

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E352 OF 2024

(Before D. K. N. Marete)

BHACHU INDUSTRIES LIMITED.....APPELLANT

VERSUS

FELIX MBULWA MUTUA.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 7th January, 2025. It is an appeal from a judgment delivered on 5th December, 2024 in Nairobi CMCC No. 9230 of 2018.

The Memorandum of Appeal sets out the following grounds:

- 1. That the learned magistrate erred in law and in facts in finding that the Respondent was entitled to damages awarded and apportioned liability at 100% against the Appellant when the Respondent was furnished with all the necessary personal protective equipment (PPE).*
- 2. That the learned magistrate erred in law and in facts in finding that the amount awarded was deserved for such a minor injury.*
- 3. That the learned magistrate erred in law and in facts in failing to consider the case laws cited by the Appellant against that of the Respondent in making an award for general damages.*

4. *That the learned magistrate erred in law by applying wrong principles of law while assessing general damages which are manifestly high and excessive in the circumstance.*
5. *That the learned magistrate erred in law and in facts in failing to consider the medical reports and medical documents in regard to the injury suffered by the Respondent and the treatment notes supplied.*

The Appellant prays for orders that:

- a) This appeal be allowed.
- b) The lower court's finding of 100% liability against the Appellant be set aside or varied to reflect the contributory negligence of the Respondent.
- c) The general damages awarded be reduced to a sum commensurate with the nature, severity and resolution of the injury.
- d) Costs of this appeal and the suit by the trial court be awarded to the Appellant.

The Appellant's case before the trial court, as contained in the Record of Appeal, was presented through the witness statement of Amritpal Bahra Singh (DW1), the Appellant's Human Resources Manager and the documentary exhibits produced at trial, including a PPE issuance record dated 13th May 2016 and an investigation report by Uptown Loss Assessors (K) Limited dated 18th January 2019.

The Appellant's case is that on 1st December, 2016 the Respondent was a casual general labourer in its employment. On that date the Respondent slipped and fell while carrying iron plates, sustaining what the Appellant characterises as a minor soft tissue injury to the left ankle.

The Appellant's principal defence is that it had issued the Respondent with the requisite protective equipment prior to the accident, as evidenced by the PPE issuance record dated 13th May, 2016 bearing what purports to be the Respondent's signature, which record confirms that the Respondent was issued with an overall, shoes, leather gloves, leather apron and helmet.

DW1 further testified that the injury was minor in nature and denied that the Appellant was in any way responsible for the accident. He produced the PPE issuance record in evidence to demonstrate that the Respondent had been properly equipped. In its written submissions before the trial court and this Court, the Appellant relied on the two medical reports of Dr. A. K. Mwaura and Dr. Cyprianus Okoth Okere, both of which classified the injury as harm, and the second of which confirmed that the injury had fully healed upon examination. The Appellant submitted that the award of Kshs. 200,000/- as general damages was manifestly excessive for an injury of this nature and urged this Court to reduce the award to a just and proportionate figure.

The Respondent's case before the trial court was presented through his own testimony and documentary exhibits. He told the trial court that he was employed by the Appellant from the year 2012 until 2020 as a general labourer performing manual duties on a casual basis. On 1st December, 2016 he was assigned duties of carrying and arranging iron plates used for making the sides of tipper lorries. While performing these duties, his foreman compelled him to use an oily and slippery path as there was no alternative route available. He slipped and fell, spraining his left ankle joint. Following the accident, he reported his injuries to the foreman, who referred him to Likoni Road Clinic for treatment. At Likoni Road Clinic, his ankle was placed on a crepe bandage and he was given antibiotics and analgesic drugs.

The Respondent attributed the accident to two failures on the part of the Appellant. First, the Appellant had failed to provide him with protective equipment, specifically safety boots. He testified that he had repeatedly sought safety boots from his supervisor who promised to provide them but had not done so by the time the accident occurred. He maintained that safety boots would have afforded him adequate grip and prevented him from slipping. Second, the Appellant had failed to maintain a safe working environment. The path he was directed to use was oily and slippery. The Appellant neither cleared or dried the path nor provided an alternative route.

The Respondent denied having signed the PPE issuance record dated 13th May, 2016 produced by the Appellant, stating that the signature thereon was not his and that he had no reason to sign it as he had not been issued with the items listed. He was subsequently examined by Dr. A. K. Mwaura and by Dr. Cyprianus Okoth Okere on behalf of the Respondent and the Appellant respectively. Both medical reports confirmed the sprain to the left ankle joint and classified the degree of injury as harm. Both doctors noted that the Respondent had recurrent pain in the left ankle joint.

In its written submissions before this Court, the Respondent urged that the trial court correctly found the Appellant 100% liable and correctly awarded Kshs. 200,000/- as general damages. On liability, the Respondent relied on sections 6(1) and 10(1) of the Occupational Safety and Health Act, 2007 and on the authority of **Sokoro Saw Mills Limited v Benard Muthimbi Njenga Nakuru HCCA No. 38 of 1995** for the proposition that an employer is duty-bound to provide a safe place of work. The Respondent further relied on **Jeniffer Nyambura Kamau v Humprey Mbaka Nandi [2013] eKLR** for the applicable evidential

burden regarding the authenticity of the PPE issuance record, and submitted that the Appellant had not discharged that burden. On quantum, the Respondent placed reliance on the authority of **Nyamira Civil Appeal No. E046 of 2021, Anthony Nyamweya v Jackline Moraa** in which Kshs. 250,000/- was awarded for soft tissue injuries, and submitted that the award of Kshs. 200,000/- was within the range for injuries of similar nature and did not warrant interference.

The issues for determination therefore are;

- 1) Whether the trial court erred in finding the Appellant 100% liable for the accident.
- 2) Whether the quantum of general damages was inordinately excessive.
- 3) Who bears the costs of this appeal.

On the 1st issue for determination is whether the trial court erred in finding the Appellant 100% liable for the accident, the standard applicable on a first appeal is that this Court is entitled to re-evaluate the evidence on the record and draw its own conclusions, while remaining conscious that it lacked the advantage of observing the demeanour of witnesses at trial. Interference is warranted only where the trial court misdirected itself in law, misapprehended the facts, took irrelevant considerations into account, failed to consider relevant matters, or reached a conclusion that is plainly wrong.

The Appellant's defence on liability rests principally on the PPE issuance record dated 13th May, 2016 which it relies upon to show that the Respondent had been provided with safety boots and other protective equipment before the accident. The Respondent denied having signed this document and denied having received the items listed in it. Once the Respondent denied the signature, the burden of proving that the signature on the PPE issuance record

belonged to him lay squarely with the Appellant as the party relying on the document. This is consistent with the provisions of sections 107, 109 and 70 of the Evidence Act, Chapter 80, Laws of Kenya and the principle affirmed in **Jeniffer Nyambura Kamau v Humprey Mbaka Nandi [2013] eKLR**, that the evidential burden of proving the authenticity of a signature on a document lies on the party seeking to rely on it.

DW1, the Appellant's sole witness, conceded in his evidence that he joined the Appellant only in August, 2021 some five years after the accident and more than five years after the alleged issuance of PPE in May, 2016. He did not witness the issuance of the protective equipment to the Respondent, did not witness the Respondent signing the PPE issuance record and that had no personal knowledge of the circumstances of either event. DW1 further disclosed that the protective equipment was said to have been issued by a safety officer, a Mr. Masinde, who was never called as a witness. The PPE issuance record itself was not signed by the safety officer who allegedly issued the items. The evidence of DW1 on the PPE issuance was therefore, at best, hearsay and of no probative value on this contested point. The Appellant called no handwriting expert and no eyewitness to the alleged signing. It did not discharge the burden of proof cast upon it.

The Appellant's own investigation report prepared by Uptown Loss Assessors (K) Limited, dated 18th January, 2019 and found at pages 19 to 27 of the Record of Appeal, is particularly instructive. In its observations during a visit to the Appellant's premises, the assessor found negligence in the provision of safety clothing, that a good number of employees did not have all the protective gear necessary to prevent injuries, that most had torn shoes incompatible with their work, excessively torn overalls, and lacked hand gloves. The assessor's conclusion was that the Appellant's employees had been sustaining injuries of varying degrees, usually

minor, due to the lack of protective gear. This report, generated by the Appellant's own insurer's representative, fundamentally contradicts DW1's portrayal of a safe and well-equipped workplace.

On the second limb, the Respondent's unchallenged evidence was that he was directed by his foreman to use a path that was oily and slippery and that there was no alternative route available. Section 6(1) of the Occupational Safety and Health Act, 2007 imposes a statutory obligation on every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all its employees. This duty requires the employer to ensure not merely that equipment is available but that the working environment itself is safe. As the court observed in the authority of **Sokoro Saw Mills Limited v Benard Muthimbi Njenga Nakuru HCCA No. 38 of 1995**, it is the duty of the employer to provide a safe place of work and not merely to warn the employee against unusual dangers, but to make the place of employment as safe as the exercise of reasonable skill and care would permit. The Appellant produced no evidence that it had taken steps to secure or dry the path or to provide an alternative route.

The Appellant nevertheless argues that the Respondent's own evidence at page 7 of the Record of Appeal shows that he had noticed the path was slippery before proceeding to use it, and that having worked for the Appellant since 2012, he had four years of experience at that workplace. The Court of Appeal in **Purity Wambui Murithi v Highlands Mineral Water Co. Ltd [2015] eKLR** cautioned that the general liability of an employer for workplace injuries does not apply where an accident happens due to the employee's own negligence, and that Section 13(1)(a) of the Occupational Safety and Health Act, 2007 places a concurrent duty on every employee to ensure their own safety and health at the workplace.

This Court has weighed this evidence carefully. The Respondent noticed that the path was slippery before using it. He did not alert his foreman to the condition before proceeding, nor does the evidence disclose any attempt to seek an alternative before being directed by the foreman. An employee of four years standing who observes an obvious hazard bears some responsibility for the consequences of proceeding without further inquiry. However, this contributory element is considerably outweighed by the Appellant's primary failures: the failure to provide safety boots, the failure to maintain the path in a safe condition, the failure to ensure an alternative route was available, and the damning findings of the Appellant's own assessor's report.

On a balance of probabilities, this Court finds that the Appellant was primarily responsible for the accident but that the Respondent's failure to take elementary precautions in the face of a hazard he himself observed amounted to contributory negligence. The trial court's apportionment of 100% liability against the Appellant is accordingly not sustained. This Court apportions liability at 80% against the Appellant and 20% against the Respondent by way of contributory negligence. This answers the 1st issue for determination.

On the 2nd issue for determination is whether the quantum of general damages was inordinately excessive, the settled principle is that an appellate court will not interfere with an award of damages unless satisfied that the lower court acted on wrong principles of law or made an award so inordinately high or low as to represent a wholly erroneous estimate. This is enunciated in the authority of **Mugambi and Silas v Isaiah Gitiru Civil Appeal No. 130 of 2002**.

The injury sustained by the Respondent was a sprain to the left ankle joint on 1st December 2016. He was treated at Likoni Road Clinic where his ankle was placed on a crepe bandage and he was given antibiotics and analgesics. Two medical reports were produced in evidence. The report of Dr. A. K. Mwaura, produced on behalf of the Respondent, confirmed the sprain and classified the injury as harm, noting recurrent pain. The report of Dr. Cyprianus Okoth Okere, produced on behalf of the Appellant, also classified the injury as harm and confirmed that it was fully healed upon examination. The injury accordingly falls within the category of soft tissue injuries.

This Court has considered the comparable awards cited by both parties. In **Nyamira Civil Appeal No. E046 of 2021, Anthony Nyamweya v Jackline Moraa**, soft tissue injuries to the temporal region, chest, lower back and shoulders attracted an award of Kshs. 250,000/- on appeal. In **Embu Civil Appeal No. 61 of 2017, Francis Ndungu Wambui & Others v Benson Maina Gatia**, soft tissue injuries including a cut to the eye attracted Kshs. 300,000/- on appeal. Again, in **Daniel Odhiambo Ngesa v Daniel Otieno Owino & Another [2020] eKLR**, multiple injuries including a sprain to the neck, dislocation of the right shoulder joint, blunt abdominal injury and dislocation at the ankle joint attracted Kshs. 90,000/-. This is followed in **Triad Coaches Limited & Another v Mary Mutheu Kakemu [2020] eKLR** where a fractured hand, blunt wrist and ankle injury, and dislocated ankle attracted an award that was reduced to Kshs. 250,000/- on appeal.

The injury before this Court is a solitary ankle sprain, confirmed to have fully healed. The award of Kshs. 200,000/- general damages is at the upper boundary for an injury of this nature and severity, particularly given the complete resolution of the injury confirmed by Dr. Okere. However, it is not so inordinately high as to represent a wholly erroneous estimate of

damages warranting interference on that basis alone. The trial court is not shown to have applied wrong principles of law, to have taken irrelevant matters into account or to have ignored relevant considerations in arriving at the award. The award of Kshs. 200,000/- as general damages is accordingly affirmed. Having however found the Respondent contributorily negligent at 20%, the net general damages payable are reduced by 20% to Kshs. 160,000/-. The special damages of Kshs. 2,000/- are likewise reduced by 20% to Kshs. 1,600/-. This answers the 2nd issue for determination.

I am therefore inclined partially to allow the appeal and order relief as follows;

- (i) The trial court’s finding that the Appellant bore 100% liability for the accident is set aside. Liability is apportioned to the tune of 80% against the Appellant and 20% against the Respondent by way of contributory negligence.
- (ii) The award of general damages is reduced from Kshs. 200,000.00 to Kshs. 160,000.00 to reflect the Respondent’s contributory negligence.
- (iii) The award of special damages is reduced from Kshs. 2,000.00 to Kshs. 1,600.00 to reflect the Respondent’s contributory negligence.

Total of award..... Kshs.
161,600.00

- (iv) Each party bears their costs of this appeal, having regard to their respective partial successes.

Delivered, dated and signed this **14th** day of **May** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Kori instructed by Mberia & Partners Advocates for the Appellant.
2. Mr. Kamau instructed by Mwaura Kamau & Co. Advocates for the Respondent