REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E295 OF 2024

FRIENDSHIP CONTAINERS MANUFACTURERS LIMITED…….....APPELLANT

VERSUS

EVANS ONDIEKI SIBWOGA…….....1ST RESPONDENT

ESSENTIAL MANAGEMENT CONSULTANCY SERVICES LTD…….....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B.M. Cheloti (PM) delivered on 9th September 2024 in Nairobi in MCCC Cause No. E738 of 2016)

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. B.M. Cheloti (PM) delivered on 9th September 2024 in Nairobi in MCCC Cause No. E738 of 2016 between the parties filed a memorandum of Aappeal dated the 9th of October, 2024 seeking the following orders: -

a. **The court makes a finding that the Chief Magistrate's court lacked the jurisdiction to handle and determine this claim as it was in breach of the Work Injury Benefits Act.**
b. **The learned trial Magistrate's finding and award of liability against the Appellant be set aside as a whole and be substituted with an order dismissing the entirety of the claim against the Appellant.**
c. **The learned Magistrate's judgment and award of general damages for pain, suffering, and loss of amenities be set aside and/or substituted with an assessment thereof at a much lower amount commensurate with the injuries sustained by the Respondent.**
d. **The learned Magistrate's award of loss of earnings be set aside as a whole and substituted with an order dismissing the entirety of that claim.**
e. **The costs of this Appeal and the subordinate court's suit be awarded to the Appellant.**

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in both fact and law by failing to appreciate that Section 16 as read with Section 23 (1) of the Work Injury Benefits Act 2007 confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director of Occupational Safety and expressly bars institution and/or continued prosecution of court proceedings by the aggrieved employee.

3. The Honourable Magistrate erred in both fact and law by holding that the Appellant owed the 1st Respondent a duty of care to provide him with a safe working environment which was contrary to the testimony and evidence led at trial.

4. The Honourable Magistrate's award of pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the 1st Respondent.

5. The Honourable Magistrate erred both in fact and law by making an award of loss of earnings and which award/finding was in any event manifestly excessive, erroneous and arbitrary as the same was never proved as required.

6. The Honourable Magistrate's award of special damages was erroneous as the same was not strictly proved as required by law.

7. The Honourable Magistrate erred in both fact and law by basing his judgment on irrelevant considerations.

BACKGROUND TO THE APPEAL

8. The 1st Respondent filed a suit against the Appellant and 2nd Respondent vide a plaint dated 10th February 2016 seeking the following orders: -

   a. General damages for pain, suffering and loss of amenities.

   b. Loss of earnings of a sum of Kshs. 11,085/- from the date of the accident up to date.

   c. Special damages -Kshs. 1,500.00

   d. Costs of this suit.

   e. Interest on (a), (b) and (c) above.

   f. Any other further relief this Honourable Court may deem just to grant.

   (pages 14-16 of Appellant's ROA dated 26th May 2025).

14. The 1st Respondent (Claimant) filed his verifying affidavit sworn on February 11, 2016, a list of witnesses dated February 10, 2016, an undated witness statement, and a list of documents along with the bundle of attached documents dated February 10, 2016 (pages 17-29 of ROA).

15. The claim was opposed by the Appellant, who entered an appearance and filed a statement of defense dated April 12, 2016 (pages 30-33 of ROA). They also submitted a list of witnesses, a list of documents, all of the same date, and a witness statement of Daniel Munyoli Mutuku dated September 13, 2016 (pages 34-48 of ROA).

16. In response to the Appellant's statement of defence, the 1st Respondent filed a Reply dated 1st August 2016 (page 49 of ROA).

Hearing before the trial court

17. The 1st Respondent's case was heard on the 18th of December 2023 with the Respondent testifying in the case. He relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant Mr. Ndegwa (pages 6-7 of ROA).

18. The Appellant's case was heard on the same day when DW1 Daniel Mutuku testifying on behalf of the Appellant relied on his filed witness statements as his evidence in chief, and produced the Appellant's document. He was cross-examined by counsel for the Respondent Ms. Okumu (page 20 of ROA).

19. The parties took directions on filing of written submissions after the hearing. The parties complied.

20. The Trial Magistrate Court delivered its judgment on the 9th of September 2024 allowing the Plaintiff/1st Respondent's claim to the tune of Kshs. 3,311,880/- comprising of global general damages, loss of earnings and special damages, plus costs and interest (judgment at pages 10-13 of ROA).

DETERMINATION

21. The appeal was canvassed by way of written submissions. Both parties complied.

22. As the first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. In Selle & Another -VAssociated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus: "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

Issues for determination

23. In their submissions dated 14th July 2025, the Appellant identified the following issues for determination, namely:-

    i. Jurisdiction.

    ii. Liability.

    iii. Quantum of damages.

24. Conversely, the 1st Respondent identified the following issues for determination in his submissions dated 5th September 2025:

i. Whether the trial court had jurisdiction to hear and determine the matter

ii. Whether the appellant owed the 1st Respondent a duty of care

iii. Whether the quantum awarded by the trial court is erroneous.

25. The 2nd respondent did not file any submissions.

26. The court finds that the parties are in agreement on the issues for determination in the appeal to be-

a) Whether the trial court had jurisdiction to hear and determine the matter Liability.

b) Liability

c) Quantum of damages.

Whether the trial court had jurisdiction to hear and determine the matter

27. The grounds of appeal under the issue were as follows-

a. The Honourable Magistrate erred in both fact and law by failing to appreciate that Section 16 as read with Section 23 (1) of the Work Injury Benefits Act 2007 confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director of Occupational Safety and expressly bars institution and/or continued prosecution of court proceedings by the aggrieved employee.

Appellant's submissions

28. The Record of Appeal (hereinafter 'the Record') at pages 14-29 contains the Plaint filed in the subordinate. From a reading thereof the suit related to an alleged workplace accident that occurred on 31st October 2013. At the time of occurrence of the alleged work injury, the applicable statute was the Work Injury Benefits Act 2007. The Act (W.I.B.A) became operational on 2nd June 2008 vide Gazette Notice No. 60 of 23rd May 2008. Before proceeding further, we take cognizance of the fact that the Hon. Chief Justice published in the Kenya Gazette notice no. 5477 Practice directions relating to pending court claims for compensation for work related injuries. The net effect of this gazette notice is 'conferring jurisdiction' upon Magistrates Courts. However, with great deference to the Hon. Chief Justice, it is trite that jurisdiction is donated to the courts by the Constitution and/or the statute which created them. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR held as follows: 'Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. (Emphasis Ours) X. Indeed, in Supreme Court Petition No. 33 of 2018, Sammy Ndungu Waity Vs I.E.B.C. and 3 others [2019] eKlr the court was of the opinion that; "Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate." a) What then is the legal position? The recourse provided for such an employee or his dependant is to notify the Director, who under section 23(1) of the Act shall, upon receipt of the notice of the accident;

"(1)…… or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act." It therefore goes without saying that Section 16 as read with section 23(1) confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of court proceedings by the aggrieved employee. Indeed, the Work Injury Benefits Act Part IV provides that all claims arising of injuries sustained in the course of employment shall be lodged with the Director of Occupational safety thereby vesting sole and exclusive jurisdiction to that office. In Petition No. 4 of 2019; Law Society of Kenya -v- Attorney General & another [2019] eKLR the Supreme Court at paragraph 55 holds as follows; 'Section 23 of the same Act then provides: "23.(1) After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act. At paragraph 56, the Supreme Court reiterates thus; 'Sections 52 (1) and (2) of WIBA further provides: 52.(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision. The Court of Appeal in Civil Appeal No. 133 of 2011 Attorney General –v- Law Society of Kenya & Anor had earlier on held as follows; '…section 16 of the Act…is to the effect that no employee or his dependents can institute a court action against the employer to claim damages in respect of work related accident... The recourse provided for such an employee or his dependant is to notify the Director….under section 23(1) of the Act XVI. It is therefore clear that courts must exercise restraint and first give an opportunity to the

relevant bodies or State organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like The Speaker of the National Assembly -v- Karume (2008) 1 KLR 426. b. Is there legitimate expectation owed to the 1st respondent? That legitimate expectation applies to only those suits that had been filed prior to the enactment of the Work Injury Benefits Act 2007. Key to note are the following decisions one of which was delivered after the Gazette Notice from the Chief Justice. a) In Color Label Limited -V- Walubengo [2024] KEHC 3964 (KLR) the High Court, while dealing with a similar appeal held as follows; 'Undoubtedly, the Chief Justice's Practice Directions of 2023, in respect of work-related injury claims were not in force in the period when the instant dispute was before the lower court, and prior to the filing of the appeal. All courts are bound by the dicta in Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 others [2012] eKLR, that a court's jurisdiction flows from either the Constitution or legislation or both. Therefore, the trial court clearly had no jurisdiction to entertain the Respondent's suit. The appeal succeeds on the question of jurisdiction. b) In Manuchar Kenya Limited -v- Dennis Odhiambo Olwete [2020] eKLR the High Court held at paragraphs 17 and 18 that; 'The upshot of the decision by the Court of Appeal as confirmed by the Supreme Court is that all work injury claims arising after the enactment of WIBA in 2007 were to be processed within the procedure set out in the Act and the original jurisdiction of the courts was thus ousted. …the accident in which the Respondent was injured occurred on 8th August 2014. That was after the enactment of WIBA and according to the decision by the Supreme Court in Law Society of Kenya -v- Attorney General & Another (supra), the Magistrate's court had no jurisdiction to try the matter.' (emphasis ours) c) In Longonot Horticulture Limited -v- James Wakaba Maina [2019] eKLR the learned judge on appeal held as follows: 'All industrial accidents and disease are legally to be reported to the

Director and not filed with the lower court. The shift created by the WIBA has been in place since 20th December, 2007 and no reason is given as to why the respondent failed to adhere…. The suit before the lower court was filed after 20th December, 2007 and as noted above, filed before the wrong forum. For the reasons above….the suit filed in Naivasha RMCC No.68 of 2013 is hereby struck out for want of jurisdiction.' d) In Saidi Mohamed -v- Diamond Industries Ltd [2018] eKLR the learned judge held as follows; 'The Court shall therefore decline jurisdiction in this dispute. It declines jurisdiction on the ground that the Claimant has not come to Court, under the procedure laid down in the Work Injury Benefits Act. XVIII. We therefore submit that ground 1 of the Memorandum of Appeal is merited. With great respect to the Chief Justice, and as rightly held by the Judge in Colour Label Limited (Supra), The Gazette Notice by the Hon. Chief Justice does not confer jurisdiction upon the Magistrates Court as it is not Statute.

1st Respondent's submissions

29. On the issue of jurisdiction of the Trial Court, the Chief Justice issued practice directions in Kenya Gazette No. 5476 issued on the 28th April 2023. The Practice directions are cited as "Practice Directions relating to pending Court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR" (hereinafter referred to as the Supreme Court decision)" The Practice rules provided that all claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision[2019] at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said Courts and that it was only suits Filed after the Supreme Court Decision with respect to compensation for work related injuries and diseases that shall commence before the Director

of Occupational Safety and Health Services. It is clear from the Practice Rules issued by the Chief Justice that the Trial lower Court had jurisdiction to hear and determine this matter as the I Respondents claim as the claim was instituted in 2016 which was before the Supreme Court Decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR. In the case of Mugatsia v Protective Custody Services [2024] KEELRC 41 (KLR) the court at paragraphs 21-25 held that; "21. Following the High Court decision declaring sections 16 and 52 unconstitutional, all WIBA claims found their way back into the courts with the bulk of them being filed in the Magistrates courts because of their pecuniary jurisdiction. A few were filed in the Employment and Labour Relations Court. The decision of the Court of Appeal which was confirmed by the Supreme Court reinstated sections 16 and 52 of the Act among others. The superior courts however did not address the issue of cases filed after commencement of the Act that were pending before the Employment and Labour Relations Court and the Magistrates' courts. 22. There emerged two schools of thought: one was of the view that the decision of the High Court having been set aside, all cases filed in the Magistrates courts after the date of commencement of the Act were filed without jurisdiction and were for striking out. The other school of thought was of the view that there being a presumption that the decisions of the courts are valid until and or unless they are set aside by a Court of superior jurisdiction, the cases filed between the dates of the two decisions wère properly before the courts and should be concluded in the courts in which they were filed. This explains the contradictory decisions cited by the parties. 23.Fortunately, the position has now been clarified by the Chief Justice in the Practice Directions issued through Gazette Notice No. 5476 dated 24th April 2023. According to the Practice Directions, all claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at

the Employment and Labour Relations Court or the Magistrates Courts shall proceed until conclusion before the said courts. The practice Directions read in part: Claims Filed after Commencement of WIBA but before the Supreme Court decision7.Taking into account that High Court vide its judgment dated 4th March, 2009 in Law Society of Kenya v Attorney General & another (2009) eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that Claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in Attorney-General and 2 Others v Ndii and 79 Others: Prof. Rosalind Dixon and 7 Others (Amicus Curiae) (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court. Therefore.(a)All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates Courts shall proceed until conclusion before the said courts.(b)All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates Courts shall be delivered by the same court. 24.The instant suit was as filed on the 9h May 2017. The Court of Appeal decision which overturned the decision of the High court which Supreme Court decision was delivered on 3 December 2019. Based on the above practice directions, the instant case which was filed before the Supreme Court decision is to proceed until conclusion before the trial court. Consequently, I allow the Appeal, set aside the orders issued by the trial court on the 17th June 2021 and order the reinstatement of the Appellant's suit for hearing before the trial

court." In light of the above decision this matter before you fall within the category of cases cited in the above decision as it was filed in the Magistrate's court vide a plaint dates 10th February 2016 after the commencement of WIBA but before the 2019 Supreme Court decision. Hence therefore, the Magistrate's court had the jurisdiction to hear and determine the matter by dint of the Practice Directions issued by the Chief Justice vide Kenya Gazette No. 5476 issued on the 28th April 2023.

Decision on jurisdiction.

30. A claim was filed before the lower court by way of a plaint dated 10th February 2016 and filed in court on 12th February 2016. It was a work injury claim. At that time, the Work Injury Benefits Act of 2007 was already effective. However, there was an injunction of the High Court in place, which enabled parties to still file cases in the lower court while the dispute was pending in the appellate courts. The matter was pending before the Court of Appeal in Civil Appeal No. 133 of 2011 Attorney General –v- Law Society of Kenya & Anor (2017)e KLR where the court in held as follows; '*…section 16 of the Act…is to the effect that no employee or his dependents can institute a court action against the employer to claim damages in respect of work related accident... The recourse provided for such an employee or his dependant is to notify the Director….under section 23(1) of the Act XVI. It is therefore clear that courts must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like The Speaker of the National Assembly -v- Karume (2008) 1 KLR 426.*'' The appellant submits that the 1st respondent's legitimate expectation applies to only those suits that had been filed prior to the enactment of the Work Injury Benefits Act 2007.

31. I have in the recent past pronounced my myself on the impugned Chief Justice Gazette Notice on the work injury claims in Chenje v Kibo & Allied Industries & another [2024] KEELRC 453 (KLR) and since the decision has not been overturned by appellate courts I adopt it to apply in the instant appeal as follows- '*The Chief Justice issued practice directions in Kenya Gazette No. 5476 issued on the 28th April 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya under the legal framework of the Constitution of Kenya, the Judicature Act, the Judicial Service Act, the Employment and Labour Relations Court Act and the Work Injury Benefits Act. The practice directions state as follows: 'Practice Directions Relating To Pending Court Claims Regarding Compensation For Work Related Injuries And Diseases Instituted Prior To The Supreme Court Decision In Law Society Of Kenya v Attorney General And Another, Petition No. 4 Of 2019; (2019) eKLR In Exercise of the powers conferred under Articles 159 (2) and 161 (2) (a) of the Constitution of Kenya, section 10 of the Judicature Act, and Section 5 (1) and 2 (c) of the Judicial Service Act, the Chief Justice issues the following Practice Directions— Citation 1. The Practice Directions may be cited as "Practice Directions relating to pending Court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR" (hereinafter referred to as the Supreme Court decision) Commencement 2. These Practice Directions shall come into force upon the date of issue. Application 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazzetted by the Chief Justice pursuant to section 29 (3) and (4) of the Employment and Labour Relations Act, 2011 to preside over cases involving employment and labour relations. Objectives 4. The Objectives of the Practice Directions are to— (a) (b) (c) (d) (a) (b) consolidate and standardize*

practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision dated 3rd December, 2019, which are pending in Courts; enhance access to justice; facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and ensure uniformity in Court experience. Judgment of the Supreme Court 5. The Supreme Court vide a judgment rendered on 3rd December, 2019, determined that sections 16, 23 (1), 25 (1) and (3), 52 (1) and (2) as well as section 58 (2) of the Work Injury Benefits Act(WIBA) are consistent with the former Constitution and the Constitution 2010, specifically; Section 16 as read with sections 23 and 52 of the WIBA does not limit access to Courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting *with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court). Retrospective operation of statutes is not per se illegal or in contravention of the Constitution and section 58 (2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58 (2) of the Act does not take away the right to legal process, or extinguish access to the Courts or to take away property rights without due process. Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked (d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya's meeting held on 21st March, 2023 urging that practice directions be issued for all pending claims be*

finalized in the respective Courts. Consequently, 6. (a) All claims with respect to compensation for work related injuries and diseases filed in various Courts before the commencement of WIBA shall proceed to conclusion under the Workmen's Compensation Act , Cap 236 (repealed). (b) 26. All judgments and rulings relating to work related injuries claims pending before the Employment and Labour Relations Court and the Magistrates Court shall be delivered by the same Court. Claims Filed after Commencement of WIBA but before the Supreme Court decision 7. Taking into account that High Court vide its judgment dated 4th March, 2009 in Law Society of Kenya v Attorney General & Another (2009) eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in Court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in Attorney-General and 2 Others v Ndii and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae) (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in Court. Therefore, (a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said Courts. (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates' Courts shall be delivered by the same Court. Claims Filed after the Supreme Court Decision 8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services. (b) All appeals

emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. (c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy. Sanctions for Non-Compliance 9. Non-compliance with these Directions shall result in such penalty as the Courts may order. Miscellaneous 10. The Chief Justice may amend these Practice Directions from time to time. Dated the 24th April, 2023. Martha K. Koome, Chief Justice and President of the Supreme Court.''(Emphasis mine) *The Court appreciates that the Chief Justice has authority to issue practice directions under Section 27 of the Employment and Labour Relations Act which reads:- ''27. Rules and Regulations (1) The Chief Justice, make rules for regulating the practice and procedure of the Court. (2) Without prejudice to the generality of subsection (1), such rules may provide for— (a) regulating the sittings of the Court and the selection of Judges for any purpose; (b) prescribing forms and fees in respect of proceedings in the Court and regulating the costs of and incidental to any such proceedings; (c) prescribing the time within which any requirement of the rules is to be complied with; (ca) delegating judicial, quasi judicial and non-judicial duties to the Registrar; and (d) any other matter required under this Act or any other written law.'' practice directions became necessary as this Court took different positions on the interpretation of legitimate expectation of parties with cases before the magistrate Courts before the pronouncement of the Court of Appeal and the Supreme Court on WIBA jurisdiction. 27. 28. 29. 30. 31. 32. 33. The Practice Directions address the fate of cases filed and pending in Court post WIBA and before the Supreme Court decision delivered on 3rd December 2019 like the instant case. The Court further observes there was a resolution passed by the Law Society of Kenya's meeting held on 21st March, 2023 as stated in the directions, urging that practice directions be issued for all pending claims* be finalized in the

respective Courts. *The Court finds that the foregoing Practice Directions would give life to the cases like the instant one. The Court is required to promote access to justice under Article 48 of the Constitution which reads: 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'' The Court in exercise of its judicial power in the matter then finds the question would be whether the appellant would suffer any prejudice pursuant to the Practice Directions. Article 159 (2)(d) provides that justice shall be administered without undue regard to procedural technicalities and that means the Court should focus on substantive justice. There is no tangible prejudice to be suffered by the appellant in the instant case. The Court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the Court so as to promote access to justice to litigants who are caught up with WIBA cases filed in Court in the period between Justice Ojwang's decision and the Court of Appeal 2017 and Supreme Court 2019 decisions. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in Court before the delivery of the Supreme Court decision of 3rd December 2019 , then the appeal succeeds on the issue of jurisdiction.''* I uphold the foregoing decision to apply in the instant case and hold that the lower court had jurisdiction to handle the work injury related claim filed in the court in 2016 and in the period between the Judgment of the High Court of Kenya at Nairobi (Ojwang, J, as he then was), dated 4th March, 2009*)* and the Court of Appeal decision of 17th Day of November, 2017. The Supreme Court held in Law Society Of Kenya v Attorney General And Another, Petition No. 4 Of 2019; (2019) eKLR that the parties before the courts in the said period had legitimate expectation pending matters would be determined before the courts. Subsequent

to the Supreme Court decision, the Chief Justice Marha Koome issued the Gazette Notice above.

LIABILITY

Appellant's submissions

32. GROUND 2 OF APPEAL- The learned magistrate erred in both fact and law by holding that the Appellant owed the 1st Respondent a duty of care to provide him with a safe working environment which was contrary to the testimony and evidence led at trial.- At the heart of this appeal lies a simple but overlooked truth: not every party who appears proximate to an accident is legally liable for it. The law demands more than proximity, it demands a duty of care, a causal link, and where the claim is grounded in employment, proof of employment, supervision, or control. These thresholds are not academic, they exist to shield litigants from arbitrary liability and to ensure that accountability follows responsibility. The 1st Respondent (Plaintiff) sued the Appellant and 2nd Respondent for a workplace accident that occurred on 31st October 2013. At paragraph 5 of the Plaint (see page 14 of the Record), he averred that he '…was contracted by the 1st Defendant (2nd Respondent herein)….' The Appellant filed its Statement of Defence dated 12th April 2016 on 13th April 2016. The same is contained at page 31-33 of the Record of Appeal. It contended that not only was the Plaintiff an employee of the 1st Defendant (2nd Respondent) but he was also an independent contractor (see lines 23-24). He who alleges must prove. Since he alleged, at paragraph 7 of the Plaint, that the Appellant breached its duty of care and/or contract of employment, he had the burden to prove the same. That the Plaintiff failed in this duty to prove his allegations against the Appellant. All the evidence tendered by the Plaintiff (1st Respondent) including sworn evidence pointed to the 2nd Respondent herein (1st Defendant in the

subordinate court) being the liable party. a. The 1st Respondent's witness statement is at page 19 of the Record. More particular at lines 19-20 he states '…the Defendant has never compensated me for the injuries I sustained while discharging my duties at its client's premises…' (emphasis ours) b. On cross-examination he testified that 'My employer was essential management who were meant to give the PPES'. c. Indeed, the Demand letter sent on behalf of the Plaintiff, further to paragraph (a) above was addressed to Essential Management Consultancy Services Ltd. See page 24 of the record. d. He produced a DOSH 1 form as part of his evidence (see page 23 of the Record). In the said form it clearly indicates that the 1st Respondent's (Plaintiff's) employer was Essential Management Consultancy Services Ltd'. It is noteworthy that this DOSH form was filled by the employer as per the law. e. Pages 26-29 of the Record contain both the employment contract between the 1st Respondent and 2nd Respondent. Further, page 29 of the Record shows a payslip issued by the 2nd Respondent Essential Management Consultancy Services Ltd' On the other hand, the Appellant, through its witness Mr. Daniel Mutuku testified as follows; a. He adopted his witness statement dated 13th September 2016 (see page 36 of the Record). In particular, he testified that the agreement between the Appellant and the 2nd Respondent (2nd Defendant) was for '…provision and management of casuals and temporary workers'. (emphasis ours) b. He also produced the agreement as Defence exhibit 1. The same is contained at pages 38-49 of the Record.

33. The appellant stated that it would not reproduce the entire agreement but shall point out a few key issues. . In the said agreement, it is an express term that any employee seconded to the Appellant; were employees of the 2nd Respondent (1st Defendant). See page 41 lines 22-35 of the Record. d. Further, the contract expressly provided that 'The contractor

(Essential Management) shall recruit and train the workers on environment, health and safety, quality control and quality ownership.' See page 40, lines 36-37 of the Record. e. The agreement made clear whose duty it was to supervise the employees, and in this case the 1st Respondent herein. Indeed, at page 39 lines 22-25 of the record it is clear that '…the contractor (Essential Management) shall appoint, employ, control, organize and supervise casual workers…' f. Indeed, the witness on cross-examination confirmed the above assertions. See page 7 lines 15-18 of the record containing the trial court's proceedings. That it is abundantly clear that the 1st Respondent (Plaintiff) failed to discharge his burden of proof. Equally, the trial court erred in its decision, therefore warranting this court's interference. The trial court failed overlooked a very simple and straightforward fact, Essential Management (the 2nd Respondent) was not a silent party, it was actively managing the 1st Respondent's deployment. It was the entity responsible for providing personal protective equipment (PPE), for training, for supervision, and for all aspects of health and safety compliance. The Appellant was expressly prohibited, by the contract between it and the 2nd Respondent, from interfering with or managing the employees, and in particular the 1st Respondent.

Respondent's submissions

34. It is a fact that is not in dispute that the 1st Respondent was an employee of the 2nd Respondent who was seconded to work in the Appellant's company as a machine attendant. Inasmuch as the 1st Respondent is an employee of the 2nd Respondent, the 1st Respondent was working at the Appellant's premises and for the benefit of the Appellant. Hence therefore the appellant had a duty to ensure that the working environment was conducive and free of any risk to any of the workers working within the premises. The 2nd Respondent

had a duty to train the 1 Respondent, but the Appellant also had a duty to provide the 1 Respondent with a safe working environment inter alia ensuring that their machines are in the right working condition. In fact, at paragraph 4.2 of the contract agreement between the Appellant and the 2nd Respondent, the contract expressly states that "the client (the Appellant Herein) shall provide protective clothing whenever necessary in exclusion of the safety shoes. The contractor must ensure that all the temporary workers are in possession of the safety shoes on the posting to the Client's work center." Therefore, it is not in doubt that the Appellant herein had the responsibility of providing the Ist Respondent with hand gloves to prevent any risk of sustaining injuries in his line of duty as a machine operator. The issues of contention here is not about who is the employer of the 1" Respondent, that is not in dispute that it is the 2nd Respondent. But the issue in question here is whose responsibility was it to provide the 1" Respondent with the protective gloves? the answer to this is very clear as clearly expressed at paragraph 4.2 of the contract: agreement between the Appellant and the 2nd Respondent that all other protective clothing were to be provided by the Appellant except for the shoes. By dint of the above express provision, this imposes a duty of care on the Appellant to provide the necessary protective clothing, a Duty the Appellant blatantly neglected putting the 1t Respondent to risk. Hence therefore the Appellant is liable both under statutory law and under common law principles. This express provision in the contract imposes liability on the Appellant to provide the 1 respondent with protective clothing a duty that he assumes expressly under the contract. Despite the fact that the Appellant is not the actual employer of the 1" Respondent, by dint that it is not their responsibility to pay monthly wages to the 1" Respondent, that does not take away the fact that the I" respondent was working in the Appellants premises and for the benefit of the Appellant. By the contract expressly providing that its the duty of the Appellant to provide

protective clothing to the 1st Respondent, the Appellant takes up this responsibility as any other employer to provide the same.

35. Common Law, (Halsbury's Laws of England Fourth Edition Volume 16 page 358-662), an employer, is under duty to take reasonable care for the safety of his employees in all the circumstances of the case so as not to expose them to an unnecessary risk. This duty includes the obligation to provide competent staff, adequate materials and proper system and effective supervision. The duty further includes the obligation to provide a reasonably safe place of work and access to it. This duty vicariously remains with the employer even after he delegates to another person. Consequently, in this case, the Appellant owed a duty of care to the 1 Respondent when he instructed him to operate the machine in his premises and for the benefit of the Appellant. This duty included the obligation to provide safety gear, competent and adequate staff to assist the Respondent in his duties and above all, supervision to guide him in discharging his duties as a machine attendant. The said duty of care has now been codified in Kenya under section 53 of the Factories Act Protective clothing and appliances. "Where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear. goggles and head coverings, shall be provided and maintained for the use of such workers. In addition section 6 of the Occupational Safety and Health Act, 2007 provides that "Every occupier shall ensure the safety, health and welfare at work of all persons working in his work place." And proceeds to provide for the specific duties of the employer towards employees which include 2(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; among others. In the case of Masinga Ndonga

Ndonge v Kualam Limited [2015|KEHC 524(KLR) the Learned Judge at held that;- "The court in African Highlands & Produce Co. Ltd v. Collins Moseti Ontekwa Kericho HCCA No. 38 of 2002(UR) while dealing with similar facts held as follows:- "I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact that under the Factories Act the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that, in the event such an employee is injured, then an employer shall be guilty of breach of a statutory duty. Liability in such event is strict." The learned authors of Winfield and Jolowicz on Tort by WVH Rogers 14h Edition, London Sweet and Maxwell at page 213 it is state as follows:- "If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty." In the case of Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 of 1987 Nairobi the Court of Appeal held that: "an employer is required by law to provide safe 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." Section 72 of the Factories Act criminalizes contravention of any of the provisions of the Act. The duty under the Factories Act is owed to persons not only employed by the occupier but also to all persons working therein." By the Appellant merely pointing out that by dint of not being the actual employer of the 1 Respondent they did not owe him a duty of care is not a sufficient cause for them to escape liability despite bearing the responsibility to provide the 1" Respondent with protective clothing as expressed in the contract between the Appellant and the 2 Respondent. As a matter of fact, the 1" Respondent was also lawfully in the premises of the Appellant by dint of the fact that the work done by the 1" Respondent was for the benefit of the Appellant and therefore the appellant had

equally a duty to ensure that the working environment which is within their premises is safe including the machinery.

Decision on Liability

36. The 1st Respondent's engagement falls under a contract for services having been outsourced by the 2nd Respondent to the appellant. It was not in dispute that the appellant was not the employer. The 1st respondent was injured while deployed to work by the 2nd respondent for the appellant at its premises. During the hearing before the trial court, the 1st respondent told the trial court that it was the duty of the 2nd respondent, his employer, to provide for safety clothing. There was no re-examination. The appellant's witness repeated the above and was aware that the claimant got injured in the line of duty. During re-examination, the appellant's witness, Daniel Mutuku, told the court that it was the duty of the 2nd respondent to train the workers, and that the appellant had no control over how the 2nd respondent conducted its duties. That the nature of work was not harmful.

37. The trial court relied on definition of occupier under section 3 of the Occupiers Liability Act to wit- *'(1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.(2) For the purposes of this Act, "the common duty of care*" and stated that it was a duty of the occupier to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The trial court further relied on Clement Lestang VP in Selle and another v Associated Motor Boat Co Ltd others [1968] EA 123, stated as follows: "*Where, however, a person delegates a task or duty to another, not a servant, or employs another, not a servant to do something for his benefit or the joint benefit of himself and the other, whether the other*

person be called an agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be". Further in decision of Lord Denning in the case of Wheat v. E. Lacon & Co. Ltd (1966) AC 522 stated follows: "*Whenever a person has a sufficient degree of control over premises that he ought to realize that any failure on is part to use cara may result in injury to a person coming lawfully there, then he is an occupier and the person coming lawfully there is his visitor."*The trial court held the 2nd respondent(the employer) owed the 1st respondent(employee) a duty care to provide him with protective gear. The court finds that this was consistent with the contract of employment. The 1st respondent produced his contract of employment with the 2nd respondent, which stated he would be provided with personal protective equipment in the course of employment(page 27 of ROA). The 1st Respondent in submissions relied on the contract for services between the appellant and the 2nd respondent, which in clause 4.2 stated –' *the client shall provide protective clothing whenever necessary in exclusion of the safety shoes.''*(page 42 of ROA). The client under the contract was the appellant(page 39 of ROA). The court finds that since the contract of employment required the 1st respondent to be provided with protective gear by the employer, the issue of the contract for services of which the employee was not a party cannot be invoked by him. He was owed a duty of care as an employee by his employer, the 2nd respondent. The trial court correctly held that the responsibility of the appellant was that of occupier. The case was of work injury. The trial court held that, the employer and client were jointly liable. The appellant submitted that the issue of the Occupiers Liability Act was introduced in the judgment and was not pleaded, and this court found that was true.

38. The provision of section 3 of the Occupiers Liability Act was interpreted by the Court of Appeal in ***Soma Properties Limited v H A Y M, [2015] eKLR*** where the court stated as follows:***"This provision, imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words "reasonable" and "reasonably" used in the above extract emphasize the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. Thus an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger."(***cited in Kenya Breweries Limited v Meshack Momanyi Osiemo [2018] KEHC 582 (KLR).) The court in Kenya Breweries Limited (Justice Githua) held-'***20.*** *Though I accept the respondent's submissions that the respondent was a lawful visitor to the appellant's premises at the time and that as the owner of the premises the appellant had a responsibility to ensure that the respondent was safe while visiting the premises, the respondent did not adduce any evidence to show or prove that there was anything wrong with the physical state or condition of the appellant's premises that predisposed him to any danger or that the appellant did or failed to do anything that endangered his safety in the premises or that his injury was occasioned by any breach of the appellant's duty of care as the owner of the premises.*'' I uphold the foregoing decisions to apply in the instant appeal. In the instant appeal, the issue of Occupiers' liability was not pleaded or advanced at the hearing. There was no proof of a connection between the accident and the occupier's negligence. The case was about a lack of protective gear, and the accident had occurred during work. The court

already established under the contract of employment that the liability for protective gear to the 1st respondent (employee) was on the employer. The court further established the 1st respondent as not a party to the contract for service between the appellant and 2nd respondent. In the circumstances, the court finds no connection between the occupier's liability and the work accident. It was the 2nd respondent who owed the 1st respondent a duty of care to ensure protective gear at the workplace as per the contract of employment. The decision of the trial court is faulted for attributing liability for the injury to the appellant without any basis, whether in pleading or based on the evidence before the court. The joint liability is set aside and substituted with liability at 100% on the 2nd respondent.

WHETHER THE QUANTUM AWARDED BY THE TRIAL COURT IS ERRONEOUS?

Appellant's submissions

39. The Learned trial Magistrate's award of pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the 1st Respondent. In his Plaint, the 1st Respondent averred that he sustained a '…fracture of the distal phalanx of the right index finger and right middle finger'. The award of Kshs. 3,000,000/- by the trial court was not just generous, it was excessive to the point of distortion.. The 1st Respondent's own medical report, admitted into evidence, assessed permanent incapacitation at 1%. No tendon, nerve, or total digit loss was reported. There was no amputation. No surgery. No long-term rehabilitation or occupational therapy. And yet, the court awarded a sum commensurate with catastrophic trauma. The 1st Respondent submitted for Kshs. 3,000,000/-, and the trial court simply adopted the figure without providing any reasoning, judicial analysis, or assessment of comparability. That is a misdirection. Courts are not bound by submissions, they are bound by principles. The

absence of any rationale for the award renders it vulnerable to appellate review. An award of damages must be guided by comparative precedent, not emotion or sympathy. For instance, in Stejes Agencies Ltd -v- Makali [2023] KEHC 22809 (KLR) the plaintiff was awarded Kshs. 350,000/- for the following extensive injuries; i. cut wound on the forehead right side ii. bruises to the face, iii. blunt injuries to the forehead with formation of hematoma, iv. deep cut wound on the anterior chest wall, v. blunt injuries on the lower back, vi. fracture of the proximal phalangeal bone of right little finger, vii. multiple bruises on the lower limbs and bruises on the upper limb. viii. His fractured finger needed to be operated on a. In Otieno -v- General Motors East Africa Ltd & 2 others [2022] KEHC 11475 (KLR) the Plaintiff was awarded Kshs. 450,000/- for the following extensive injuries; i. Soft tissue injury to the face. ii. Traumatic amputation of the left thumb at the proximal phalanx. iii. Fracture of the middle phalanx of the left finger. iv. Severe soft tissue injury of the left hand. b. In Kenya Power & Lighting Company Limited -V- Margaret Wanjiku Njunge [2019] eKLR the court awarded Kshs. 500,000/- for the following injuries; i. lost distal phalanx of the right thumb and ii. lost distal phalanx of the left little finger iii. the right index finger healed with a deformity and iv. the left ring finger healed with surgical scars v. permanent disability was assessed in the region of 15-20%. This Court has the power, and the responsibility, to intervene where a trial court's award constitutes a wholly erroneous estimate of loss. We respectfully submit that this is such a case. An appropriate and justifiable award, based on prevailing precedent and the extent of injury, would not exceed Kshs. 250,000/-, had liability been established. That is what fairness demands, not only for litigants, but for the integrity of judicial precedent.

40. GROUND 4 OF APPEAL- The Learned trial Magistrate's award of pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the 1 st Respondent. The trial court's award of loss of earnings against the Appellant was legally unfounded and factually unsustainable. There was no dispute that the 1st Respondent's employment contract, pay slips, and statutory reporting documents (including the DOSH form) all pointed to Essential Management as his employer. The 1st Respondent himself confirmed this under oath. At no point did he allege that he was employed, paid, or dismissed by the Appellant. Loss of earnings is not a general damages award—it is a special damage claim. It must be specifically pleaded, strictly proved, and most importantly, causally linked to the conduct of the party from whom it is sought. In Bank of Baroda -v- Kennedy Onyango [2007] eKLR, the court was unequivocal: "The court cannot award lost income against a party with no employment link to the claimant." That principle is not procedural pedantry, it is fundamental to fairness. No party should be required to compensate for income it never promised, paid, or withheld. In this case, the 1st Respondent's loss of income, did not arise from any act or omission of the Appellant. The Respondent stated at page 19 of the Record that his employment was terminated "after I demanded compensation.". But that demand was directed to Essential Management, his employer, not the Appellant. There is no evidence the Appellant dismissed him or took any retaliatory action whatsoever. To then saddle the Appellant with compensatory liability for the consequences of a decision made by a third party is legally incoherent and ethically unjust. The legal test is simple: if you did not employ him, and you did not cause his termination, you cannot be made to pay for his lost income. That principle has been upheld consistently in appellate courts see. Transmara Sugar Co Ltd v Danree Ke [2021] eKLR. The trial court failed to apply it here. Essential Management Ltd, his employer, was the

party with both the legal and moral duty to preserve his job or compensate him for its loss. The award against the Appellant, therefore, lacked both legal causation and factual grounding and must be set aside.

1st respondent's submissions

41. The global general damages awarded to the 1st Respondent by the lower court amounts to Ksh. 3, 311, 880. This arises from an award of Ksh 3,000,00 for global general damages, Ksh. 310,380 for loss of earnings and Ksh. 1500 for special damages and the cost of the suit to be borne by the defendants. The special damages were awarded as pleaded and proved before court in the plaintiff's list of documents dated 10th February 2016. For the loss of earnings, the 1" Respondent in his documents produced before court included his pay slip which is a proof of payment for the work he did. The pay slip indicates that the 1 Respondent was earning a monthly salary of Ksh 11,085. It is trite to note that loss of earnings is a special damage. Therefore, the same must be pleaded and proved. This pay slip is a prove that the 1" Respondent lost his monthly earnings due to the injuries suffered. The 1 Respondent was injured on 31 of October 2013 and filed his case at the trial court on the 10 of February 2016. This period between when the injuries occurred and the time when the suit was filed amounts to 28 months. Therefore, the computation of loss of earnings will be calculated as Ksh 11,085 X 28-310,380 On the issue of general damages for pain and suffering and loss of amenities, the injuries suffered by the 1" Respondent as a result of the accident subjected him to severe pain and suffering and even loss of his employment. The 1" Respondent suffered traumatic fractures of the distal phalanx on the right index finger and middle finger. The right hand being the 1 Respondent's dominant hand, the injuries have greatly affected his individual life and his ability to perform various tasks and earning a

living. As a result the 1" Respondent is not able to steadily engage in meaningful employment, hence has been subjected to great economic loss owing to the fact that the 1" Respondent is partially incapacitated by dint of losing two of his fingers in his right hand which is his dominant hand in performing his chores. In the case of Butler -Vs. Butler cited in John Kipkemboi & Another -Vs- Morris Kedolo [2019] eKLR the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows a) A person's loss of earning capacity occurs were as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury: b) 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: c) Damages under the heads of loss of earning capacity and loss of future earnings, which in English law ere formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on the: d) Loss of earning capacity can be a claim on its own, as where a 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: e) 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 improper to award it under its own heading: and f) 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." In the case of Patrick Kithaka Kivuti v John Mwangi [2017] KEHC

299 (KLR) the learned Judge set aside the decision of the Trial Court in a matter with closely similar facts to this which the Appellant lost of use of the right arm and had a dislocation of the right shoulder was described as permanent disability by the doctor in his report made about one year after the accident. The trial court awarded the Respondent Ksh 600,000. The learned Judge set aside this decision of the Trial Court and substituted it with Ksh. 2,000,000. Given that the 1st Respondent herein had provided sufficient evidence on the degree of injuries sustained, in the view of the severity of the injuries, and making due allowance to the inflation it is our humble view that the Trial Court was correct in awarding the 1 Responded the amount of Ksh 3,000,000 on this head.

Decision

42. The trial court awarded reliefs as follows-

'The Court guided by the precedents highlighted by the Parties herein, assessed amages and awards the same as follows:

a. Global general damages at Kshs. 3,000,000/-

b. Loss of earnings at Kshs. 310,380/-

c. Special damages at Kshs.1,500/-

d. The cost of this suit be borne by the Defendants.

e. Interest on (a) to (c) above at court's rate from the date of this judgment until payment in full.'' Contrary to the principle that courts are to be guided by comparable awards, the Learned Trial Magistrate just imposed global figures without any justification. That is not acceptable. The court is then obliged on appeal to re-evaluate the evidence and past comparable awards cited in the submissions by the parties before the trial court and reach

own conclusion(Selle & Another -V Associated Motor Boat Co. Ltd & Others [1968] EA 123).The 1st respondent's injury, as held by the trial court, was of amputation of the middle and index fingers of his right hand.(page 12 of ROA). The accident was not in dispute. A medical report by Dr. Okere indicated the injury opinion and prognosis as ' *partial amputations of the distal phalanges of the right index finger and middle finger. The injury was classified as maimed and the degree of incapacity is 1% ''*.(page 25 of ROA).

43. **On loss of earnings,-** the 1st respondent pleaded that he suffered loss of earnings from the date of injury of 31st October 2013 to date which the suit was filed on 10th February 2016 which he submitted was 28 months and computed for Kshs. 310,380/- and was so awarded. Conversely, the appellant submitted as follows- Loss of income or future earnings is compensated for real assessable loss which is Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:-difference between an "*It is important to realize that there is a award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."* I find that it is not enough for the Plaintiff to claim for loss of earnings. He must also provide actual proof of the loss. On cross-examination the plaintiff testified that he had not provided proof that as a result of the injury, he was unable to work. He testified that he had no proof that he had been dismissed from employment. He also had no proof, medical or otherwise that he was unable to work. In any event, he ought to have provided proof that his employer, i.e. the 1st Defendant. Essential Management Consultancy Services Ltd, dismissed him from his employment as a result of the injuries sustained herein. In Cecilia Mwangi & Another v Ruth W. Mwangi CA No. 251 of 1996 as

hereunder; "*Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as proved on a balance of probability.* 'The 1st respondent in the claim particularized the loss of earnings for Kshs, 11085 per month and in prayer stated from date of the accident upto date. The injury was assessed at 1% incapacity. The claimant in the witness statement did not disclose whether he was unable to work. The claim for termination lay under the Employment Act. I find that this head of the claim for loss of earnings was not proved on a balance of probabilities. The 1st respondent simply pleaded that he was later dismissed. The court concluded that he continued in employment at time of recovery hence the loss of earnings was not proved. The award for loss of earnings is set aside for lack of basis.

On the relief sought for general damages for pain, suffering and loss of amenities-3,000,000.

44. The 1st respondent submitted that he suffered traumatic fractures of the distal phalanx Index finger and middle finger. The plaintiff's dominant hand is the right hand; therefore, the said injuries have greatly affected his individual life. It has affected his ability to perform tasks living. In the case of Kaluworks Limited v' Nicholus Ngome Ko and earn a Kombo [2020] eKLR the lower court awarded the respondent Kshs 800,000 and the learned Judge agreed with the learned magistrate's view that the lack of three phalanges is indeed incapacitating being that the plaintiff is right-handed. Given that the plaintiff has provided sufficient evidence on the degree of injuries sustained and in view of severity of the injuries suffered by the plaintiff which were severe and making due allowance of inflation we humbly submit that an award of Kshs 3, 000, 000/= in general damages for pain, suffering and loss of amenities would be ample compensation. That as a result of the injuries that the plaintiff sustained, he has suffered loss of future earnings of sum of Kshs 11,085 per month until the

mandatory retirement of 60 years that the plaintiff would have worked. The 1st respondent submitted under this head he mitigate that as a result of the accident, the plaintiff has been incapacitated and as such he is unable to secure any meaningful employment with any employer. That the plaintiff be compensated for the risk that the disability has exposed him of losing his job and his diminished chances of getting an alternative job in the labour market. He urged the Honourable Court to exercise its unfettered discretion and award the plaintiff an award of Kshs 5,000,000 under this title as compensation for the plaintiff for loss of future earning.(page 54 of ROA)

45. Conversely, the appellant submitted as follows before the lower court - it is settled practice that even where a suit fails on liability, a court remains duty bound to assess damages it would have awarded in any event. To that end, the Defendant proceeds to address damages as follows:- According to the Plaint, the Plaintiff sustained a

a) Traumatic fracture of the distal phalanx of the right index finger.

b) Traumatic fracture of the distal phalanx of the right middle finger.

c) Bleeding and pain. In Stejes Agencies Ltd -v- Makali [2023] KKEHC 22809 (KLR) The plaintiff sustained a 'cut wound on the forehead right side/ bruises to the face, blunt injuries to the forehead with formation of hematoma, deep cut wound on the anterior chest wall, blunt injuries on the lower back, fracture of the proximal phalangeal bone of right little finger, multiple bruises on the lower limbs and bruises on the upper limb. He had not fully recovered from the injuries and his fractured finger needed to be operated on'. The High Court on appeal set aside the trial court's award of Kshs.400,000/- and substituted it with an award of Kshs. 350,000/-. In Samuel Kariuki Kinya -V- Makenzie & Another HCC 520 of 1987, the plaintiff suffered soft tissue injury, a fractured his right index finger and had deep

abrasions of the arm and was awarded Kshs 100,000/=. In Mogaka Sydney -V- Faith Ndunge Nyundo H.C.C.A No 29 of 2017 for similar injuries the award was reduced from Ksh. 450,000/= to 300,000/=. In Micheal Okello Vs Priscilla Atieno H.C.C.A NO 45 of 2019 the appellant was awarded Ksh.250,000/= for severe soft tissue injuries. (PAGE 58 OF ROA). In Patrick Odhiambo obiro Vs The catholic Diocese of Nakuru HCCC No 177 of 1995 the plaintiff sustained a cut on the thumb, cut on the 3rd and 4th ring left hand, fracture of the middle Phalanx of the left hand and soft tissue injuries and was awarded Ksh.400,000. The appellant opined that compensation of general damages of Kshs. 200000 was sufficient.

Decision

46. The trial court did not justify its award of Kshs. 3,000,000 for general damages and loss of amenities. The appellate court had to consider the remedy on merit to reach its own conclusion (see Selle & Another -V. Associated Motor Boat Co. Ltd & Others [1968] EA 123). In P.J Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal **No.6 of 2017 (2018) eKLR** the court held as under: ***".....it is generally accepted from the laid down legal principles on the assessment of quantum that personal injuries are difficult to access with precision and accuracy so as to satisfy the claimant. The court's discretion has been left to individual judges to exercise judicious with respect to the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to***

apply the principles in various case law and authorities decided by the superior courts on the matter." I uphold the decision to apply in the instant case.

47. The appeal in this case was based on the judgment of the lower court, where a medical report by Dr. Okere was presented indicating the injury opinion and prognosis as 'partial amputations of the distal phalanges of the right index finger and middle finger.' The injury was classified as maim, with a degree of incapacity of 1%. (page 25 of ROA). In the decision relied upon by the 1st respondent (plaintiff), that is, Kaluworks Limited v. Nicholus Ngome Ko and Earna Kombo [2020] eKLR, the appellate court found that the injuries were as follows -'*The appeal at hand is founded upon a personal injury claim based on the following injuries sustained by the respondent,*

a) Traumatic amputation of the index finger.

b) Traumatic amputation of the middle finger.

c) Traumatic amputation of the ring finger'' The foregoing were the injuries in Kaluworks Limited v Nicholus Ngome Kombo [2020] KEHC 2793 (KLR) and were worse than in the instant appeal. In the decision(Kaluworks), the trial court awarded general damages for pain and suffering for Kshs. 800000. On appeal the amount was not in dispute and was upheld. The appeal decision was in 2020. The court found that the decisions cited by the appellant before the lower court had lesser injuries of fractures and not amputations hence not comparable. The decision cited by the 1st respondent was the closest. The court, taking into account the award in Kaluworks Limited v Nicholus Ngome Kombo

[2020] KEHC 2793 (KLR), factoring in inflation since the delivery of the lower court decision in 2019, the court finds an award of Kshs. 1,000,000 was sufficient compensation for General damages for pain and suffering, loss of amenities as at 2024 when the decision of the lower court was rendered. The award of Kshs. 3,000,000 is set aside and substituted with an award for general damages for pain and suffering and loss of amenities for **Kshs. 1,000,000/- .**

48. In the upshot the Court allows the appeal. The Judgment and Decree of the Hon. B.M. Cheloti (PM) delivered on 9th September 2024 in Nairobi in MCCC Cause No. E738 of 2016 is set aside and substituted as follows-

The claim is dismissed against the 2nd defendant. The claim for loss of earnings is dismissed. Judgment is entered for the plaintiff against the 1st Defendant **(Essential Management Consultancy Services Ltd)** as follows-

A. Liability 100%

B. General damages for pain and suffering and loss of amenities – Kshs. 1,000,000

C. Special damages Kshs. 1,500

Interest at court rate (B and C above) plus costs from date of judgment until payment in full.

49. The appeal was partially successful. I order each party to bear own costs.

50. 30 days stay is granted.

51. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH OCTOBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ndegwa

Respondent –Nyangito