ribs on palpation, bruises on the knees, dislocation on the right hip joint and right knee. The Appellant proposed damages at Kshs 280,000/= less the 80% contribution as adequate compensation to the Respondent which would be in total Kshs 283,000/= with special damages and the awardable amount to the Respondent total to be Kshs 590,000/=

Respondent's Submissions

17. The Respondent filed his written submissions dated 27th May, 2023 and submitted that he was injured while working for the Appellant. That it was confirmed that the Appellant never provided him with protective equipment. That the Appellant did not call any witnesses to controvert his evidence nor produce any record of providing him with protective equipment nor the accident register.
18. On the issue of whether the trial Magistrate award of damages was high the Respondent submitted that the trial magistrate considered the injuries sustained by the respondent and awarded a reasonable figure. That the report of Dr. Okere confirmed his injuries. That the trial magistrate was right in holding the Appellant 100% liable for the accident since the Appellant did not provide a record on providing him with protective equipments. The Respondent relied on the case of *Overseas Tankship Ltd v Morts Dock Ltd*[1967] 1 AC 617.
19. The Respondent submitted that he got injured while working on the Appellant's premises and relied on *Halsbury's law of England* 4th Edition Vol 16 and case of *Makala Maku Mumende v Nyali Golf & Country Club* ca No.16 of 1989 on the duty of care by the employer. He submitted that the appeal lacked merit, should be dismissed and the judgment enhanced to Kshs 1.5 Million.

Analysis & determination

20. This court has considered the pleadings by both parties and the submissions and this being a first Appeal, the court will proceed to reanalyze the evidence before it as was held in the case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. In this case, the Judgment of the trial court was that;

I find the Defendant 100% to blame for the accident. I award the Plaintiff Kshs 700,000/= for general damages and Kshs 3,000/= as special damages pleaded plus costs and interests at court rates."

22. The Appellant was aggrieved with the 100% liability on its part and the award of quantum of damages awarded to the Respondent of Kshs 700,000/= as general damages which he felt was inordinately high. The main issues in this Appeal are therefore;

- a. Whether the trial magistrate erred in finding the Appellant 100% liable for the accident.
- b. Whether trial magistrate's award of Kshs 700,000/= as general damages to the Respondent was inordinately high.

Whether the trial magistrate erred in finding the Appellant 100% liable for the Accident.

23. This court notes that in as much as the Appellant alleges that the Respondent had nothing to show that he was its employee it has also admitted that the Respondent had worked for 4 years hence it can not deny him as his employee. It is also not disputed that on the date of accident the Respondent was assigned offloading and arranging wheat bags at the Appellant's store when the bags fell from a height and injured the Respondent. This court also notes that the Respondent had worked for the Appellant for four years hence had the required expertise and experience to avoid any danger.

24. The court agrees with the lower court that the Respondent did not call witnesses to controvert the Respondent's evidence. No evidence was tendered to show that the appellant provided the Respondent with protective gear. The Appellant as the Respondent's employer had a duty of care to provide a safe working environment for the Respondent. Halsbury's Laws of England, 4th edition volume 15 at paragraph 560:-

"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk.

25. In the case of Segwic Kenya Insurance Brokers – v- Price Water House Coopers Kenya HCCA No. 720 of 2006 Lesiit, J cited the case of Capro Industries Ltd Plc v Dickman & Others [1990] 1 All ER, 658, where the House of Lords held thus;

"The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed."



26. In this particular case the Respondent alleged that the Appellant did not provide protective gear. This court is therefore tasked with the question whether if the Respondent was provided with the protective gears would it stop the accident or him from being injured. The answer to this question is that the protective gear could not stop the bags from falling or prevent the Respondent from sustaining the nature of the injuries sustained by the Respondent. The question therefore was what the Appellant supposed to do to prevent the accident when the Respondent was the one to offload and arrange the bags of wheat. Taking in to account his experience of four years working with the Appellant on the same work of offloading and arranging bags the Respondent had the necessary expertise, experience and knowledge to avoid such danger. The Respondent did not lead any evidence on the change of the work he was assigned to do. He never raised any issue of the working environment being unsafe for the four years he worked for the Appellant. He never produced any evidence of reporting to the management of any challenges with his working environment.
27. Whereas the larger responsibility lies on the employer to provide a safe working environment, the employee also has some measure of responsibility to ensure their own safety. As observed earlier, the respondent had worked for the appellant for approximately four years. He must have therefore acquired the necessary experience in the work he was doing and aware of the potential dangers that could arise in the course of the performance of his work. The Respondent who was arranging the bags ought to have known that when they were wrongly arranged there was danger of falling. He ought therefore to have been careful while carrying out his work. Some measure of liability for the accident ought therefore to have been apportioned to the respondent and this Court apportions 10% contributory negligence.

Whether trial magistrate’s award of Kshs 700,000/= as general damages to the Respondent was inordinately high.

28. Whereas the trial court acted within its discretion to award the said damages which are discretionary in nature; this court as an appellate court will proceed carefully so as not to interfere with such trial Court’s discretion unless certain conditions are satisfied as was held in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR. The Court of Appeal held as follows:-

It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

“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 at a figure which was either inordinately high or low.”

29. In this case the court is called upon to illustrate if the trial court proceeded on wrong principle, the amount excessively high or if the award was an erroneous estimate. The Appellant has submitted that the trial magistrate considered cases where the Plaintiff sustained serious injuries than those sustained by the Respondent herein and therefore arrived at a wrong figure.



30. The nature of the Respondent's injuries were dislocation of the left knee joint, blunt chest injury with a bruise, blunt injury to the left shoulder and bruise on the left ankle. These injuries conform with the Dr. Cyprianus Okoth medical report who classified the injuries as grievous harm. The Report which was conducted one month after the accident indicated that the Respondent complained of pain on the left knee, chest pains and lower backaches.
 31. The Appellant's medical report conducted by Dr. Ashwin Madhiwala three years after the accident confirmed that the Respondent sustained dislocation of the left knee and soft tissue injury over the chest. The Report confirmed that the Respondent had well healed with no permanent disability. The report indicated that the Respondent still complained of pain on the left knee.
 32. The cases relied upon by the trial magistrate the injuries ranged from fracture dislocation of both hips, fracture of pelvis, blunt injury to the left shoulder among others. The court also takes note of the cases given by the Appellant. The Court of Appeal in *Simon Taveta v Mercy Mutitu Njeru* Civil Appeal No. 26 of 2013 [2014] eKLR restated the principle that damages should be determined by the nature and extent of injuries sustained and comparable awards made in the past.
 33. The cases relied upon by the trial magistrate seemed to have multiple fracture dislocations and severe injuries. The Respondent herein did not have any degree of permanent disability apart from pain on the left knee. The authorities relied on by the Appellant are close to the injuries suffered by the Respondent herein. The amount proposed by the Appellant is however low compared to the inflation in the market and the cases quoted.
 34. This court takes note of the case of *Carolyne Indasi Mwoyonyo Kenya Bus Service Ltd, H.C.C.A. No. 17 of 2007*, where the Plaintiff suffered soft tissue injuries and the dislocation of the right knee and was awarded Kshs 350,000/=. In this particular case since the Respondent suffered almost similar injuries and the fact that he still complains of pain at the knee and taking into account inflation the time since the above decision was made, an award of Kshs 500,000/= would be reasonable.
 35. After giving due consideration to all the authorities cited before the court and also before the trial court, this court finds that the learned trial magistrate awarded a sum that was very much on the higher side. Accordingly, the said award is set aside. This court therefore substitutes it with an award of Kshs 500,000/=.
 36. The Appeal therefore partially succeeds on the following Orders.
 - a. Liability 50: 10 as against the appellant.
 - b. General damages Kshs 500,000/= Less 10% -- Kshs 450,000/=
 - c. Special Damages Kshs 3,000/=Total ..Kshs 453,000/=
- The appeal being partially successful, each party shall bear their own costs.

37. It is so ordered

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

JUDGE

