



Kenal Plumbers Limited v Olenya (Employment and Labour Relations Appeal E201 of 2024) [2026] KEELRC 52 (KLR) (23 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 52 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E201 OF 2024
NJ ABUODHA, J
JANUARY 23, 2026**

BETWEEN

KENAL PLUMBERS LIMITED APPELLANT

AND

JUSTUS OMENDA OLENYA RESPONDENT

(Being an appeal from the Judgment of the Honourable A.N. Oganda (P.M) delivered on the 21st day of June 2024 in Milimani CMCC NO.982 of 2018)

JUDGMENT

1. Through the Memorandum of Appeal dated 19th July, 2024 the Appellant appeals against the Judgment of Honourable A.N. Oganda.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and in fact in finding the Defendant 100% liable for the accident that occurred on 10th October 2017.
 - ii. The Learned Magistrate erred in law and in fact when he found the Plaintiff is entitled to general and reduced earning capacity of Kshs.1,400,000 which is extremely high in the circumstance.
 - iii. The Learned Magistrate erred in law and in fact by failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.
 - iv. The Learned Magistrate erred in law and in fact by failing to consider the written submissions of the Appellant in arriving at his judgement.



3. The Appellant prayed that the appeal be allowed with costs, the judgment of the Magistrates' Court on 21/06/2024 be set aside entirely and the suit be dismissed with costs to the Appellant.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant through its advocates Mucheru Law LLP filed written submissions dated 25th August, 2025.
6. On the issue of whether the Appellant was wholly liable for the accident, counsel submitted that it was trite law that he who alleges must prove and that the Respondent did not sufficiently prove negligence of the Appellant.
7. Counsel relied on Section 13 of the *Occupational Safety and Health Act*, 2007 to submit that the Respondent had a responsibility to ensure his own safety and care. The Respondent ought to have looked out for himself and taken precautions to avoid the accident. Counsel relied on the case of Alfred Chivatsi Chai & another V Mercy Zawadi Nyambu [2019] eKLR on this assertion.
8. Counsel submitted that in common law an employee who acts carelessly, disregards safety instructions or fails to use available protective gear can be held contributorily negligent.
9. Counsel submitted that the Respondent's witness in the trial court PW2's evidence was inconsistent as during cross-examination he stated that there were only two people in the room, the Respondent and another who was not DW1 yet he admitted that the grinder was atop being used by DW1.
10. Counsel submitted that the witness alleged that the grinder did not have a guard to prevent the accident. However, it is not feasible to provide a guard which covers the whole disk as it would prevent it from performing its function that it is made to do.
11. Counsel relied on the case of Easy Coach Limited & another v Gideon Otieno Oulu & another [2021] eKLR to submit that in instances where the court had two conflicting versions of the accident and no reasonable means of untying the tie, the correct position is to split blame equally.
12. Counsel submitted that the Respondent and the Appellant's witness were the only eye witnesses to the accident and they had different versions of how the accident occurred. Therefore, liability should be split as in the authority.
13. On the issue of whether the learned magistrate erred when he found that the Respondent is entitled to general and reduced earning capacity of Kshs.1,400,000/=, counsel submitted that considering the general damages awarded by the learned magistrate, the same ought to cover the diminished earning capacity as well.
14. Counsel relied on the case of Daniel Makau Mutinda v Patrick Ngei [2020] eKLR to submit that loss of earnings is claimed as special damages and it must be specifically pleaded and strictly proved. The Court understands this to comprise lost wages, it is a specific figure based on the Claimant's rate of monthly salary, and years expected to continue working. That the aspect of reduced earning capacity was not proved as the Respondent did not provide the court with what he was earning as a casual labourer prior to the accident. That the Respondent did not prove that he was deserving of the prayer for reduced earning.
15. Counsel submitted that the doctor who examined the Respondent indicated in his report that the Respondent had sustained deep cut wound on the right hand which was followed by cut tendons of the



right hand and multiple fractures of metacarpal bone of the right hand which was involving the right thumb, index and middle fingers during the accident. He further stated that the injuries had healed.

16. Counsel relied on among other cases, the case of *Maina & Another vs Achieng* (Civil Appeal No. E113 of 2023) (2024) KEHC 11640 (KLR) to submit that an award of Kshs. 500,000 would have been fair considering the injuries sustained by the Respondent.

Respondent's Submissions

17. The Respondent's Advocates, Mwaura Kamau & Co. Advocates filed written submissions dated 19th September, 2025.
18. On the issue of whether the trial court erred in finding the Appellant wholly liable for the accident, counsel submitted that on 10th October, 2017 the Respondent was assigned duties by his supervisor of painting waste pipes which were in a room. That he was not alone in the room as there was one of his co-workers who was working using a grinder to cut some angle lines. That the co-worker was standing on a ladder while cutting the angle lines when the disc of the grinder came off. That due to force it hit the wall and one of its broken piece flew back after hitting the wall and cut the Respondent's right hand.
19. Counsel submitted that the Appellant shifting blame to the Respondent while relying on section 13 of the Occupational, Safety and *Health Act* 2007 that the Respondent should have ensured his own safety should not be entertained. As per above provision the Respondent was a painter and that his work did not at any one time put him to any form of risk and did not also affect any of his co-workers.
20. Counsel submitted that at no one time was the Respondent aware that the disc that had been fitted in the grinder would come off. The coming off of the disc is not an every-day occurrence and the presence of the Respondent in the room where a grinder was being used could not have been said to have put him at any risk. That the Respondent had no way of knowing that the disc would come off from the grinder so as to report the same to his supervisor.
21. Counsel relied on Section 6 (1) and (2) and the case of *Purity Wambui Murithi v Highlands Mineral Water Co. Ltd* (2015) eKLR to submit that every occupier (employer) shall ensure safety, health and welfare at work of all persons working in his work place. It therefore, follows that as a general rule, it is the employer who is liable for any injury or loss that occurs to his employees while at the work place as a result of the employer's failure to ensure their safety.
22. Counsel submitted that the Respondent was just minding his own business of painting waste pipes in a place assigned to him by his supervisor. The Respondent did not contribute in any way to the occurrence of the accident. That the Respondent was injured by a disc that was fitted to a grinder owned by the Appellant and being controlled by the Appellant's employee.
23. Counsel submitted that the Appellant should also have taken preventive measures by fitting a guard to the grinder. The guard is usually fitted on the other hand is ordinarily used to prevent any debris from the object being cut by the grinder from flying away and injuring people working with the grinder as well as those within the vicinity of the grinder.
24. Counsel relied on *Winfield and Jolowicz on Tort*, 17th Edition to submit that the employer's duty is to take reasonable care as not to subject persons employed to unnecessary risk and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.



25. Counsel submitted that the person operating the grinder who was the employee of the Appellant was not competent as he did not fit the disc properly and also operated it without ensuring it had a guard for the safety and welfare of not only himself but also his co-workers who included the Respondent.
26. Counsel submitted that the Appellant had a statutory obligation under Section 6(1) of the *Occupational Safety and Health Act* to provide a safe working environment for its employees who included the Respondent. That the trial court was justified in its judgment to find the Appellant wholly liable for the accident after evaluating all the evidence of the both parties.
27. On the issue of whether the quantum of damages was inordinately excessive, counsel submitted that the trial court awarded the Respondent Kshs 900,000/= as general damages and Kshs 500,000/= as diminished earning capacity which the Appellant faults as excessive. That the nature of injuries sustained by the Respondent were; deep cut wound to the right-hand lateral side, fracture of the right metacarpal bone right thumb, fracture of the right metacarpal bone right hand index finger, fracture of the right middle metacarpal bone and cut extensor tendons right hand.
28. Counsel submitted that the Respondent was first treated at Kenyatta National Hospital and thereafter taken to St. Marys Hospital where he was admitted between 12th October, 2017 to October 18th. That X-rays of the right hand taken at St. Mary's hospital showed that the Respondent had multiple fractures of the right hand affecting the right thumb, right index finger as well as right middle finger. That the Respondent also had deep cut to the extensor tendons of the right hand that made it impossible for the Respondent to have movements as well as grips of the right hand.
29. Counsel further submitted that during hearing at the lower court the Respondent lifted his hands which was completely deformed. That the Respondent informed the court that he could not do anything with the right hand as all the nerves were completely dead. That this evidence was corroborated by Dr. A.K. Mwaura who on Clinical examination indicated that the Respondent's right hand is hypertrophic. He also noted that the right hand had no grip and assessed the degree of permanent incapacity at 25%.
30. Counsel submitted that the Respondent had prayed for Kshs 1,000,000/= as general damages, the Appellant proposed Kshs 700,000/= but he was awarded Kshs 900,000/= after the court analysed all the evidence before it. That the trial court compared the injuries sustained by the Respondent with the decision of Barchia Leonard Mbaabu & Another vs Angelina Ngesa Rambim(2019) eKLR where the High Court refused to interfere with award of Kshs 1,500,000/=.
31. Counsel relied on the case of Mugambi and Silas v Isaiah Gitiru Civil Appeal No.130 of 2002 on when appellate court will interfere with the discretion of the lower court on awards of damages.
32. Counsel submitted that the trial court seriously considered the Respondent's injuries. In assessing the damages, the trial court did not take into account an irrelevant factor and did not leave out a relevant factor nor did it misapprehend the evidence. That the appellant has not pointed out to this court the irrelevant factor the court took into account and/or relevant factor the court failed to take into account in arriving at the judgment.
33. Counsel relied on among other cases, the case of China Road and Bridge Construction v James Ponda, Malindi Civil Appeal No.69 of 2019 to submit that similar awards were made for similar injuries. That the award of Kshs 900,000/= as general damages was not inordinately high to warrant interference by this court.



34. On diminished earning capacity counsel relied on the case of *Mumias Sugar Co. Ltd v Francis Wanalo* (2007) eKLR to submit that the award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not employed.
35. Counsel submitted that the justification for the award of reduced earning capacity is to compensate the plaintiff for the risk that disability exposes him of either losing his job in future or in case he loses the job. That the loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages as happened in this case.
36. Counsel relied on the case of *Butler v Butler* (1984) KLR 232 to submit that loss of earning capacity is a different head of damages from the actual loss of future earnings which can be readily proved at the time of the trial.
37. Counsel relied on the case of *Fairely v John Thompson (Design & Contracting Division) Ltd* (1972) 2 Lloyd Rep. 40, 42 (CA) to submit that compensation for loss of future earnings is awarded for assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages. Damages under the loss of earning capacity can be classified as general damages.
38. Counsel submitted that the Respondent claimed damages for reduced earning capacity which is classified as general damages and therefore did not need to ascertain the actual loss. That all the Respondent needed to prove was that his chances of working as a normal healthy person had been diminished as a result of the injury he suffered. He stood a real likelihood of losing his job as happened in this case and his chances of getting another similar job were diminished.
39. Counsel submitted that the Respondent in his evidence did indicate that he had lost use of the right hand and that he was currently an employee and being a casual labourer his chances of securing a similar employment are next to zero. Counsel relied on the case of *Nyagoto vs Mini Bakeries Ltd* (Civil Appeal E38 of 2021) where the court held that damages for diminished earning were part of general damages and proceeded to award Ksh 1,000,000/= under this head.
40. Counsel submitted that the award of Kshs.500,000/- as damages for diminished earning capacity was reasonable taking into account all factors.

Determination

41. The court has considered this Appeal, the record of appeal and submissions filed by the both parties herein and proceeds to analyse them as follows.
42. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, 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.”



43. The Judgment of the trial court was that judgment was entered in favour of the Respondent against the Appellant. The court apportioned liability at 100% and awarded total damages of Kshs 1,402,000/= which included general damages at Kshs 900,000/, diminished earning capacity at Kshs 500,000/= and special damages at Ksh 2,000/= with costs and interest. The Appellant being aggrieved by the whole judgment fronted four grounds of appeal.
44. This court will condense the grounds in to two issues: –
- a. Whether the trial court was justified in apportioning liability at 100%
 - b. Whether the trial court’s award of general damages of Kshs 900,000/= and diminished earning capacity of Kshs 500,000/= was justified.

Whether the trial court was justified in apportioning liability at 100%

45. It was not in dispute that the Respondent was an employee of the Appellant who on the fateful day of the accident was assigned by his supervisor to paint waste pipes in a room where his co-worker was operating the grinder to cut angle lines. It was further not in dispute that the disc came out from the grinder, hit the wall and a piece of the disc flew to the Respondent’s right hand causing him the injuries he sustained.
46. The Respondent blamed the Appellant for failure to have the grinder installed with guards to prevent the disc from coming out while the Appellant alleged that the guard would make the grinder unable to work which allegation the trial court disagreed with. This Court also agrees with the trial court on this assertion. On the other hand, the Appellant’s case was that the Respondent failed to take proper care in the course of his duty while relying on section 13 of *Occupational Safety and Health Act* that the Respondent ought to ensure his own safety and care.
47. The court notes that the Respondent was a painter and it was upon the co-worker to ensure that he does not cause injury to the Respondent and the Appellant was bound to ensure a safe working environment to the Respondent without exposing him to such risks. This is a requirement under section 6(1) of the *Occupational Safety and Health Act*. It was not clear that the Appellant provided the Respondent with protective gears and that he refused to wear them.
48. Section 107(1) of the *Evidence Act*, provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
49. This was the position on *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”
50. The trial court held that the Appellant had a duty of care to provide a safe working environment for the Respondent. From the above, there was no evidence presented by the Appellant to controvert the Respondent’s claim that he was not provided with protective gear. The Appellant never produced an inventory of issuance of protective gears to the Respondent and that he failed to wear them.



51. This Court is fully aware that it is the responsibility of an employer to provide protective gear to an employee as it was held by the Court of Appeal in the case of Makala Mailu Mumende vs Nyali Golf County Club [1991] KLR 13 to reasonably take steps in respect of the employment, to lessen danger or injury to the employee as it is his responsibility to ensure a safe working place for its employees.
52. This court notes that the Appellant ought to prove that the Respondent was negligent in terms of the duty of care the Respondent had to the Appellant hence why he sustained the injuries. In the case of Segwick Kenya Insurance Brokers –Vs- Price Water House Coopers Kenya, High Court Civil Appeal No. 720 Of 2006 (NAIROBI) the learned Lesiit, J cited the case of Capro Industries Limited Plc –Vs- Dickman &Others (1990) 1 ALL ER, 658, where the House of Lords held thus;

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

53. However, from the above proposition this court asks the question whether assuming the Respondent had the said protective gear would they prevent the accident from taking place? The courts answer to this question is that since the Respondent was working in the same room with a colleague operating a grinder if the Respondent was provided with gloves the injury to his hand could have been mitigated.
54. The court also asks itself what the Respondent was supposed to do to prevent the said accident and answer to this question is that the Respondent was working as a painter at that particular moment and it was the duty of the Appellant to ensure that the grinder was in a good mechanical state to prevent the disc from coming out and employ skilled personnel to operate the grinder. There was nothing the Respondent could do to prevent the accident since he was just on a different assignment. It is the Appellant who ought to have provided a safe working environment by not assigning the Respondent in the same room with a colleague operating a grinder.
55. In the case of James Finlaly (K) Ltd v Benard Kipsang Koechi [2021] eKLR the court had this to say in support of the above assertion.

However, it is my view that the said duty of care is not absolute and it does not absolve the employee from the duty to exercise due care to avoid exposing himself from foreseeable risk. An employee is not a robot that must be programmed to work in particular way. Consequently, an employee will solely or largely to take the blame if he exposes himself to injuries due to his negligence.

56. The Respondent was not in any way negligent and he did not expose himself to any danger. The court therefore agrees with the trial court that the Appellant was wholly liable for the accident and will not disturb the finding of 100% liability.



Whether the trial court awards of general damages of Kshs 900,000/= and diminished earning capacity of Kshs 500,000/= were justified.

57. On the issue of quantum of general damages awarded by the trial court this court will only interfere with the issues of quantum on the circumstances stated in the case of Butt v. Khan [1981] KLR 349 where it was held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

58. This court will therefore interfere with quantum herein if it was inordinately high or low. The medical report dated 15th January, 2018 by Dr. A. K Mwaura described the nature of injuries as deep cut wound to the right-hand lateral side, fracture of the right metacarpal bone right thumb, fracture of the right metacarpal bone right hand index finger, fracture of the right middle metacarpal bone and cut extensor tendons right hand.

59. The injuries left the hand with multiple complications of no grip, shortening of the right middle finger as well hypotrophic of the hand with the degree of permanent incapacity of the right hand at 25%.

60. The trial court awarded the Respondent Kshs 900,000/= as general damages as per above nature of injuries and Kshs 500,000/= for reduced earning capacity which the Appellant faults as excessive. This court notes the nature of the injuries and the resultant effect where the hand had no grip, the shortening of the right middle finger and the degree of permanent incapacity of 25%.

61. The trial court considered the injuries, the case law of Barchia Leonard above and awarded the Respondent Kshs 900,000/= which this court will not disturb because it was justified. This court takes is guided by the recent case of Isl Kenya Limited v Ilovi (Appeal 4 of 2021) [2025] KEELRC 909 (KLR) where the employee had the injuries below;

“...degloving injury to the right arm, tone extensor tendon to the right arm, comminuted fracture of the right radius bone and comminuted fracture of the right ulna bone. The normal anatomy of the Respondent’s hand was destroyed and he had weakness over the right thumb and index finger and therefore could not grip with his right hand, will be unable to lift heavy loads and will never work with his right hand like before.

62. The degree of permanent disability was assessed at 25 % and 30% by different doctors. The trial court had awarded general damages for pain and suffering of Kshs 1,000,000/= which on appeal, the court found that it should not disturb as it was justified.

63. On the award of diminished earning capacity the trial court explained very well that the same can be awarded as a general damages not necessarily as a special award. It was clear that the Respondent’s injuries healed but he was left with a no grip of the hand, shortened right middle finger and the hand during trial looked deformed. This therefore means he will have a limitation on the use of the said hand to earn a living being a casual labourer. The trial court was justified in awarding the same to the Respondent.

64. In the above case of ISL Kenya limited(supra) the appellate court reduced this award from Kshs 3,192,681.60/= to Kshs 1,000,000/= although in this case the employee was employed and in this case



the Respondent was a casual employee hence the award awarded by trial court of Kshs 500,000/= was justified.

65. In the foregoing the Appeal is found unmerited and is hereby dismissed with costs to the Respondent.

66. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF JANUARY 2026

DELIVERED VIRTUALLY THIS 23RD DAY OF JANUARY, 2026

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

