Dogra International Limited v Wanekaya (Appeal E033 of 2024)
[2025] KEELRC 212 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 212 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E033 OF 2024

JW KELI, J

JANUARY 31, 2025

BETWEEN

DOGRA INTERNATIONAL LIMITED ..... APPELLANT

AND

GEOFREY WANEKAYA ..... RESPONDENT

JUDGMENT

1. The appellant was the respondent before the trial court and being dissatisfied with the entire Judgment and Decree of the Magistrate court at Milimani Commercial Court delivered by Hon. Rawlings Liluma (SRM) on 26th January 2024 in Civil Case no. 10920 of 2018 filed the memorandum of appeal dated 21st February 2024 received by the court on even date and the record of appeal received by the court on the 1st October 2024. The appeal sought for the following orders: -

    a) The Trial Court's Judgment and Decree be set aside.

    b) The finding on liability be set aside.

    c) The assessment of general damages be reviewed downwards.

    d) Costs of the suit in the lower Court and the costs of the Appeal be awarded to the Appellant.

2. Grounds of the appeal

    a) That the Learned Trial Magistrate erred in law and fact in finding that the Respondent had proved existence of an employment Contract without any supporting evidence.

    b) That the Learned Trial Magistrate erred in law and fact in holding that the Appellant was 100% liable for causing the accident without proof of any employment contract.

    c) That the Learned Trial Magistrate erred in law and in fact in making an award of General Damages which was not within limits of already decided cases of similar nature.

d) That the Learned Trial Magistrate erred in law and fact in awarding the Respondent General damages of Kshs. 750,000/= which award is inordinately high and excessive.

e) That the Judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record.

Background to the appeal

3. The Respondent filed a claim by way of plaint dated 1st March 2018 on basis of injury at work seeking for the following reliefs against the appellant:-

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

   b. Special damages Kshs. 16,300.

   c. Costs and interest.

4. In support of the suit the plaintiff filed his witness statement and produced documents in support of the case including medical report and treatment evidence (at pages 9 -22 of RoA was the list of documents and the bundle).

5. The appellants entered an appearance and filed a statement of defence dated 8th April 2019 where it denied liability (Pages 23 to 25 of RoA).

6. The plaintiff's case was heard on the 6th of December 2023 where the plaintiff gave evidence as only witness of his case. He produced the documents under his list of documents 1st March 2028 as C-exh 1-8. The defence closed its case the same day without calling any witness (page 57-58 of RoA). Parties then filed written submissions. (pages 26-50 of RoA were the submissions filed by both parties)

7. The trial court, Hon. Rawlings Liluma (SRM) delivered judgment in the suit in favour of the Respondent against the Appellant, as follows: -

   1. Liability 100%.

   2. General damages Kshs. 750,000 together with interest from the date of judgment.

   3. Special damages Kshs. 16,300 with interest from the date of filing suit.

   4. The plaintiff is awarded costs of the suit.

   5. Costs.

   6. Interest at court rates.

8. The appeal was canvassed by way of written submissions.

Determination

9. The duty of the court sitting as the first appellate court is as stated in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) thus,'' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. ' The court is duly guided.

Issues for determination

10. The appellant addressed the following issued in written submissions: -

    a. Failure to prove existence of employment contract

    b. The finding of 100% liability was made in error.

    c. The assessment of general damages at Kshs.750,000.00 was inordinately high

11. The respondent addressed the issue of the employment contract and the award of damages.

12. The court having perused the grounds of appeal and the written submissions was of the considered opinion the issues placed by the parties for determination in the appeal were as follows: -

    a. Where there was proof of employment of the respondent by the appellant.

    b. Whether the finding of liability at 100% was in error.

    c. Whether the assessment of general damages at Kshs. 750,000.00 was inordinately high.

Where there was proof of employment of the respondent by the appellant

13. The Claim before the Trial Court was an employment dispute founded on work injury. Whether the Respondent was an employee of the Appellant or not was a germane issue in the dispute. The Plaintiff alleged that he was injured while operating the Appellant's concrete drainage pipes as an employee of the Appellant. The Defendant denied the existence of an employment contract.

Appellant's submissions

14. The appellant submitted that the place of the Employment Contract in employment dispute was affirmed in the case of Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited (2016) eKLR, where the Court stated;-

> " The jurisdiction of the Employment and Labour Relations Court as far as employment matters are ` concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further." The Appellant contended that the trial Court failed to satisfy itself on the existence or non-existence of an employment contract.

15. The Appellant submitted that it was the burden of the Claimant to prove the existence of an employment relationship and the unfair termination thereof. That during cross-examination, the Respondent when asked to show proof of his employment stated as follows:-

> " I urge the Court to consider interim invoice. It is proof of my employment."(page 60 of the Record of Appeal). That a perusal of the said Invoice produced at pages 21 to 22 of the Record of Appeal does not show the Appellant's name. It is nowhere closer to showing existence of employment relationship.

16. That the Respondent further failed to give the name of the Directors of the Company or the names of the colleagues who allegedly witnessed the accident. The Respondent further failed to call any of his fellow employees to corroborate his testimony and ascertain that indeed he had been the Appellant's employee and was indeed injured on the said date as claimed.

17. The Appellant submitted that there was equally nothing to show that the Plaintiff's injuries were sustained at the place of work. It relied on the decision in the case of Mutua Muasya v Meera Constructions Limited [2019] eKLR, where the Court stated that:-

''The fact of being an employee of the Respondent was disputed and so he bore the burden of proving this fact by way evidence. Employment is not a matter about which the court can take judicial notice. Even though the appellant was a casual worker with no any formal documentation he had other ways of proving that he was an employee. Here I have in mind calling witnesses who were at work with him on the material day or showing proof of payments or through discovery and so forth. Mere claim that he was an employee of the Respondent is not enough. Under the *Evidence Act* burden of proof was on the appellant of which he did not discharge. As a result, I find that the Appellant did not prove that he was an employee of the Respondent at the material time. The trial magistrate did not err in finding that Appellant was not an employee of the respondent.''

18. The Appellant submitted that the respondent having failed to prove the existence of an employment relationship the claim had no leg to stand and ought to have failed. That the Respondent failed to prove that he was an employee of the Appellant or that he was injured at the premises of the Appellant. The Appellant is therefore not liable for the injuries sustained by the Plaintiff.

Respondent's submissions

19. The respondent submitted that his witness statement and oral evidence was that he was an employee of the appellant for so many years. That the *Employment Act* envisages oral and written employment contracts under section 8. That section 9 casts statutory duty on the employer to ensure a contract is drawn. Section 10(7) casts burden on employer in case of legal proceedings to prove contract terms. That his evidence was oral evidence on oath. That evidence is as defined under section 3 of the *Evidence Act*. That oral evidence is not inferior to written evidence because section 62 of the *Evidence Act* provides:'' all facts , except the contents of documents, may be proved by oral evidence.''

20. The respondent submitted that the appellant did not adduce documentary evidence. That oral evidence must be direct as stated under section 63 of the *Evidence Act* and referred to section 63(2) (c) to wit:- ''(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;'' The Respondent submitted that he told the trial court he had worked for the company director who retired. That he had left employment until his son recalled him. That he sustained injuries as per medical report by Dr. Wokabi. That the appellant paid for the medical bill partly by cash and cheque and he produced the hospital invoice that showed the bill was paid vide cheque No. 000911 attributed to the appellant. That the appellant did not call rebuttal evidence. That the appellant under section 74 of the *Employment Act* the appellant was obliged to keep record of it employees and under section79 it was obliged to keep a register of employees. That for failure to produce the employment records as per the law an adverse inference could be drawn against the appellant under section 112 of the *Evidence Act*.

Decision

21. The court finds the issue of employment of the claimant was not identified as an issue for determination by the trial court. During cross-examination the Respondent told the court he was a permanent employee and relied on the hospital invoice that showed the bill was paid vide cheque No. 000911 attributed to the appellant. In his witness statement the claimant/respondent stated that the appellant was his employer since August 2002. That he had previously worked with the Appellant from 1991 to 2000 and left when the founding director died. That it was the son of the ex-director who came for him in the year 2002 and was paying him Khs. 500 daily against a book kept by the

appellant. He was never issued with employment documents (page 8 of the RoA). That upon injury the appellant paid his medical bills of which invoice was produced.

22. The court on perusal of the filed defence statement at trial court did not find denial of the employment relationship(page 24-25 of RoA). The court finds that the issue of employment was only brought up at cross-examination. The court holds that it is trite that parties are bound by their pleadings. The appellant having not denied the employment of the respondent as pleaded in the witness statement then that was deemed as an admitted fact.

23. The court agreed with the respondent that an employment contract need not be in written. Section 8 of the *Employment Act* envisages oral and written contracts of employment. The respondent laid sufficient basis on the employment relationship with the appellant like the statement of having been recalled by the son of the ex-director. C-exh 5 was a letter dated 23rd May 2017 by the Nairobi County Occupational Safety and Health officer addressed to the appellant on the injury to the respondent of 10th February 2016(Page 9 of the RoA). That letter was produced as evidence before the trial court.

24. The Appellant under section 74 and 79 of the *Employment Act* is obliged to keep records of employees. It never called rebuttal evidence. Section 74 states (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act. Section 79 provides:- ''An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31st December containing such information shall be sent to the Director not later than 31st January of the following year.'' The failure of the respondent to produce the register of its employees before the trial court was a reason for this court to make inference that the employment of the respondent was not in dispute. The employment was not denied in the statement of defence. The court holds there was evidence on the balance of probabilities of the employment of the respondent by the appellant before the trial court.

Whether the finding of liability at 100% was in error

25. The trial court on the issue of liability, having stated that the defendant had not called a witness, relied on the decision of Odunga J (as he then was) in Linus Nganga Kiongo & 3 others v Town Council of Kikuyu (2012)e KLR where the Judge cited with approval several decisions to find 100% liability for lack of rebuttal evidence as follows:- ''What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

> " Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001* the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 Makhandia, J. held:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".

The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*said:- "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed." The trial court relying on the foregoing decisions held that the appellant was 100% liable for the injury.

26. The appellant submitted that It was erroneous for the trial Court to find the Appellant 100% liable on the sole reason that the Appellant had failed to call evidence in support of her case. The trial Court erred by failing to appreciate that the Respondent's duty to prove liability against the Appellant was not anchored on the Appellant's failure and/or otherwise to call evidence in defence of the case. It is trite law that the absence of a Defence witness does not absolve the Plaintiff from discharging the burden of proof and demonstrating on a balance of probability that they should succeed as against the opposing party. To buttress the submission the appellant relied on the case of Muchi Gachukia V Francis Ndirangu Njoroge & 2 Others [2019] eKLR wherein the Court citing with approval the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR pronounced itself thus: -

> ''The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company

Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated: -"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."

27. The appellant further relied in the decision in Gichinga Kibutha v Caroline Nduku [2018] eKLR where the Court in the same breadth held that:- ''It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.'' The upshot of the above is that the Learned Magistrate misdirected himself by holding that that the Appellant was 100% liable merely by the fact that it failed to call evidence in defence of the case. That the failure by the Trial Magistrate to critically analyze the evidence and arguments presented by the Respondent meant that Judgment so delivered was flawed.

28. The Appellant further submitted that the Respondent did not properly and sufficiently demonstrate how the accident occurred, and/or who was blamed for the said accident and accordingly, the particulars of negligence were not sufficiently proven. There was no explanation as to how the metal rod broke and what caused its breakage.The Respondent also failed to link his injuries to the Defendant.

Decision

29. The court was called upon to re-evaluate the evidence on merit, the trial court having failed to do so relying on failure of the defence to call rebuttal evidence.

30. The Respondent in witness statement adopted before the trial court as evidence in chief, stated he was operating the appellant's concrete drainage pipes making machine when a metal rod for lifting the pipe broke at his end injuring his right hand as per the medical report(At page 10-11 of the RoA). He testified that the rod was old, rusty, and overused. The medical report was produced before the trial court. The court found that the respondent explained how the metal rod broke and what caused its breakage being that, it was old, rusty and overused. The Court found that it was the responsibility of the appellant to provide safe working space and equipment. The court found that the respondent discharged his burden of proof and there was no evidence called by the employer in rebuttal. The court found that the Respondent met the test stated in the decision cited by the appellant in Kenya Power & Lighting Company Limited V Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated: -"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."

31. Consequently, the Court found no basis to interfere with the finding of the trial court on 100% liability against the appellant.

Whether the assessment of general damages at Kshs.750,000.00 was inordinately high

32. The trial court relied on the decision in Phillip Mwago v Lilian Njeri Thuo (2019)e KLR where the High Court upheld an award of Kshs. 500000 for general damages for a claimant who had suffered broken humerous with 8 % residual functionality disability. The trial court stated that it took into consideration decisions relied on by the parties, issue of passage of time and inflation

rates and permanent incapacity suffered by the plaintiff in the case in awarding general damages at Kshs.750,000.00 (page 62 of RoA was the authority relied on).

Appellant's submissions

33. The Appellant submitted that the Learned Magistrate erred in law and in fact in making an award that was not within the limits of already decided cases of a similar nature. The law regarding General Damages was settled by the Court of Appeal in the case of Nyambura Kigaragari V Agrippina Mary Aya (1982-1988) 1 KAR where it was observed as follows:-

> "I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover..."

34. The appellant contended that the Learned Trial Magistrate erred in awarding the Respondent general damages of Kshs.300,000 which amount is inordinately high and excessive considering the injuries sustained by the Respondent. The Respondent alleged in his Plaint that he had sustained fracture of the right humerus. The incident happened in the year 2016 and awards decided around the same time provided that damages in the sum of Kshs.300,000.00 to Kshs.350,000.00 for similar injuries. To buttress the forgoing submissions the appellant relied on the case of Maina Onesmus v Charles Wanjohi Githome [2019] eKLR the High Court substituted an award of Kshs. 650,000/= with an award of Kshs. 350,000/= for a Plaintiff who humerus, fracture of the condyles; fracture of the shoulder gird and pain and psychological trauma. In the case of Said Abdullahi & another v Alice Wanjira [2016] eKLR in which an award of Kshs.300,000/= was made on appeal to a plaintiff with a fracture of the right humerus bone and degree of permanent incapacity at 10%. Relying on the foregoing decisions the appellant submitted that an assessment of Kshs.350,000/- would be will be a fair and commensurate compensation..

Decision

35. The medical report was to the extent that the respondent suffered a fracture of right-hand humerus with permanent disability at 15 %. The 100% liability against the appellant was upheld. The outstanding question before the appellate court was whether the award of Kshs. 750,000 was excessive. The appellant had relied on the decision in Maina Onesmus v Charles Wanjohi Githome [2019] eKLR where the Judge stated on appeal- ''I have considered the authorities cited and it is clear to my mind that the defendant/respondent sustained fractures of the right arm- which were not serious injuries as both the doctor who filed the P3 and the one who examined him subsequently considered the degree of injury to be harm – meaning that there was no permanent damage and the injuries healed well.'; and proceeded to reduce the awarded general damages from Kshs. 600,000 to Kshs. 350,000.

36. The appellant on appeal further relied on the decision in Said Abdullahi & another v Alice Wanjira [2016] eKLR in which an award of Kshs.300,000/= was made on appeal to a plaintiff with a fracture of the right-hand humerus bone and degree of permanent incapacity at 10%.

37. The trial court relied on the decision in Philip Mwago v Lilian Njeri Thuo(2019) e KLR where on appeal against the award the Judge observed:- ''47. The respondent sustained a fracture of the left humerus as documented in the medical report of Dr. Wokabi and summary from Avenue Hospital. A permanent disability of 8% was recorded. Counsel for the respondent proposed an

award of Kshs.800,000/= while the defence proposed Kshs.250,000/=.48. The respondent submitted for an award of Kshs.800,000/= in respect of general damages while the appellant submitted for Kshs.250,000/=. The honourable trial magistrate exercised his discretion and awarded the respondent Kshs.500,000/=. The question is whether this amount can be said to be so inordinately high considering the injuries sustained being left humerus was fractured as evidenced by the medical report of Dr. Wokabi. 49.This court finds no justification to disturb the award of damages as it is not demonstrated that it is so inordinately high as to represent an entirely erroneous estimate. It is not shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high." The Court found this decision was more relevant to the injuries sustained by the respondent compared to that relied on by the respondent in Maina Onesmus v Charles Wanjohi Githome [2019] e KLR. Further the decision in Said Abdullahi & another v Alice Wanjira [2016] eKLR in which an award of Kshs.300,000/= was made on appeal to a plaintiff with a fracture of the humerus bone and degree of permanent incapacity at 10% was much earlier in 2016.

38. The court having re-evaluated the evidence finds that the decision relied on by the trial court in Philip Mwago v Lilian Njeri Thuo(2019) e KLR was relevant as the injuries were similar save for being on the left hand and with less disability. The trial court considered inflation over the years from 2019 to 2024. Taking into account inflation and the more permanent disability of 15% the court held that the award by the trial court to the respondent of compensation of Kshs. 75,0000 for the injuries suffered was not inordinately too high.

39. In the upshot the Court found no basis to interfere with the award of general damages by the trial court the same having been based on comparable award and not inordinately high in the circumstances.

40. In conclusion, the Court held that the appeal lacked merit. The Judgment and Decree of the Magistrate Court at Milimani Commercial Court delivered by Hon. Rawlings Liluma (SRM) on 26th January 2024 in Civil Case no. 10920 of 2018 is upheld. The appeal is dismissed with costs to the respondent.

41. Stay of 30 days is granted.

42. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31 ST DAY OF JANUARY, 2025.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant : - Mwai Muthoni h/b Njuguna

Respondent: Ms Kanana h/b Gakuru