

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**MACHOKOS**  
**APPEAL NO. 13 OF 2021**  
*(Formerly Machakos HCCA No. 150 of 2015)*

**ALPHARAMA LIMITED.....APPELLANT**  
*VERSUS*

**BENJAMIN KASYOKI KYULE.....RESPONDENT**

**JUDGMENT**

1. The Appeal herein arises from the decision of Hon. E.K Too Senior Resident Magistrate in Mavoko PMCC No. 497 of 2013 delivered on 31<sup>st</sup> July, 2015. In the plaint dated 30<sup>th</sup> May 2013, the Respondent herein (Plaintiff in the lower Court suit) sought general damages for injuries he alleged to have sustained as a result of an industrial accident that occurred in the course of his employment with the Appellant.
2. The Respondent attributed the accident to negligence and breach of the terms of the contract of employment on the part of the Appellant. The Respondent prayed for general damages, special damages and costs of the suit together with interest at Court rates.

3. The Appellant filed a defence denying any liability as alleged or at all. The Appellant denied that the Respondent was its employee as at the time he alleged to have been injured. It attributed the accident (if at all) to negligence on the part of the Respondent.
4. In his judgment delivered on 31<sup>st</sup> July 2015, the Trial Magistrate found the Appellant 90% liable for the accident and awarded the Respondent Kshs. 200,000/- as general damages, Kshs 2,050 as special damages plus costs and interest.
5. The Appellant being dissatisfied with the Judgment of the Trial Magistrate filed the instant Appeal vide its Memorandum of Appeal dated 24<sup>th</sup> September 2015 in which it raised the following grounds: -
  - i. The Learned trial Magistrate misdirected himself and erred in law and in fact by holding that the Plaintiff had proved his case against the Defendant on a balance of probabilities.
  - ii. The Learned trial magistrate misdirected himself and erred in law and in fact by disregarding the Defendant's

Witness testimony and holding the Appellant 100% liable for the accident the subject of this suit.

- iii. The learned trial magistrate misdirected himself and erred in law and in fact by failing to enter on record part of the Defendant's witness exhibits and hence arrived at an erroneous finding on liability.
- iv. The learned trial magistrate misdirected himself and erred both in law and in fact in failing to consider the Defendant's overwhelming evidence on record and hence arrived at an erroneous finding on liability.
- v. That the learned trial magistrate erred in law and in fact by failing to find that the plaintiff did not prove that he was the defendant's employee at the material time or at all and hence arrived at an erroneous finding on liability.
- vi. The learned trial magistrate erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis a vis the injuries sustained by the plaintiff.

- vii. That the learned trial magistrate misdirected himself and erred in law and in fact by totally failing to consider the Defendant's Submissions on record thus arrived at an erroneous finding on liability and quantum.
  - viii. The learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.
6. The Appellant prayed for the following Orders: -
- i. That the Appellant's appeal be allowed.
  - ii. That the whole of the judgment delivered on 31<sup>st</sup> day of July, 2015 against the Appellant on liability.
  - iii. That the Respondent's suit in the lower Court be dismissed with costs to the Appellant.
  - iv. Without prejudice to the foregoing the whole of the judgment delivered on 31<sup>st</sup> day of July, 2015 against the Appellant on quantum be set aside.
  - v. That without prejudice to the foregoing, Special Damages be substantially reduced.
  - vi. That the costs of this Appeal be awarded to the Appellant in any event.

vii. Such other and/or further relief as this Honourable Court may deem just to grant.

7. The Appeal was originally filed in the Civil Division of the High Court at Machakos as High Court Civil Appeal No. 150 of 2015. Directions were given that the appeal be transferred to this court and that the same proceeds by way of written submissions.

### **Appellant's Submissions**

8. In its submissions dated 18<sup>th</sup> February 2022, the Appellant contended that the trial court erred in finding that the Respondent was the Appellant's employee on 21<sup>st</sup> May 2013. According to the Appellant, from the attendance register it produced for the month of May 2013, the Respondent's name does not appear therein as he was not working for the Appellant.
9. It is on this basis that the Appellant submitted that the trial court erred in finding that the Respondent had proved liability against the Appellant
10. On the issue of quantum, the Appellant asserted that the trial court awarded an excessive amount for a superficial

burn wound on the right leg. While citing the case of ***Devki Steel Mills Ltd v Jared Osodo HCCA No. 232 of 2024 Nairobi***, the Appellant submitted that the Court of Appeal reduced an award of Kshs 170,000 to Kshs 80,000 where the Respondent had sustained burns on the left shoulder, burns on the lower abdominal wall, burns on both lower legs and feet and burns on both upper legs.

11. In conclusion the Appellant urged this Court to find merit in its Appeal and allow the Appeal as prayed.

### **Respondent's Submissions**

12. The Respondent on the other hand crystallised the issues for determination to be the liability of parties and quantum of damages awardable to the Respondent.
13. On liability, the Respondent contended that the trial court was correct in holding the Appellant 90% liable for the accident. It was his submission that in his pleadings and testimony before the trial court, he blamed the Appellant for failing to provide him with protective gears which evidence was not rebutted by the Appellant.

14. The Respondent submitted that the Appellant's claim that the trial court erred in holding the Appellant 90% while the Respondent held 10% liable for the accident cannot hold any water as it did not prove what preventive measures or protective gears were provided to protect the Respondent.
15. With regard to the allegation by the Appellant that the Respondent was never its employee, the Respondent submitted that he did not have any control in ensuring that his name had been entered in the register as his duty, mandate and responsibility only ended upon him surrendering his identity card and reporting to the Appellant's clinic nurse who had unfettered powers to record and enter the name in the register or ignore the same.
16. In addition, the Respondent submitted that upon the Respondent getting injured, he was taken to Athi River Health Centre and the hospital bill was settled by the Respondent an act which confirms that the Respondent was the Appellant's employee. In this regard, the Respondent submitted that the finding on liability was proper as the Appellant breached their statutory duty.

17. On the quantum of damages awarded by the trial court, the Respondent submitted that as per the medical summary from Athi River Health Centre and Medical Report by Dr Titus Ndeti, which documents he produced as evidence, he suffered superficial burns on both the right hand and right leg which resulted in lots of pain and ugly scars which are of a permanent nature. The Respondent thus submitted that based on the nature of injuries he suffered, the award of Kshs 200,000 by the trial court was proper and ought to be upheld by this court.
18. In conclusion, the Respondent urged the court to dismiss the instant appeal with costs to the Respondent.

### **Analysis and Determination**

19. This is a first appeal. The court has to evaluate the evidence and record of the trial court afresh before drawing its own conclusion. From the record, the Respondent testified and called one witness in furtherance of his case while the Appellant called one witness.
20. The Respondent's evidence as per the appeal record was adduced firstly by Dr Titus Ndeti who testified as PW1 and

introduced himself as the doctor who examined the Respondent and issued him with a medical report. In his testimony, PW1 stated that he examined the Respondent and noted that the Respondent suffered superficial burn wounds on his right hand and right leg. He opined that the Respondent suffered harm which caused him pain and suffering that would heal with no long term disability anticipated.

21. The Respondent testified as PW2 and stated that he was working for the Appellant as an offloader on 21<sup>st</sup> May 2013 when as he was offloading lime by hand from the container, the lime which was packed in 25kgs bags poured from the storage bags and burned his hands and leg. He averred that he was given first aid and thereafter taken to Athi River health Centre for treatment.
22. The Respondent blamed the Appellant for the accident stating that he was not warned that the chemical could scotch. It was also his testimony that although he had been issued with an apron and gloves, they were not sufficient as the apron was short and the gloves were torn.

23. On cross examination, the Respondent stated that during his employment with the Appellant, he was paid in cash save for 23<sup>rd</sup> March 2013 and 28<sup>th</sup> March 2013 when he was paid through the bank.
24. On re-examination, the Respondent stated that in March 2013 he was working in the mining department but in May 2013, he was in loading and offloading department where wages was paid in cash by Mr Silas, the Appellant's accountant.
25. The Appellant called its Human Resource Manager, Ruth Ndalizu who testified as DW1. The Appellant's witness stated that the Respondent was not injured on 21<sup>st</sup> May 2013 as he was not in the Appellant's employment. In support of this position, the Appellant relied on the attendance register and the clinic attendance register which was produced as DExb 1 and DExb 2 respectively which documents did not have the Respondent's name.
26. On cross examination, DW1 stated that accidents are recorded by the respective supervisors who personally escort the injured employees to the Company clinic. She also

testified that the Respondent worked for the Appellant in March 2013 but was not in the Appellant's employment in May 2013.

27. Upon carefully considering the grounds of appeal, the record of appeal and the submissions of the parties, I find that the issues that present themselves for determination are: -
- i. Whether the trial court erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent;
  - ii. Whether the trial court erred in law and fact in its finding on liability
  - iii. Whether the award on quantum damages was justified

*Whether the Learned Magistrate erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent*

28. The Appellant maintained that the Respondent was not its employee in May 2013 when he alleges to have been injured while in the course of his employment. In support of this position, the Appellant, through its witness DW1 produced as

exhibit, the attendance register and the clinic register to show that the list of persons indicated therein did not include the Respondent's name.

29. I have analyzed the attendance register at page 26 of the Record of Appeal and noted that it is for the period between 30<sup>th</sup> May 2013 to 5<sup>th</sup> June 2013 which has 13 pages. The Appellant produced only one page of the register for the period between 16<sup>th</sup> and 22<sup>nd</sup> May, 2013 leaving doubt as to whether the list with the name of the Respondent was deliberately left out.
30. The Appellant further produced records of the clinic which look obviously altered on the dates. The same is further not an accident register but a register of persons treated at the clinic. The registers produced by the Appellant were therefore not of much help in proving whether or not the Respondent was at work on the date he allegedly got injured. In the absence of any other evidence showing that the Respondent was not at work on the 21<sup>st</sup> May 2013, I find that on a balance of probabilities, the Respondent was

injured while in the course of his employment with the Appellant.

*Whether the learned trial magistrate erred in law and fact in finding on liability*

31. The Respondent testified that he was injured on 21<sup>st</sup> May 2013 when he was on duty working for the Appellant. He produced a medical report and blamed the Appellant on grounds that he was given defective protective gear. It was his testimony that the apron he was issued with was short and the gloves were torn. In the case of **Bungoma Criminal Appeal No. 144 of 2011; Peter Wafula Juma & 2 others vs Republic**, the court held;

*“Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence.... Even in civil cases, when prima facie evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In*

*both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where evidential burden is not discharged, judgment may be entered against the defendant - in case of a civil case - or a conviction against the accused - in case of a criminal case.”*

32. It is trite law that the employer has a statutory duty of care to provide a safe working environment for employees. The Appellant herein did not lead any evidence to show that it had provided its employees with protective gear. The burden of proof was upon the Appellant to show that the employees were provided with safety gear which were effective. I am therefore in agreement with the findings of the trial court on the liability and find no basis to disturb the award. The award on liability at ratio of 90:10 in favour of Respondent is upheld.

*Whether the award on quantum damages was justified*

33. The award of general damages is discretionary and an appellate Court will only interfere with quantum where the

Trial Court arrived at the quantum after taking into account irrelevant factors, or failing to take into account relevant factors or where the quantum is inordinately low or inordinately high as to amount to an erroneous estimate of damages.

34. The principle of law on whether a court on appeal can disturb the quantum of damages was well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727**. At page 730 Kneller J.A. said: -

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*

35. The Appellant submits that the Trial Magistrate erred in law and fact by failing to be guided by the principles of law in awarding general damages. It further submitted that the award of Kshs 200,000 as general damages in favour of the Respondent was inordinately high considering the injuries suffered by the Respondent.
36. The Respondent on the other hand submitted that the Trial Magistrate exercised his discretion judiciously and that the award was fair and commensurate with the injuries sustained.
37. In his evidence, PW1, the medical doctor who examined the Respondent stated that the Respondent suffered superficial burn wound on his right hand and right leg.
38. In **Eldoret Steel Mills limited v Maurice Ochieng [2019] KEHC 2411 (KLR)**, the Respondent had 1% superficial burns and the trial court award Kshs.230,000/= as general damages, the appellate court reduced the same to Kshs.150,000/=.

39. In **Eastern Produce Kakuzi Ltd v Edwin Wasike (2013)** **eKLR**, the court awarded Kshs.100,000/= for chemical burns to both legs and toes.
40. Taking into account the comparable authorities and the inflationary trends, I find the award by the trial court fair and I find no reason advanced to warrant this court to interfere. I therefore decline to interfere with the award of Kshs. 200,000 as general damages.
41. In view of the findings hereinabove, the appeal is unmeritorious and is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY  
THIS 29<sup>TH</sup> DAY OF OCTOBER, 2025.**

**M. ONYANGO  
JUDGE**