



REPUBLIC OF KENYA



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**Kamuya v Elgon Kenya Limited (Civil Appeal 321 of 2018)
[2022] KECA 1404 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1404 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 321 OF 2018
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 16, 2022**

BETWEEN

PETER MUSYOKA KAMUYA APPELLANT

AND

ELGON KENYA LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi
(L. Njuguna, J.) delivered on 12th July 2018 in High Court Civil Appeal No. 473 of 2016)*

JUDGMENT

1. Peter Musyoka Kamuya, the appellant, was an employee of Elgon Kenya Ltd., the respondent. The respondent ran a factory in Nairobi, and the appellant was an assistant machine operator. In the course of his duty, the appellant was using a palletizer machine, which is used to stack and palletize products.
2. On the night of 11th/August 12, 2009, the appellant sustained injuries on the left hand when operating the palletizer machine. The appellant then filed a suit in the magistrate court at Nairobi claiming that the accident was caused by the negligence of the respondent or its employees or agents by: failing to provide safe means of work; not providing a safe machine for removing stack material; not guarding off the dangerous parts of the machine; and not maintaining or servicing the machine, among other grounds.
3. On its part, the respondent blamed the appellant for: failing to use the proper tools that were provided; failing to employ skill and attention; failing to observe workplace safety guidelines, and for not taking adequate measures to protect himself.



4. Upon hearing the parties, the trial magistrate held that each party was to blame for the accident and apportioned liability at 90:10 basis in favour of the appellant. The relevant part of the judgment was as follows:

“The plaintiff told Court that the injury sustained on that day resulted into the amputation of his left hand below the elbow. The injury is acknowledged in the Doshi 1 form. The medical report by doctor W M Wokabi dated June 29, 2015 indicates that the plaintiff sustained a cut and blunt injury on the back of his left hand. The doctor noted that the injuries complicated causing the hand to wither away and a diagnosis of post traumatic reflex sympathetic dystrophy was made which the doctor explained was a nerve complication as a result of which the hand was amputated at distal forearm. The acknowledgement by the defence that they spent a lot of money for plaintiff’s treatment is a confirmation of the doctor’s finding that the injury complicated. From that report I am satisfied that the final diagnosis of the plaintiff’s injuries was a direct result of the initial injury at the defendant’s factory. The Doctor assessed the degree of permanent incapacity at 65%.

PAIN AND SUFFERING

Mr Kaburu counsel for the plaintiff submitted for an award of Kshs 3,000,000/= for pain, suffering and loss of amenities and cited two decisions. The injuries in John Masulahi Mutuku v Samuel Macharia Kamau & another NRB HCCC 492/2010 is most comparable to the present case. An award of Kshs 2,500,000/= was made for comparable injuries in the year 2012.

Mr Kariu for the defendant submitted that the plaintiff had been fully compensated for the injuries he sustained. I have considered the submissions before me, the seriousness of the plaintiff injuries, the cited comparable award, and the age of the decision plus the incidence of inflation and find an award of Kshs 2,500,000/= adequate compensation for pain, suffering and loss of amenities. This figure shall be less what was paid to the plaintiff by the defendant as compensation for the injuries.

LOSS OF EARNING CAPACITY

The plaintiff in their prayers have fragmented this claim but the Court will deal with it under one heading. The plaintiff worked as a machine operator. He lost his left hand below the elbow. His nature of work is that he would require both hands to be effective. He told Court that his employer had proposed to take him on light duties but its HR department rejected him and couldn’t work anymore. This is clear demonstration of the difficulties the plaintiff would face in the job market. The injury has diminished his earning capacity tremendously. The plaintiff told Court that during treatment he was not paid and his last pay was in November 2009. This evidence is uncontroverted. The Doshi 1 form places the age of the plaintiff at 36, he would have worked for a further 24 years but given the unexpected in life, I would give him 18 years thus; $9010 \times 12 \times 17 = 1,838,040$.

The doctor’s report indicates that the plaintiff will require prosthesis at a cost of 100,000/= and will change every 5 years. The plaintiff is now 42 years, I will award 400,000/= under this provision.

There is further claim for special damages in respect of medical report and medical costs. The plaintiff’s evidence is that the defendant met his medical bill. I therefore find no basis for the claim on treatment costs. I will however award Kshs 2,000/= for medical report.



The defendant claimed and pleaded that the plaintiff was compensated under the workman's compensation Act. The only

evidence I was shown is a tabulation of the payable amount. There was no proof of payment. The plaintiff however admitted that he was paid Kshs 218,000/= under that Act.

Judgment is entered for the plaintiff against the defendant as hereunder:

1. General damages for pain, suffering and loss of amenities Kshs 2,500,000/=
 2. Loss of earning capacity Kshs 1,838,040/=
 3. Cost of prosthesis Kshs 400,000/=
 4. Special damages Kshs 2,000/=
 - Loss 10% contribution = Kshs 474,004/=
 - Less paid under workman's compensation Kshs 218,000/= Payable Kshs 4,048,036/=
 5. Costs and interest.”
5. Aggrieved by the decision of the trial magistrate on both issues of liability and quantum, the respondent filed an appeal in the High Court. Upon hearing the parties, the learned Judge (L Njuguna, J) overturned the ruling of the trial magistrate on liability and quantum of damages that had been awarded, holding as follows:

- “ 20. I have considered the submissions of both parties on this aspect. The medical reports on record show that the respondent suffered severe pain for a period of 3 years since the accident occurred up to when the arm was amputated. This is not disputed. The trial magistrate awarded him the sum of Kshs 2,500,000/= and relied on the case of *John Masulabi Mutuku v Economic Industries Ltd* HCCC No 492 of 2010 in which the plaintiff suffered a hand crush leading to amputation of his upper left limb.
21. In the case of *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR, the respondent suffered amputation of the left hand (below the elbow), and the High Court upheld the lower court's award on general damages for pain and suffering of Kshs 2,200,000/=
22. Considering the pain suffered by the respondent for the duration of the 3 years, it is my finding that the trial magistrate's award of Kshs 2,500,000/= was proper and not excessive. I will not interfere.
23. On loss of earning capacity, the trial magistrate awarded the sum of Kshs 1,838,040/= calculated at 9.010x12x17. The magistrate award was based on the presumption that the respondent was totally incapacitated as a result of the accident and amputation of the arm. I have considered the fact that the respondent worked as a machine operator and he could not continue working as such due to the amputation. However, that does not mean that the respondent was rendered totally incapacitated. The respondent could take up other light tasks upon healing which may not necessarily require the use of both forearms. In the premises, I find the respondent could have lost one half



of his earning capacity in which case, the award under this heading will be the sum of Kshs 973,080/= calculated as thus; $9,010 \times 12 \times 18 \times \frac{1}{2}$.

24. In the end, the appeal partially succeeds and judgment is entered for the respondent as hereunder:

a. Liability

i. 70%: 30% in favour of the respondent against the appellant.

b. General damages

i. For pain and suffering – Kshs 2,500,000/=

ii. Loss of earning – Capacity – Kshs 973,080/=

iii. Cost of prosthesis – Kshs 400,000/=

c. Special damages

(i) Kshs 2,000/=

Subtotal – Kshs 3,873,080/=

Less 30% (contributory negligence)

- Kshs 1,161,924/=

Total - Kshs 2,711,156/= together with costs and interests.

General damages to earn interest from the date of this judgment and special damages from the date of filing of the suit.”

6. The appellant is aggrieved by the decision of the learned Judge and has filed this appeal on the grounds that the learned Judge erred by: reducing the award of damages for loss of earning or diminished earning capacity; awarding interest in general damages from the date of her judgment; finding that the appellant was 30% liable for negligence; and in failing to apply the correct principles of law.
7. The parties filed written submissions which we have considered pursuant to Rule 58(1) as the appellant did not attend the hearing on October 3, 2022, even though they had been served. On its part, the respondent’s counsel Mr Karanja Njenga indicated that they would rely wholly on their written submissions.
8. We have carefully considered the record of appeal, the written submissions and the authorities. The appellant prays that this Court allows the appeal, set aside the judgment of the High Court dated July 12, 2018 and substitute therefor, with the judgment of the trial magistrate dated July 6, 2016, and grant the appellant costs of the appeal and of the suits in the court below. The appellants submit that the learned judge was wrong in apportioning 30% liability contrary to the 10% that was the finding of the magistrate court. On its part, the respondent submits that both parties were to blame for the accident and liability should be share equally.
9. This is a second appeal, and the approach that we should adopt is set out in many decisions of this Court. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, Onyango Otieno, JA expressed himself as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two Courts below considered matters they should not have



considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

10. In the cases of *Maina v Mugiria* [1983] eKLR 78, *Kenya Breweries Ltd v Godfrey Odoyo* (supra) and *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, in their respective holdings, *inter alia*, held that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the two Courts below considered matters they should not have considered, or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
11. On the issue of damages, the Court pronounced itself in the case of *Butt v Khan* [1978] eKLR Civil Appeal No 40 of 1977 as follows:

“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. This, with respect, is what I think happened in this case.”
12. We have considered the grounds raised by the appellant and form the view that this case succeeds or fails on the following grounds: did the learned judge misapprehend the evidence that was adduced, so that the judgement is based on incorrect basis; did the court consider matters it should not have considered or did it fail to consider matters it should have considered; is the sum awarded for damages so inordinately high or low as to represent an entirely erroneous estimate; and did the Judge proceed on wrong principles or misapprehend the evidence in some material respect.
13. We have carefully read and analyzed the judgement of the learned Judge and note: that she properly directed her mind to the relevant legal principal that the appeal before the court was a first appeal, and that the court had to re-evaluate the evidence that was adduced and render its independent findings; that there was conflicting evidence between the parties on how the accident occurred; that the appellant was cut by a lump cutter machine which was not in a proper working condition; that the appellant was well aware that the machine did not have a shutter, and that he knowingly used the machine knowing it was not in a proper working condition; and that the appellant deliberately took the risk in operating the machine.
14. It is clear that the learned Judge properly addressed herself to the applicable principles on liability and on quantum. The learned Judge took into account all the relevant factors, and the award of damages that she awarded was not inordinately high or low to warrant disturbance by this Court. The learned Judge properly re-evaluated the evidence as the court of first appeal and reached the right conclusions. The learned judge correctly observed that the appellant who was operating the machine knew that it was not in a proper working condition for some time, and he knowingly proceeded to operate the machine.
15. Indeed, there was no evidence or claim that the appellant had reported to the employer that the machine was defective, and was then forced to use it. By using a defective machine, the appellant took a deliberate risk and must carry some liability for that act. It should be clear to employees that they also have a responsibility to take care of their safety, and should not expect the employer to bear full liability where it is shown that there was deliberate act of negligence or omission to take safety precautions by an employee.
16. In conclusion, we have found that the learned Judge addressed all the relevant principles, and that the award of damages was not inordinately high or low, this answers all the issues raised in the appeal. It



is our finding that all the grounds of appeal fail. Accordingly, we dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

