

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC APPEAL NO. E033 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

WONDER FEEDS LIMITED.....
APPELLANT

VERSUS

LABAN MBOI ANDAI.....
RESPONDENT

(Being an Appeal from the Ruling and Order of the Honourable B. Ochieng, Chief Magistrate, delivered on 26th March 2025 in Nakuru CM ELRC No. 432 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable B. Ochieng, Chief Magistrate, filed this appeal vide a Memorandum of Appeal dated 12th June 2025, on the following grounds that: -

1. *The learned trial Magistrate erred in law and in fact in applying wrong principles and failing to take into account material facts in arriving at an erroneous award.*

2. *The learned trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions which were filed on 16th October, 2024.*
 3. *The learned trial Magistrate erred in law and in fact in failing to find that the Respondent was 100% liable and/or apportion liability at all and yet the evidence was overwhelming against the Respondent.*
 4. *The learned trial Magistrate erred in law and in fact in awarding a sum of Kshs.600,000/= general damages for pain and suffering which is excessive and unrealistic in the circumstance against injuries alleged.*
2. The Appellant prays that:
- a. *The finding of the trial Magistrate on both liability and quantum be set aside, be reviewed and/or revised and/or be substituted with the judgment of this Honourable Court.*
 - b. *This Honourable Court do make further orders as it may deem fit.*

c. This Appeal be allowed with costs to the Appellant.

3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the Respondent failed to prove negligence on the employer's part, as the evidence suggested he fainted rather than slipped due to unsafe conditions. The Appellant cited **section 107(1) of the Evidence Act**, stressing that the burden of proof lay with the Respondent.
5. The Appellant relied on the case of ***Muthuku vs Kenya Cargo Services (1991) KLE 468*** which held:
"It is for the appellant to prove upon a balance of probability, one of the forms of negligence as was alleged in the plaint, our law has not reached the stage of liability without fault."
6. On damages, the Appellant contended that the award was excessive, given the soft tissue injuries healed without permanent incapacity. The Appellant invoked the principles set out in the cases of ***Kemfro***

Africa Limited t/a “Meru Express Services (1976)” & another v Olive Lubia & Another [1983] KECA 61 (KLR) and ***Butt v Khan [1981] KLR 349***, which allow appellate interference where awards are based on wrong principles or are inordinately high.

7. The Appellant further cited the cases of ***Arrow Car Limited v Elijah Shamalla Bimomo & 2 others [2004] KECA 136 (KLR)***, stressing consistency in awards, and comparable precedents such as ***Joseph Mwangi Macharia v Jonathan Muriuki [2016] eKLR***, ***H. Young & Co. (E.A.) Ltd v James Mbithi Munyao [1985] eKLR***, and ***Paul Kipsang & Another v Titus Osule Osore [2013] eKLR***, where lower awards were given for similar injuries.
8. The Appellant urged the appellate court to set aside the liability finding, dismiss the suit or apportion liability, and reduce damages to between Kshs.150,000 to 200,000.

Respondent’s written submissions

9. The principles governing a first appeal are well settled in the cases of in ***Susan Munyi v Keshar Shiani [2013] KECA 472 (KLR)*** and ***John***

Wambua v Mathew Makau Mwololo & another [2020] KEHC 1602 (KLR), where the appellate court must re-evaluate the entire record afresh, analyze and weigh the evidence independently, but with due respect to the trial court's advantage of observing witnesses. It should be cautious in disturbing factual findings, especially where credibility is central, and will only interfere if the findings are plainly wrong. The appellate court must remember that even if it might have reached a different conclusion, it cannot fault the trial court where evidence supports its findings. Degrees of blame among tortfeasors involve discretion and are rarely disturbed. Where the case is finely balanced, the trial court's decision carries paramount importance.

10. The Respondent submitted that his evidence was mis-transcribed, and the handwritten proceedings confirm he denied collapsing on his own. His testimony, corroborated by the discharge summary, established negligence by the Appellant in failing to provide gumboots and a safe workplace. The Respondent also submitted that the Appellant's claim

of issuing protective gear was unproved, as DW1 admitted no evidence of issuance. The theory of fainting was an afterthought, contradicted by the hospital history given by the Appellant himself.

11. The Respondent further submitted that the trial magistrate properly considered submissions and authorities, and on a balance of probabilities described ***in Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] KEHC 9906 (KLR)*** as ***“establishing our case to a percentage of 51% as opposed to 49% of the opposing party”*** found liability against the Appellant.
12. The Respondent relies on ***MK v Republic [2020] KEHC 7942 (KLR)*** where the court emphasized the trial court’s singular advantage in assessing live testimony, and ***Susan Munyi v Keshar Shiani(supra)*** where the Court of Appeal upheld the trial court’s preference for one narrative over another, stressing that absent sufficient reason, appellate courts should not disturb factual findings. Accordingly, the Respondent urges the appellate court to uphold the trial court’s findings on liability.

13. The Respondent submitted that the principles on assessment of damages in ***John Wambua v Mathew Makau Mwololo & another(supra)*** are clear: damages are at the discretion of the trial court, and an appellate court will not substitute its own figure merely because it would have awarded differently. *Quantum* of damages is a question of fact, guided but not rigidly bound by precedent, and interference only arises if the trial court acted on wrong principles or made an entirely erroneous estimate.
14. The Respondent argued that the Appellant's challenge to the award of Kshs.600,000/= for pain and suffering fails because the medical report by Dr. Malik was never produced in evidence, as emphasized in ***Sila Tiren & another v Simon Ombati Omiambo [2014] KEHC 6641 (KLR)***, which held that appeals must be determined on the same material before the trial court. The Respondent's injuries were classified as "grievous harm" by Dr. Kiamba, not mere soft tissue, consistent with ***Lilian Wanja v Cyprian Mugendi Igonga & 2 others [2016] KEHC 3512 (KLR)***, which distinguished grievous harm from soft tissue injuries. The award was within the bracket established by

precedent, including ***Opondo v Dela Rue Currency and Security Print Limited*** [2017] KEHC 2125 (KLR), and the Appellant failed to show any misdirection.

15. On loss of expectation of life, the Respondent submitted that the award of Kshs.250,000/= was within the range of comparable awards and not excessive. As reiterated in ***Municipal Council of Nakuru & Another v David Mburu Gathiaya*** [1993] KECA 59 (KLR), appellate courts only disturb damages if they are inordinately high or low, or based on wrong principles, which was not the case here.
16. In conclusion, the Respondent submitted that the trial magistrate properly exercised discretion, the awards were justified, and urged the court dismiss the appeal with costs.

Analysis and determination

17. Being the first appeal, it is the court's duty to reassess the evidence presented, conduct its own analysis, and reach independent conclusions in order to determine whether the trial court's findings align with both the evidence and the applicable law. The

court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance. **(See *Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123 and Peters vs Sunday Post Limited (1968) EA 123*)**

18. Having looked at the grounds in the memorandum of appeal and the rival submissions by both parties; the issue for determination is

- (1) *Whether the Appellant's negligence caused the Respondents injuries at his work place.*
- (2) *Is the Respondent entitled to the damages awarded?*

19. **Sections 107, 108 and 109 of the Evidence Act** provide that whoever allege must prove. The same is reiterated in the case of ***Moi v Muriithi & Another [2014] KECA 642 (KLR)*** where the Court of the Appeal stated as follows:

“In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows; 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.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. 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 be on any particular person.”

20. In this instant appeal, the Respondent filed a suit in the lower court seeking judgment against the Appellant on the basis that, while he was lawfully engaged in the course of his duties at the Appellant's premises, he fell from a height onto a weighing machine and sustained serious injuries. He was subsequently rushed to Nakuru Provincial General Hospital for treatment. The Appellant, however, denied liability, contending that the Respondent did not suffer an accident but rather fainted due to his

own medical condition. Upon evaluating the evidence, the trial magistrate held that the Appellant owed the Respondent a duty of care, which he breached by exposing him to a hazardous working environment. Consequently, the court found the Appellant 100% liable and awarded the Respondent Kshs.600,000/= in general damages and Kshs. 16,000/= in special damages, together with costs of the suit.

21. The court is of the view that the trial magistrate did not err in his judgment, as the Appellant failed to produce sufficient evidence to prove that the Respondent fell due to his own medical condition while performing his duties. Instead, the Appellant sought to escape the reality that an accident had indeed occurred, despite its obligation to provide the Respondent with a safe working environment.
22. The court considered the Response by the Appellant dated 2nd August 2019. The Appellant did not plead that Respondent fainted and hence the accident. The Respondent gave particulars of negligence as failure by the Respondent to take care of himself. He referred to the same as *volenti non fit injuria* meaning

the Respondent brought about his injuries and so cannot ask for compensation.

The defence that the Respondent was injured as a result of having fainted was raised by the Appellants during their submissions dated 19th January 2026. The same therefore cannot be introduced at the Appeal of the case during submission. The Appellant's witness in the lower court trial Joseph Mwangi however alluded to the fact that the Respondent fainted at his place of work. This was at the hearing of the case but was not in the pleadings. Parties are bound by their pleadings.

23. The Respondent's evidence is that he fell from a height into a weighing machine and sustained injuries. This court would not find it prudent to interfere with the findings of the trial magistrate who listened to the witnesses in person and weighed their evidence and pleadings. There are no compelling reasons to depart from the trial court's findings. The court therefore finds there is a case of negligence against the Appellant and so the findings of the trial court are upheld. This is in persuasion of the case of ***SELLE VS-Associated Motor Boat (Supra)***.

24. The trial court awarded damages of Kshs.600,000/= as compensation for injuries sustained. Dr. Wellington in his medical report classified Respondent's injuries as grievous harm consisting of traumatic injuries to the lower back resulting into weakness of the lower limbs. He also said that the Respondent got head injuries with loss of consciousness.
25. This court having considered the authorities cited by the Respondent in their submissions and in particular **DAVID OMUTELEMA - OPONDO -VS- DE LARUE CURRENCY & SECURITY PRINT LTD 2017 (SUPRA)** where a plaintiff was awarded Kshs.1,200,000/= for back injury, I find and hold the award of Kshs.600,000/= is not excessively high and will not interfere with it.
26. The court finds the Appellant has not proved a case to overturn the judgment of the trial court. The Appeal lacks in merit and is dismissed.
27. The costs of the lower court and of the Appeal are awarded to the Respondent.

28. Interest at 14% per annum is awarded from the date of this judgment on the unpaid judgment sum until full payment.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 13th Day of
March, 2026.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of

access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE