REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E043 OF 2025

MASAI ROLLING MILLS LIMITED…….

…….....APPELLANT

-VERSUS

MESHACK NAVUIMBA MAKOKHA.....1ST RESPONDENT

BARFORD COMPANY LIMITED…….....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. R.A. Oganyo (CM) delivered on 21st January 2025 in Kajiado CMCC 65 of 2018)

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. R.A. Oganyo (CM) delivered on 21st January 2025 in Kajiado CMCC 65 of 2018 between the

parties filed a Memorandum of Appeal dated the 12th of February 2025 seeking the following orders: -

a) **The appeal herein be allowed.**

b) **The learned Magistrate's judgment and decree issued in Kajiado Civil Suit number 65 of 2028 be reviewed, varied or set aside.**

c) **The Honourable Court finds that the 1st Respondent was not injured at the Appellant's premises and was not injured as a result of the Appellant's negligence.**

d) **The 1st Respondent was not an employee of the Appellant.**

e) **The quantum award be reduced to a commensurate amount, taking note of the nature and extent of the injuries and the awards made for comparable injuries.**

f) **The costs of this appeal and the trial court be awarded to the Appellant.**

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law and fact in disregarding the evidence produced and proceeding to find that the 1st Respondent had proved his employment with the Appellant.

3. The Honourable Magistrate erred in law and in fact in disregarding the evidence produced and proceeded to find that the 1st Respondent had proved he was injured while at work at the Appellant's premises.

4. The Honourable Magistrate erred in law and in fact in finding that the Plaintiff had never been issued with PPEs, holding that evidence of the same had not been produced, whereas the 2nd Defendant had filed the PPE issuance forms.

5. The Honourable Magistrate erred in law and in fact in finding the Appellant liable yet the 1st Respondent did not prove that his injuries were caused by the Appellant's negligence.

6. The Honourable Magistrate Respondent erred in law and in fact in failing to find that the accident was caused by the negligence of the co-worker.

7. The Honourable Magistrate erred in law and in fact in awarding a liability of 90:10 when the 1st Respondent had two (2) other work injury related cases.

8. The Honourable Magistrate erred in awarding a sum so inordinately high, that it represented an excessive and erroneous award for the injury suffered.

9. The Honourable Magistrate erred in not considering that the 1st Respondent did not call any witness to corroborate his evidence thus did not meet his evidential burden.

10. The Honourable Magistrate erred in law and in fact in shifting the burden of proof to the Appellant.

11. The Honourable Magistrate erred in failing to hold that the 1st Respondent had failed to prove negligence on the part of the Appellant while the onus of proof law with the 1st Respondent.

BACKGROUND TO THE APPEAL

12. The 1st Respondent filed a suit against the Appellant vide a Plaint dated 5th March 2018 seeking the following orders: -

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

b. Costs of this suit.

c. Interests in (a) and (b) at court rates.

d. Any other relief that this Honourable Court may deem fit and just to grant.

(pages 10-11 of Appellant's ROA dated 30th June 2025).

13. The 1st Respondent filed his Verifying Affidavit sworn on March 5, 2018, along with his list of documents of the same date, which is attached to the bundle of documents, as well as a list of witnesses of the same date and a witness statement filed on March 6, 2018 (pages 12-20 of ROA). Additionally, the 1st Respondent submitted a further list of documents dated June 13, 2023 (pages 21-23 of ROA).

14. The claim was opposed by the Appellant, who entered an appearance and filed a defense dated April 9, 2018 (pages 24-25 of the ROA). They also submitted a list of witnesses dated October 22, 2021; witness statement of MOSES PARSITAU KISAKUI of the

same date; and a list of documents dated April 9, 2018, with the bundle of documents attached (pages 26-43 of the ROA).

15. In response to the Appellant's defence, the 1st Respondent herein filed a Reply to Defence dated 11th May 2018 (page 44 of ROA).

16. The 2nd Defendant/Respondent filed an amended defense dated January 18, 2024 (pages 45-48 of ROA). They also submitted a list of witnesses dated May 11, 2018, a list of documents dated June 22, 2018, and a witness statement of the same date (pages 7-22 of the Supplementary ROA dated August 27, 2025).

17. The 1st Respondent's case was heard on October 1, 2024, with the 1st Respondent testifying in the case. He relied on his filed witness statement as his direct evidence, produced the documents attached to his list of documents, and was cross-examined by counsels for the Appellant Ms. Wanjiku and for the 2nd Respondent Ms. Awuor (pages 78-83 of ROA).

18. The Appellant's case was heard on the same day with the Appellant calling one witness, Moses Kisagui Parsitau (DW1) to testify on its behalf. He relied on his filed witness statement as his evidence in chief, and produced the Appellant's documents. He was

cross-examined by counsel for the 1st Respondent Mr. Ngigi and for the 2nd Respondent Ms. Awuor (pages 84-88 of ROA).

19. The 2nd Respondent did not call any witness, instead electing to rely on their filed documents (page 88 of ROA).

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

21. The Trial Magistrate Court delivered its judgment on the 21st of January 2025 allowing the Claimant/1st Respondent's claim, apportioning liability in the ratio 90:10 in favour of the 1st Respondent, and awarding Kshs. 200,000/- as general damages to the 1st Respondent payable jointly and severally by both the Appellant and the 2nd Respondent (Judgment at pages 91-95 of ROA).

DETERMINATION

22. The appeal was canvassed by way of written submissions. Only the Appellant complied.

23. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. Ltd [1968] EA 123 that:- *"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own*

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

24. The court on first appeal is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "*I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.''*

Issues for determination

25. In their submissions dated 28th August 2025, the Appellant identified the following issues for determination, namely:-

    i. Was the 1st Respondent an employee of the Appellant;
    ii. Was the 1st Respondent injured while in the Appellant's premises;
    iii. Was the 1st Respondent awarded a sum so inordinately high.

26. The respondents did not file submissions. The court adopted the issues outlined by the appellant in the determination of the appeal namely-

    a. Was the 1st Respondent an employee of the Appellant;

    b. Was the 1st Respondent injured while in the Appellant's premises;

    c. Was the 1st Respondent awarded a sum so inordinately high.

Was the 1st Respondent an employee of the Appellant;

27. The ground of appeal was- The Honourable Magistrate erred in law and fact in disregarding the evidence produced and proceeding to find that the 1st Respondent had proved his employment with the Appellant.

Appellant's submissions -

28. Section 2 of the Employment Act defines an employee to mean "a person employed for wages or a salary and includes an apprentice and indentured learner." In the case of Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited [2019] eKLR, the Court stated in regards to the ingredients that are necessary to determine the existence of an employer employee relationship: "A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the nom de guerre - control test). The 1st Respondent was injured on 16th June,2017 and he produced a bank statement for payment of salaries by the Appellant for January and February,2018

(refer to page 17 the Record of Appeal). He did not produce any proof of salary payment in 2017 when he got injured to associate himself with being an employee of the Appellant. It is also not in dispute that there existed a labour Outsourcing agreement between the Appellant and the 2nd Respondent. It is pertinent to note that Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya, places an onus on a 1st Respondent who alleges, to prove the allegations made on a balance of probabilities. The 1st Respondent stated that he was employed by the Appellant. He did not produce any document showing that he was employed by the Appellant during the period of the injury. There was no job card issued to him by the Appellant, there was no contract or even called any of his former colleagues to corroborate his evidence. The 1st Respondent did not call any witness or produce any document proving an employment relation between him and the Appellant. This court has previously acknowledged labour outsourcing agreements in the case the case of Mumbua Kisilu & 16 others v Allied Wharfage Limited & another [2020] eKLR the learned Judge stated that "The agreements, signed between the Respondents from 2011, stipulate that the 2nd Respondent would supply the 1st Respondent with Casual /Piece- rate Workers. The agreements, standardly state that, the supplied Workers are employed by the 2nd Respondent. The 2nd Respondent would directly pay the Workers. The 2nd Respondent obligated itself, to comply with all laws, rules and regulations pertaining to labour and employment. The 2nd Respondent would maintain work injury insurance cover for the Workers at all times. It was agreed between the Respondents that the 2nd Respondent would be responsible for any labour disputes involving the Workers, and shoulder liability for any decisions made pursuant to such disputes. The 2nd Respondent assumed 100% liability for the Workers recruited to work

for the 1st Respondent. The Claimants were by virtue of successive outsourcing agreements, employed by the 2nd Respondent..... The outsourcing agreements however, placed him at the full control of the Claimants. The 1st Respondent has no responsibility at all in this Claim, and the Court finds the Claims against the 1st Respondent must be rejected in their totality." The Appellant and the 2nd Respondent entered into a labour outsourcing agreement which was to run between 24th March,2017 to 23rd March,2018. - - --30 (refer to page no 33 of the Record of Appeal)The mandate of the 2nd Respondent as listed in the Labour Outsourcing agreement were among others to: a) Providing manpower as when required b C) d) Drawing of his employees contract of employment; Supervising his workers and achieving the agreed production targets; Buying of insurance cover to cover for worker's safety, buying of PPE'S and training his employee; e) Administer work ..)f) Payment of wages and salaries; i) Dealing with claims or court cases arising from its employee; To report injuries to insurance for Wiba purposes; To pay all statutory deductions that is NSSF, NHIF, PAYE & NITA.

29. On the issue of outsourcing, the Court of Appeal in the case of Kenya Airways Ltd Vs Aviation & Allied Workers Union & Others Lady Justice Murgor observed that outsourced service is one such widely accepted business concept which enable a company to focus on core business, reduce overheads, increase cost and efficiency savings and manage cyclical resource demands. In line with the outsourcing agreement the 2nd Respondent gave the 1st Respondent protective gear as captured in the supplementary record of appeal at page 9. Further in line with the labour outsourcing agreement stated that the 2nd Respondent would take out insurance for their employees as shown in page

41-43 of the Record of Appeal. Finally, on the obligation of the 2nd respondent was to issue the employees with contracts as shown on page 31-32 of the Record of Appeal and a copy given to the 1st Respondent. On cross examination the 1st respondent accepted to having received the contract of employment from the 2nd Respondent (Refer to page 80 of the Record of Appeal) which stated his - -- contract started 1/4/2017 to 25/12/17. The 1st Respondent was an employee of the 2nd Respondent thus the 2nd Respondent is liable to his injured activities and book keeping accountability;

Decision

30. In the statement of claim dated 5th March 2028 the 1st respondent stated in paragraph 3 that – ' *at all material times to this suit the plaintiff was contracted and or employed by the 1st defendant company and insured by the 2nd defendant* ''(page 10 of ROA) In witness statement the 1st respondent stated that he was employed by the appellant from 1st April 2017(PAGE 20 ROA). Conversely, In statement of defence paragraph 3, the appellant denied the content of paragraph 3 of the claim and stated that ' …*by way of defence avers that it has no employment relationship with the plaintiff. That the 1st defendant (appellant) outsources the supply and management of casual labour to a contractor , Barford Company Limited*(2nd defendant)''.

31. During the hearing before the trial court, 1st respondent said he was an employee of the appellant as a furnace charger. He admitted he had signed an employment contract with 2nd respondent as furnace charger,. At re-examination, the 1st respondent reiterated that the appellant was his employer and said he had a contract to that effect, and 2nd

respondent was never his employee. He told the court that one David, an employee of the appellant, was his supervisor. The 1st respondent had sued the 2nd respondent. The employee denied knowledge of the contract for service between the appellant and Barford Company Ltd dated 24th March 2027 (page 40). The 1st respondent denied knowledge of D-exh2, which was a contract agreement between the employee and Barford Company Ltd (2nd respondent) for 9 months, 1st April 2017-25 December 2017, signed on 2nd October 2017 **(pages 31 and 32 of ROA)** . The employee denied that he signed the contract and further stated that the indicated ID number was not his. He said the contract was signed on 27th October 2017 yet he got injured on the 16th June 2017. (page 80-83 of ROA was the 1st respondent's cross-examination and re-examination proceedings). The witness for the appellant (Moses) denied they had a supervisor called David. During cross-examination by counsel for the 1st respondent/claimant, RW1 told the trial court they outsourced employees, that the appellant had different types of employees. That the 1st respondent was brought by Barford Company Ltd who paid the employees. RW1 admitted that the bank statement bore the name of the appellant as the remitter of salary. He admitted the machines were for the appellant. He said that there was a contract between the employee and Barford Company Ltd and there was a rubber stamp by Barford at the place of signature of management. RW1 admitted that only the employee had signed the impugned contract of employment. On cross-examination by counsel for Barford, RW1 told the trial court that as at 16th June 2017 the 1st respondent was a driver with the appellant. The 1st respondent denied that the contract of employment was a forgery.

32. On re-examination, RW1 told the trial court the list of names produced as having been issued with PPE were all employees of the Barford Company Ltd , and the 1st respondent/claimant's name was no. 20 (page 9 of the supplementary record of appeal.) RW1 further told the trial court that the appellant's counsel had asked for employees of Barford Company Ltd only. RW1 said that the name of the claimant was not in the list of injured employees as per register by Barford Company Ltd (13-19 of supplementary ROA). Barford Company Ltd closed its case without calling a witness.

33. The trial court held - *'The plaintiff alleged that he got injured on 16th June, 2017. The alleged agreement between the 1st and 2nd Defendant was entered on 24th March, 2017. The impugned employment contract between the Plaintiff and the 2nd Defendant was however entered into on 2nd October, 2017 which is moths after he was injured. Besides the Plaintiff argued that the signature and the ID number of the Plaintiff as appearing on the said date are impugned and the same has not been signed by the Defendant. Further, the plaintiff produced an exhibit indicating that his salary was paid by the 1st Defendant. Dw1 also confirmed that the equipment in PW1's company were owned and operated by the 1" Defendant. To me, the said agreement between the Plaintiff and the 2ND Defendant having been entered way after the Plaintiff's injury, a contract in respect of-the same being unsigned, I find that the Plaintiff had proved his employment by the 1" Defendant and that he was injured while at work.''* I established the decision was based on documents before the court, the alleged contract of employment between the 1st respondent and the Barford Company Ltd was dated as signed by 1st Respondent on 2nd October 2017 while his alleged injury was earlier in June 2017, he denied the indicated

no. of ID namely 26630800 as his and the alleged contract was not signed at the place of signature for management (page 32 of ROA). The 1st respondent produced his National ID card and the number is 26630308. (PAGE 18 OF ROA). It was not denied that the 1st respondent was working at the appellant's premises and machines. The employee produced his bank statement of 2018 which indicated that the salary was remitted by Masai Rollings Mills Ltd, the appellant . (page 17 of ROA). The appellant had produced a WIBA cover indicating Barford Company Ltd . The insurance cover had no list of covered employees, hence it was not possible to know if it covered the 1st respondent. On amended defence of 2nd Respondent (Barford it was stated in paragraph 3A-'' *for avoidance of doubt the 2nd defendant avers that the plaintiff was in fact employed by Maasai Rollings Mills''*(page 45 of the ROA).The court finds that the 1st respondent proved on a balance of probabilities that he was an employee of the appellant. I uphold the finding of the trial court.

Was the 1st Respondent injured while in the Appellant's premises?

34. The appellant submitted as follows- The 1st Respondent claims that he was injured on 16th June,2017, while in the course of his employment. He claimed that his injuries were caused by his colleague who let go of his side of the door they were carrying and it fell on his left foot. During cross-examination, he stated that he had a medical document, but it did not show he was injured while at the Appellants' premises. Further the 1st Respondent stated that though he got injured in full sight of other people he did not call anyone to confirm he got injured and he got injured while at the Appellant's premises. He stated that he worked in shifts and a shift would run from 6:00 AM to 6:00 Pm. He said he got

injured at around 2-4 Pm and had to leave the premises before the shift ended. He confirmed that the attendance sheet ought to have shown that he clocked out at 4:00pm on that particular day. The attendance sheet on the 2nd Respondent's documents showed that he left the workplace at 7:00 PM. (Refer to page 81 of the record of Appeal and page 20 of the Supplementary record of appeal). Further the claims register that is the 2nd Respondent document did not have the 1st Respondent injuries recorded. (refer to page 13-19 of the supplementary record of appeal). He who alleges must proof, It's the mandate of the 1st Respondent to proof that he got injured on the 16th June,2017 and he sustained the injuries while at the Appellants company. Did the 1st Respondent proof liability - The 1st Respondent claims that the Appellant had failed to provide him with --- safe working place in the premises, He did not proof the same and did not call anyone of his colleagues to corroborate his allegation. It was his evidence that the accident was caused by his co -worker and had the co -worker not dropped the door he would not be injured. Liability is a tort of negligence and the burden was on the 1st Respondent to proof on balance of probabilities as per section 107 and 109 of the Evidence Act that he got injured while at work and it was the negligence of the Appellant that caused the accident. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie - on any particular person. The High Court in Kajiado in P. J. Dave Flowers Ltd v David Simiyu Wamalwa [2018] eKLR when faced with a similar issue stated that ...the particulars of the hazards and elements of breach of duty of care must be clearly pleaded and evidence adduced to prove them. The plaintiff/respondent might have suffered harm but there is lack of nexus between the injuries and breach of employment contract with

appellant company. The Plaintiff has failed to show how the Respondent provided him with unsafe /poor working conditions. The Plaintiff did not proof any of this and he did not call any of his co-workers to thumb stamp his statement."- - - The 1st Respondent claims that the Appellant was negligent but informed court that the accident had been caused by a co-worker. The 1st Respondent had been provided with safety gear and the Appellant would not have foreseen the co-worker dropping the car door on him. Further the work was manual and the Appellant required no supervision when carrying the door as it was all in his control. In the case of Amalgamated Saw Mills vs. David K. Kariuki [2016] eKLR the court held that " An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety. The court finds that the - respondent and the machine operator, an agent and employee of the appellant contributed largely to the accident, together with the none provision of protective gear to the respondent. It is the court's finding that the respondent has proved a causal link between the appellant's negligence and his injury, and upon which negligence on a balance of probability has been proved" Section 13 (1) (a) of The Occupational Safety and Health Act, No. 15 of 2017 makes it mandatory for every employee to ensure his or her own safety at work and at all times to wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risk to his safety and health. Further the courts have held that in adversarial systems like ours a party undermines his case drastically by not calling or failing to call witness. The 1st Respondent simply did not adduce any evidence before the court on liability. They should have called the colleague or any other witness. Proof of negligence was material in this case and the burden was on the 1st Respondent. The 1st

Respondent accepted that he had suffered previously and had three matters in court related to work injury showing he was not careful when working. The evidence act section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. It was the mandate of the 1st Respondent to proof that he was within the premises of Appellant on that particular day, that he got injured on 16th June,2017 and that the injuries occurred due to the negligence of the Appellant. That the Liability of 90:10 in favor of the 1st Respondent was wrongly arrived at since he had previous matters related to injury and the accident was caused by a co-worker.

Decision

35. The ground of appeal on the issue was-

a. The Honourable Magistrate erred in law and in fact in disregarding the evidence produced and proceeded to find that the 1st Respondent had proved he was injured while at work at the Appellant's premises.

b. The Honourable Magistrate erred in law and in fact in finding that the Plaintiff had never been issued with PPEs, holding that evidence of the same had not been produced, whereas the 2nd Defendant had filed the PPE issuance forms.

c. The Honourable Magistrate erred in law and in fact in finding the Appellant liable yet the 1st Respondent did not prove that his injuries were caused by the Appellant's negligence.

d. The Honourable Magistrate Respondent erred in law and in fact in failing to find that the accident was caused by the negligence of the co-worker.

e. The Honourable Magistrate erred in law and in fact in awarding a liability of 90:10 when the 1st Respondent had two (2) other work injury related cases.

f. The Honourable Magistrate erred in not considering that the 1st Respondent did not call any witness to corroborate his evidence thus did not meet his evidential burden.

36. The 1st respondent stated that he and a colleague were assigned to feed the furnace with scrap metal. That as they were carrying a heavy car door scrap metal to the furnace the said colleague let go of his side without a warning or alerting him , the car door feel on his left foot causing serious injury.

37. On the issue -The Honourable Magistrate erred in law and in fact in finding that the Plaintiff had never been issued with PPEs, holding that evidence of the same had not been produced, whereas the 2nd Defendant had filed the PPE issuance forms- The trial court held that the defendant only stated the claimant had been issued with PPEs but failed to provide evidence. The appellant submits that that was contrary to evidence of the 2nd respondent who filed the PPE issuance forms. The court concluded the form referred to is listed at page 9 of the supplementary record of appeal. On perusal of the

proceedings the court found that the 2nd respondent closed its case without calling a witness to produce the document. The advocate simply said they relied on their documents(page 88 of the ROA). During the hearing the 1st respondent denied having been issued with PPE and denied having signed the said document. The court finds that the 2nd respondent having failed the to produce the said documents through a witness to be cross-examined the same was not admitted as evidence and was of no evidential value. On the liability the trial court held that the 1st respondent was injured at work and the injuries were confirmed as per the filed medical treatment notes and report produced in court. (Page 15-16 of ROA). The treatment note at Kisaju Medical center was dated 16th June 2017 and indicated the employee was injured at the appellant's premises, and this was the document used in preparation of the medical report, and the doctor observed the same injuries. On the apportionment of liability, the appellant said that it was not liable as the claimant blamed a co-worker. The claimant said the co-worker was an employee of the appellant. The scrap metal belonged to the appellant. The appellant had not provided protective gear and ensured safety of the 1st respondent as required under section 6 of the Occupational Safety and Health Act NO. 15 OF 2007-''6. *Duties of occupiers (1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace. (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes— (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health; (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; (c) the provision of such information, instruction, training and supervision as*

*is necessary to ensure the safety and health at work of every person employed; (d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health; (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;''*The alleged previous negligence cases were not placed before trial court. (See the appellant's list of documents at page 29 of the ROA). The court finds no basis to interfere with the apportionment of 90/10 in favour of the 1st respondent by the trial court (**Mbogo v Shah** applied).

Was the 1st Respondent awarded a sum so inordinate high –

38. The Appellant submitted as follows- The 1st Respondent sustained a laceration on the left foot. The court relied on the on the case of Onsongo v Owino & another (Civil Appeal E102 of 2023) [2024] KEHC 2483 (KLR) (12 March 2024) (Judgment where an award of Kshs 100,000/= was awarded for Laceration on the lower lip, Chest contusion and Blunt trauma to the left thigh. The court went further to consider inflation and lapse of time and awarded Kshs 200,000/= despite the suit relied on being a 2024 suit. The 1st Respondent in this case had just one injury which had healed by the time he went to see the doctor for the medical report on 19th February, 2018. (Refer to page 16 of the Record of Appeal). The above case was among the cases relied too by the Appellant, if one takes into consideration the injuries suffered by the 1st Respondent to wit laceration on the left foot, it's obvious that an award of Ksh 200,000/= is manifestly excessive. 35. In the case

of Rege vs LA(minor suing through her father and next friend GAA) Civil Appeal E111 OF 2021) (2022) KEHC 16634 (KLR) (20 DECEMBER 2022) where the court awarded Kshs 80,000/= for bruises on the right hand, blunt trauma to the right hand and chest contusion. 36. Considering the nature of injury and the fact that it was not multiple injuries we submit that an award of Kshs 75,000/= will be commensurate.

Decision

39. The ground of appeal was as follows-

A. The Honourable Magistrate erred in awarding a sum so inordinately high, that it represented an excessive and erroneous award for the injury suffered.

40. The court on this issue is guided by the decision of the Court of appeal in the case of ***Butt vs Khan (1977) 1KAR*** **where** Law JA stated that:

"An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low." The trial court relied on the on the case of Onsongo v Owino & another (Civil Appeal E102 of 2023) [2024] KEHC 2483 (KLR) (12 March 2024) where an award of Kshs 100,000/= was awarded for Laceration on the lower lip, Chest contusion and Blunt

trauma to the left thigh. The award ought to be based on comparable awards for consistency purposes. The 1st respondent relied on other authorities of which the court finds the injuries were not comparable. The trial court relied on the authority and held as follows- *'1. On quantum, the Plaintiff stated that he suffered a laceration on the left foot. The injuries were confirmed by the treatment notes from Kisaju medical center and Dr. Okere's medical report adted19th February, 2018 in which he classified the injuries as harm.2. In Onsongo v Owino & another [2024] (KLR) Ong'udi J. awarded award of Kshs. 100,000/= in general damages for injuries similar to the ones suffered herein. Taking into - account the said authority as well those relied on by the Plaintiff, inflation and the lapse in time, I find that a sum of Kshs. 200,000/- will adequately compensate the plaintiff for the injuries sustained.''* In ***Onsongo case*** the injuries were stated as follows- 'In the instant suit, the injuries suffered by the appellant were listed in the treatment notes and the medical report by Dr. Morebu Peter Momanyi as:

i.Laceration on the lower lip.

ii.Chest contusion.

iii.Blunt trauma to the left thigh.'' The Judge at appeal upheld award of Kshs. 100000. This was on 12th day of march 2024. The court found that there was no material time difference of time to justify a higher award taking into account the instant case was of less injury with no incapacity. The court agreed with the appellant that the award was excessive and unjustified, taking into account the authority relied on. (Butt v Khan applied). The award is set aside and substituted with award of Kshs. 100,000/- **.**

CONCLUSION

41. The appeal is allowed on quantum only. The Judgment and Decree of the Hon. R.A. Oganyo (CM) delivered on 21st January 2025 in Kajiado CMCC 65 of 2018 is set aside and substituted as follows –

Judgment is entered for the plaintiff against the 1st defendant as follows-

Liability 90:10 in favour of the plaintiff

General damages Kshs. 100,000/=

Total Kshs. 100,000 less liability.

Costs and interest of the suit,

42. On costs of the appeal. The appeal was partially successful. Each party to bear own costs.

43. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ms. Wanjiku Mburu

Respondent – Njuguna