

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MACHAKOS
ELRC APPEAL NO. 8 OF 2021
(FORMERLY MACHAKOS HCC APPEAL NO. 153 OF 2018)

**DEVKI STEEL MILLS
LIMITED.....APPELLANT**
VERSUS
**VINCENT SAKWA
MALONGO.....RESPONDENT**

JUDGMENT

1. By a plaint dated 18th August 2015 the Respondent (Plaintiff in the trial court) alleged that on or about 30th April 2015, he was lawfully working for the Appellant as a casual laborer when the Appellant (Defendant in the trial court) through its supervisors negligently and in breach of its statutory duty assigned him duties of carrying metal rods wherein his right leg was badly cut by a metal rod as a result of which he sustained serious bodily injuries.
2. The particulars of breach of contractual obligation by the Appellant was set out at paragraph 5 of the Plaint as follows:

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- i. Assigning the plaintiff duties without due care and attention
- ii. Exposing the plaintiff to risk of damage or injury which they knew or ought to have known
- iii. Failing to provide a safe place of work
- iv. Failing to provide the necessary working implements
- v. Failing to provide any protective devices and providing protective devices which are defective
- vi. Assigning plaintiff duties to work with defective machine.

3. The Respondent particularized the injury as a deep cut on the right leg and sought for a judgment against the defendant for:-

- i. General damages
- ii. Special damages for the medical report of Kshs. 3000
- iii. Interest at courts rates from the date of filing this suit
- iv. Costs of this suit

4. The Appellant entered appearance and filed a statement of defence dated 30th November 2015 denying the allegations by the Respondent against it. It averred on a without prejudice basis, that if the accident occurred, then the same was caused due to the negligence on the part of the Respondent.
5. The Appellant particularized the negligence on the part of the Respondent as: -
 - i. Working without due care and attention
 - ii. Willfully exposing himself to the risk of injury
 - iii. Displaying poor and or unprofessional workmanship thereby causing the said accident
 - iv. Failing to be alert and on the look out at all material time so as to avoid the accident
 - v. Being careless and negligent while performing his duties
 - vi. Failing to exercise reasonable skills in carrying out his duties
6. The suit proceeded to full hearing and the trial magistrate after considering the evidence entered a judgment against the Appellant in the following terms: -

- i. General damages Kshs. 130,000
- ii. Less 20% liability
- iii. Special damages Kshs 3,000
- iv. Costs to the Plaintiff

- 7. The general damages were to attract interest at court rates from the date of judgment while the special damages were to attract interest at court rates from the date of filing suit.
- 8. The Appellant being dissatisfied with the judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal dated 28th July 2017:

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- i. THAT the learned trial Magistrate erred in law and fact in holding that the Respondent was injured while in the Appellant's employment despite overwhelming evidence adduced by the Appellant to the contrary thereby arriving at a finding that was manifestly unjust and unfair.
- ii. THAT the learned trial Magistrate erred in law and fact by disregarding the evidence adduced by the Appellant at trial and/or failing to judiciously

analyze the said evidence thereby arriving at a finding that was erroneous and manifestly unjust.

- iii. THAT the learned trial Magistrate erred in law and fact in holding the Appellant 70% liable for the alleged accident without setting any basis for doing so which decision was highly erroneous and manifestly unfair and unjust.
- iv. THAT the learned trial Magistrate erred in law and fact by disregarding and/or failing to judiciously analyze the Appellant's written submissions and case law cited thereby arriving at a decision that was highly erroneous and manifestly unfair and unjust.
- v. THAT the learned trial Magistrate erred in law and fact by disregarding and/or failing to judiciously analyse the medical evidence on record as well as the Appellant's submissions on record thereby arriving at an award of Kshs. 130,000/- as general damages
which award was highly excessive and exaggerated and an erroneous estimate of the damages payable

for the nature of injuries alleged to have been sustained.

vi. THAT the Appellant shall upon receipt of the typed proceedings file a supplementary memorandum of appeal to include other grounds and reasons to be adduced at the hearing hereof.

9. The Appellant seeks the following orders: -

i. THAT the judgment of the trial court be set aside.

ii. THAT the Respondent's suit in the lower court be dismissed.

iii. THAT the Appellant be awarded the costs in both the lower court and the entire appeal.

10. The appeal was disposed of by way of written submissions. The Appellant filed its submissions on 6th October 2020 whereas the Respondent filed his submissions on 28th January 2021.

Appellant's Submissions

11. In its submissions, the Appellant crystallized the issues for determination from the grounds of appeal to be: -

i. Whether the learned magistrate judiciously analyzed the evidence on record

- ii. Whether the award on damages was manifestly excessive as to warrant interference by this court.

12. On the first issue, the Appellant submitted that whereas the Respondent alleged to have been injured while in the course of his employment, and that he knew the company rules that the accident would be recorded, he contradicted himself during cross examination that he did not know whether the accident was recorded. The Appellant maintained that it disputed the occurrence of the alleged accident and that DW1, its supervisor, produced the attendance register which showed that the Respondent worked for 8 hours and 21 minutes and signed out with no injury on the day he alleged to have been injured.
13. Further, the Appellant submitted that the trial court failed to examine the evidence tabled by the Respondent who in cross examination admitted that the treatment notes lacked any stamp from Athi River Medical Services where he alleged to have been treated. The Appellant therefore maintained that the documents were not sufficient to establish on a balance of probabilities that the Respondent sustained the injuries. In addition, the Appellant submitted that the

Respondent never testified on why he continued working for hours even after being injured and that the treatment notes did not state whether the injury was serious or otherwise. It is on this basis that the Appellant submitted that it was erroneous for the trial court to make assumption that the Respondent continued working because the injuries were not bad.

14. The Appellant also submitted that the trial court faulted the Appellant's injury register and attendance sheet citing that the same could have been manipulated yet there was no evidence from the Respondent of manipulation of the accident register as its contents were not challenged. The Appellant submitted that the trial magistrate took into account irrelevant and extraneous matters by holding that the accident register could have been manipulated.
15. While challenging the liability apportioned to it at 80%, the Appellant cited the case of ***Timsales Ltd vs Willy Nganga Wanjohi (2006)eKLR*** and asserted that the trial court failed to consider that not every injury is necessarily as a result of someone's negligence. The Appellant submitted that even if the accident occurred, the trial court having

acknowledged that the Respondent never gave evidence as to what caused him to slide, erroneously proceeded to hold the Appellant 80% liable. The Appellant thus submitted that even if the accident occurred, then in the absence of evidence as to what caused the Respondent to slide, the only inference to be drawn is that he was in breach of duty to ensure his own safety.

16. On the second issue as to whether the award on damages was manifestly excessive to warrant interference by this court, the Appellant submitted that the trial court did not lay any basis for the award made in favor of the Respondent. The Appellant asserted that the Respondent allegedly sustained a cut on his chin and that according to the medical report of Dr Wambugu who examined the Respondent more than one year after the accident, the injury was soft tissue in nature from which the Respondent had made full recovery. The Appellant submitted that the trial court failed to take the medical report by Dr Wambugu into account resulting in an award that was excessive.
17. The Appellant thus opined that the sum of Kshs. 80,000 is sufficient and commensurate to the injuries sustained by the

Respondent. In support of this position, the case of ***PF VS Victor O. Kamadi & Another (2018)eKLR*** was cited where the appellant who sustained multiple soft tissue injuries was awarded Kshs 100,000.

18. The Appellant therefore urged the court to allow the appeal.

Respondent's Submissions

19. The Respondent on his part identified the issues for determination to be;-

- i. Whether the trial magistrate applied the correct principles of law and available facts in apportioning liability in the ratio of 70:30 (sic) in favor of the Respondent
- ii. Whether the trial magistrate applied the correct principles of law and available facts in assessment on damages payable under general damage.

20. In addressing the first issue, the Respondent submitted that from DExh 2 (accident register), produced before learned trial magistrate, it was recorded there was an accident reported. According to the Respondent all that was expected of him after the occurrence of the accident was to report the accident, that he was taken to the company clinic and was

attended to by the company doctor. The Respondent submitted that it was not his responsibility to make entries to the accident register but as testified by DW1, it was the responsibility of the company doctor to make such entries.

21. The Respondent submitted that the trial magistrate therefore did not err in finding that the Appellant breached their statutory duty by failure to provide the Respondent with any safety apparels as none was ever offered to him. While citing Section 29 of the Factories Act, the Respondent maintained that the Appellant failed in its statutory obligation to provide him a safe working environment as a result of which he sustained serious injuries. In support of this position the Respondent cited the case of ***Simba Posho Mills Ltd v. Fred Machíra Ongutí, Nakuru H.C.C.C No. 65 of 2002.***
22. The Respondent submitted that in his judgment the learned trial magistrate was well guided by section 6 of the Occupational Safety and Health Act (Act No. 15 of 2007), section 101 and section 10(3) of the Work Injury Benefits Act in finding that the Appellant herein had statutory obligation to provide safety gear and safe working environment to the Respondent.

23. The court was urged to uphold the judgment of the trial court on this head.
24. On the second issue, the Respondent submitted that the he suffered serious injuries as per the plaint he filed in court which injuries were confirmed by the medical report and treatment notes from Athi River all produced before the learned trial magistrate.
25. The Respondent maintained that the trial magistrate did not err in awarding him Kshs 130,000 as general damages as the award is comparable to the injuries and the amounts awarded in other comparable cases.
26. The court was therefore urged to dismiss the appeal with costs.

Analysis and Determination

27. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving allowance for the same. **[See *Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 12*].**

28. Having considered the grounds of appeal herein as well as the submissions filed by the parties, I find that the issues for determination are whether the Respondent proved his case on a balance of probabilities and whether the award made was commensurate with the injuries he sustained.
29. PW1, the Respondent herein testified on 7th November 2016 and adopted his witness statement recorded on 18th August 2015 as his evidence in chief. It was his testimony that he was injured while in the course of his employment with the Appellant on 30th April 2015.
30. On cross examination, the Respondent stated that after the accident, he reported the incident to his supervisor whereupon he was taken to the company doctor for treatment. He stated that he was further treated on 5th May 2015 at Athi River hospital. PW1 explained that he was injured by a metal, "Z" that he was carrying when he slid. He denied liability for the injury and stated that he did not have protective apparel.
31. On re-examination, the Respondent reiterated that he reported the accident to his supervisor who took him to the company doctor for treatment.

32. The Appellant called its supervisor, Mr. Joshua who testified as DW1 on 15th May 2017. DW1 stated that he supervised the Respondent on the day he alleged to have been injured while at work and stated that the Respondent worked from 5:45 am to 2:08 pm and checked out without reporting any incident. He denied that the Respondent was injured on the said date and maintained that no accident was reported to have occurred. He explained that whenever an employee was injured while at work, he would be notified and he would take the injured employee to the company clinic. That incase the injury was serious, the employee would be referred to Athi River.
33. On cross examination, DW1 testified that the accident register is kept by the company doctor and it is filled in the presence of the injured employee and the supervisor. He reiterated that the Respondent was not injured on that day as DW1 was supervising the department where the Respondent worked and no accident was reported.

Liability

34. From the Memorandum of Appeal herein and the submissions of the Respondent, the court notes that the

parties mentioned that liability was apportioned at the ratio of 70:30 against the Appellant. However, from a perusal of the impugned judgment, the record shows that the trial court apportioned liability at 80:20 against the Appellant.

35. The Appellant denied the occurrence of the alleged accident arguing that it was not recorded in the Appellant's Accident Register. The Appellant in support of its case produced the Accident Register as Defence Exhibit 2 found at page 48 of the Record of Appeal. I have examined the said copy of accident register and although there was only one incident reported on 30th April 2015 involving one Kipkurui Mutai, I am not convinced that it is conclusive proof that the Respondent was not injured at work. This is because from the Defence Exhibit 2, at page 46 of the Record of Appeal, in the document showing the employees at work on 30th April 2015 the name of the employee recorded in the Accident Register is missing. Further, Defence Exhibit 2 does not look like a register but rather, an extract from a register which could have been deliberately altered to exclude the name of the Respondent.

36. I therefore find that the defence by the Appellant that the Respondent was not injured on 30th April 2015 is not supported by the evidence on record.
37. The Respondent's case is that he was not provided with safety apparel which would have prevented him from sustaining the injuries he alleges to have suffered while in the course of employment.
38. Courts have held that although an employer owes a duty of care to its employees, this duty is not absolute and it does not absolve the employee from the duty to exercise due care to avoid exposing himself from foreseeable risk.
39. The Respondent in his testimony before the trial court stated that he slid as a result of which the metal he was carrying inflicted a deep wound on his right lower leg. The Respondent further stated that if he had gumboots, the accident would have been prevented. However, he did not explain what led to him sliding. The Appellant on the other hand apart from denying the occurrence of the alleged accident, did not rebut the evidence that the Respondent was not issued with safety apparel and particularly gumboots.

40. It is my view that the accident that occurred on 30th April 2015 was caused by the negligence of the Appellant and contributed to by the Respondent. The Appellant failed to provide the Respondent with safety apparel while the Respondent on his part, did not take the necessary precautions to avoid getting injured by the metal.
41. In view of the foregoing analysis, I find that the trial court was right in apportioning liability between the parties at 80% and 20% in favor of the Respondent.
42. I therefore find no reason to disturb the finding of the trial court on liability.

Quantum

43. It is well-settled principle of law that appellate court will not disturb discretionary award of damages except if the trial court proceeded on wrong principles or misapprehended the evidence. In the case of **Butt v Khan [1982-88] KAR 1** the court held that: -

“An appellate court will not disturb an award of damages unless it’s 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.”

44. The Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)) KLR 30** stated as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”

45. A doctor’s opinion in the medical reports is one of the material evidence to consider in determining the quantum of damages in an injury claim. In the medical report at page 11 of the Record of Appeal, Dr Cyprianus Okoth Okere examined the Respondent on 6th July 2015 and opined that the Respondent sustained a deep cut on the right lower leg which injury he classified as harm.

46. In the case **Kipkebe Limited v Peterson Ondieki Tai [2016] KEHC 5422 (KLR)**, the Respondent was awarded Kshs 30,000.00 for the following injuries; deep cut wound on the left leg, chest contusion and bruises on the left shoulder.
47. Although the court is conscious of the fact that no two cases are usually similar in terms of the nature and extent of the injuries sustained, the balance is always to find the similarity of the injuries suffered in making awards on quantum.
48. Relying on the case **Kipkebe Limited** (supra) I find that the award for general damages by the trial Magistrate in the sum of Kshs. 130,000 was excessive and inordinately high.
49. Taking all factors into account, including the rate of inflation, I find a sum of Kshs 40,000 reasonable damages for pain and suffering in the present case. I therefore set aside the award of Kshs 130,000 and substitute the same with Kshs. 40,000.
50. In the end, this appeal partly succeeds. The trial court's decision on quantum is set aside and substituted with the following:

<i>General damages</i>	<i>Kshs. 40,000</i>
<i>Less 20% contribution</i>	<i>Kshs 8,000</i>

Sub Total Kshs. 32,000

Add special damages Kshs. 3,000

Total **Kshs. 35,000**

51. I also award the Respondent costs of the suit and interest on General damages in the trial court at court rates from the judgment date until payment in full. Interest on special damages shall be from date of judgment in the trial court.
52. Since this appeal has partially succeeded, I order that each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THIS 29TH DAY OF OCTOBER, 2025.**

**M. ONYANGO
JUDGE**