



REPUBLIC OF KENYA



**Hajar Services Limited v Mwita (Appeal 5(B) of 2020)
[2025] KEELRC 1029 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1029 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 5(B) OF 2020
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

HAJAR SERVICES LIMITED APPELLANT

AND

PETER NYANGI MWITA RESPONDENT

(Being an Appeal from the decree and judgment of the Hon. M Kasera, Senior Principal Magistrate (SPM) delivered on the 31st day of January, 2020 in Kajiado CMCC No. 35 of 2017)

JUDGMENT

1. The Appeal herein arises from the decision of Hon. M. Kasera, Senior Principal Magistrate in Kajiado CMCC No. 35 of 2017 delivered on 31st January, 2020. In the plaint dated 18th January, 2017, the Appellant herein (Respondent in the lower Court suit) sought general damages for injuries he had sustained as a result of an industrial accident that allegedly occurred in the course of his employment with the Appellant.
2. The Respondent attributed the accident to negligence, breach of statutory duty and/or carelessness on the part of the Appellant and/or its agents. The Respondent claimed for general damages and special damages.
3. The Appellant filed a defence denying any liability as alleged and terming the suit fraudulent, vexatious fatally defective, mischievous, misplaced and an abuse of court process.
4. In her judgment delivered on 31st January, 2020 the Trial Magistrate found in favour of the Respondent, found the Appellant 70% liable for the accident and proceeded to award the Respondent Kshs.140,000 less 30% contribution and therefore giving an award of Kshs. 98,000 as general damages, special damages of Kshs.4,700 making a total of Kshs. 102,000 plus costs and interest from date of judgment.



5. The Appellant being dissatisfied with the Judgment and decree of the Trial Magistrate on both liability and quantum filed the instant Appeal vide its Memorandum of Appeal dated 1st July, 2020 in which it raised the following grounds THAT:
- a. The Learned trial Magistrate misdirected herself and erred in law and in fact by holding that the Plaintiff had proved his case against the Defendant on a balance of probabilities.
 - b. That the Learned trial Magistrate erred in law and in fact by failing to find that the plaintiff did not prove that he was the Defendant's employee at the material time or at all and hence arrived at an erroneous finding on liability.
 - c. The Learned trial Judge misdirected herself and erred both in law and in fact by failing to find that the Respondent did not produce any documentary evidence to prove that he was the Defendant's employee at the material time or at all.
 - d. The Learned trial Magistrate misdirected herself and erred in law and in fact by completely disregarding the Defendant's Witnesses testimony and holding the Appellant 70% liable for the accident the subject of this suit.
 - e. The Learned trial magistrate misdirected herself and erred in law and in fact completely disregarding and failing to consider the Defendant's exhibits and hence arrived at an erroneous finding on liability.
 - f. The Learned trial Magistrate misdirected herself and erred both in law and in fact in failing to consider the Defendant's overwhelming evidence on record and hence arrived at an erroneous finding on liability.
 - g. The Learned trial Magistrate erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis a vis the injuries sustained by the plaintiff.
 - h. That the Learned trial Magistrate misdirected herself and erred in law and in fact by totally failing to consider the Defendant's Submissions on record thus arrived at an erroneous finding on liability and quantum.
 - i. The Learned trial Magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.
6. The Appellant prayed for the following Orders: -
- a. That the Appellant's appeal be allowed
 - b. That the whole of the judgment delivered on 31st day of January 2020 against the Appellant on liability be set aside.
 - c. That the Respondent's suit in the lower Court be dismissed with costs to the Appellant.
 - d. Without prejudice to the foregoing the whole of the judgment delivered on 31st day of January 2020 against the Appellant on quantum be set aside.
 - e. That without prejudice to the foregoing, General Damages be substantially reduced.
 - f. That the costs of this Appeal be awarded to the Appellant in any event.
 - g. Such other and/or further relief as this Honourable Court may deem just to grant.



7. Directions were given that the appeal proceeds by way of written submissions.

Appellant's Submissions

8. The Appellant identified the issues for determination to be:

- a. Whether the Respondent was an employee of the Appellant
- b. Whether the Respondent exercised his burden of proof
- c. Whether there are any damages due to the Respondent (sic) and of what amount, if any.

9. The Appellant submitted that the Respondent was not an employee of the Appellant and none of the Appellant's witnesses knew him. That the evidence of the Appellant's witnesses was consistent. That under sections 107, 108 and 109 of the *Evidence Act* it was the burden of the Respondent to prove that he was employed at the Appellants building site by calling a colleague that he worked with and that the alleged injury occurred. In support of this position the Appellant relied on the decision in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* where the court stated that-

“We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (see J. Wigmore. Evidence & 265, at (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavourable to his cause.

In the case of *Bukenya & others v Uganda* [1972] EA 549 Court addressed itself thus:-

- “(i) The Prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- (iii) Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to the adverse to the prosecution.

10. It was further submitted that the Respondent alleged that he was using a wooden ladder at the site and had requested for a metal ladder yet in cross examination he acknowledged that the site was using metal scaffolding and had no wooden ladders.

11. It was further submitted that the Trial court erred when it held that there were no photos of the site yet the same are referred to at page 53 of the Record of Appeal where it is stated that the photos were produced in court. That the photos corroborate the evidence of the Appellant's witnesses that during construction only metal scaffolding were used at the site.

12. It was submitted that the Respondent was an imposter. For emphasis the Appellant relied on the decision in *Chamache Tea Factory Company Limited v Henry Nyabuto Monari* [2009] eKLR it was held-

“... a plaintiff succeeds in providing his case on the strength of his evidence in support of his pleadings but not on perceived weakness of defence evidence. Whether or not a civil suit is



defended, a plaintiff has to prove his case on a balance of probabilities before judgment can be entered in his favour.”

13. The Appellant further relied on the decision in Nakuru HCCA No. 230 of 2004 *Timsales Ltd v Willy Nganga Wanjohi*, Justice Kimaru observed that:

“...when a party pleads negligence he has to prove the causal link between an employee is undertaking manual work as is the case hereof, he is to take reasonable care of his own safety as the employer is not expected to babysit or supervise such manual task that need no supervision.”

14. The Appellant also relied on the decision in *Benter Atieno Obonyo v Anne Nganga & another* [2021] eKLR where Chemitei, J stated-

“It is not enough to allege as done by the appellant herein and expect the court to agree with you. As expected under Section 107 and 108 of the *Evidence Act*, the burden squarely is upon the appellant....”

15. The Appellant also relied on the decision in *Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karengi* [2021] eKLR in which Odunga J, in finding the Appellant had not exercised her burden of proof relied on the decisions in *Mary Wambui Kabugu v Kenya Bus Services Ltd*. Civil Appeal No. 195 of 1995,

“The age long principle of law is that he who alleges must prove. The appellant’s case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent’s driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed.

16. The Appellant also cited *Treadswetters Tyres Ltd v John Wekesa Wepukhulu* 92010) eKLR, where Ibahim, J (as he then was) cited *Charlesworth & Percy on Negligence* thus-

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1. Whether on that evidence, negligence may be reasonably inferred and 2. whether, assuming it may be reasonably inferred, negligence is in fact inferred.”



17. The Appellant also cited Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR, where Nyamweya, J quoted Halbury’s Laws of England-
- “The Burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owned by the defendant to the plaintiff, some breach of that duty and injury to the plaintiff between which and the breach of a causal connection must be established.”
18. On quantum the Appellant submitted that should the court find that the accident occurred the reasonable compensation for the Respondent’s injuries should ne Kshs. 50,000 relying on the decisions in Kericho HCCC No. 56 of 2004 James Nyaboga Masogo v Kipkebe Ltd [2007 EKLR the court observed inter alia that the award of damages by a court of law is not meant to put the plaintiff in better position than he would have been had he not been injured. It is meant to compensate him for the injuries that he had.
19. It further relied on the case of Nakuru Civil Appeal No. 60 of 2010 crown foods Ltd v Emily Wangui [2022] eKLR the court observed inter alia that an award of damages must be reasonable and be assessed in moderation as an award is not to punish the defendant was but should be a reasonable compensation for the loss suffered.
20. The Appellant also referred to Elisha Akello Raga v Shajan and Holding Limited & another [2016] eKLR where Majanja J. observed
- “Our courts have also pointed out the need for consistency in awarding damages for similar injuries although it is agreed that not all injuries are the same (see Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR) which the current value of the shilling and the economy have to be taken into account, astronomical awards must be avoided and the court must see to it that awards make sense and result in fair compensation’
21. On special damages the Appellant submitted that only damages specifically pleaded and proved should be awarded.

Respondent’s Submissions

22. For the Respondent the issues for determination were identified as:
- a. Whether the Respondent was an employee of the Appellant and suffered injuries in the course of employment
 - b. Who holds liability for the said accident and to what extent
 - c. What amount of damages is the Respondent entitled to?
23. On the first issue the Respondent submitted that the Appellant’s witnesses denied that the Respondent was its employee and stated that they had a list of the labourers engaged at the site daily at the time of the accident but failed to produce the list. Relying on the decision in Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR the Respondent submitted that it was the duty of an employer who was in possession of the evidence, to produce it in court. That section 107 of the *Evidence Act* provided that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts bears the burden to prove that those facts exist.



24. On the question of liability, it was submitted that the Respondent suffered the injury in the course of work. That section 6(3) of the *Occupational Safety and Health Act* states that every occupier shall adopt preventive and protective measures to ensure that under all conditions of their intended use, all machinery, equipment, tools and processes under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in the Act.
25. The Respondent relied on the decision in *United Millers Limited & Another v John Mangoro Njogu* [2016] eKLR and *AAA Growers Ltd v Ann Wambui* (suing as the Administratrix in the Estate of Thomas Wahome Wambui) & Another [2016] eKLR where the courts discussed the concept of *volenti non fit injuria*.
26. It was submitted that the Respondent, though voluntarily executing his duties, was not aware of the fact that the ladder had a loose joint that would lead to his injuries.
27. On quantum it was submitted for the Respondent that the court factored contributory negligence of 30% to the award of general damages of Kshs. 140,000 guided by the decision in *Goerge Kinyanjui & Another v Hussein Mahad Kuyule* [2016] eKLR.
28. The Respondent submitted that the trial court did not misdirect itself in awarding the damages relying on the decision in *Butt v Khan* (1977) 1 KLR where the Court of Appeal stated that an appellate court will not disturb an award for damages unless it is inordinately high or low, or the trial court proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

Analysis and Determination

29. I have carefully considered the grounds of appeal, the record of appeal and the submissions of the parties. The issues for determination are whether the learned trial magistrate erred in finding that the Respondent was injured in the course of working for the Appellant in its premises and, if the first issue is in the affirmative, whether the award was too high to warrant interference by this court.
30. This being a first appeal, this Court has a duty to re-evaluate the entire case and come up with its own findings in the matter. This is as was set out in the case of *Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126* where the Court stated as follows:

“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 appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
31. It was the Respondent’s averment that he was working for the Respondent when he fell from a wooden ladder at the Appellant’s construction site when the ladder broke while he was working on straightening a beam. That as a result he sustained the injuries that are the subject matter of this appeal.
32. The Appellant on the other hand insists that the Respondent was not its employee and that the accident alleged by the Respondent to have occurred at the site where the Appellant was carrying out construction work on 11th July 2016 did not happen. The Appellant’s case is that by that date the construction work on the buildings was complete and the work that was ongoing was on the perimeter wall which was 1.5 meters high and did not require any ladder.



33. It was further the Appellant's case that it did not use any wooden ladders at the site as it was using metal scaffolding during construction.
34. The Appellant further stated that the person named by the Respondent as the foreman, one Mr. Mwangi, was unknown to the Appellant.
35. The Appellant produced photos of the site as at July and November, 2015 and January, 2016 to support its case. It further produced an investigation report by Capricorn Loss Assessors Ltd dated 7th March, 2017.
36. The Trial Magistrate held that the Appellant did not produce the photos in court, which was an error as the photos are on record.
37. The trial court further found that the Appellant did not produce the attendance register for 11th July, 2016. The court therefore found that the Appellant did not discharge its burden of proving that the Respondent was not at work on the material date and on that ground found it liable for failing to provide head gear to the Respondent which would have prevented the injury he sustained. The court further found that the Appellant was liable under section 6(1) of the Occupational Safety and Health Act which provides that-

“Every occupier shall ensure the safety, health and welfare at work of all persons in his workplace.”
38. The trial court further found that the Respondent had proved his case on a balance of probabilities by production of treatment records which corroborated his averments in the plaint and testimony in court.
39. I have looked at the photos produced and they do not controvert the evidence of the Respondent. The Respondent testified that he was working on 2nd floor and the houses were up to 4th floor. No clarity was sought from the Respondent at the hearing whether he was working from the inside or outside of the building. It was not clarified whether a beam is straightened from outside or inside of a building. It was further not explained whether there was scaffolding both on the inside and the outside the building.
40. The photos produced by the Appellant do not give any clarity on the issue whether the work the Respondent was doing was inside or outside and whether there was scaffolding on both the inside and outside of the building.
41. From the evidence adduced by the Respondent, especially the uncontested medical reports, it is evident that the Respondent was injured. According to him the injury occurred at the Appellant's construction site. Without production of the list of workers on the site on the material date it is not possible to I therefore agree with the trial magistrate that the burden of disproving that the Respondent was injured at the Appellant's construction site lay with the Appellant who was the party that wished the court to decide in its favour on that fact.
42. I therefore find no basis to disagree with the trial Magistrate on the finding that the Appellant failed to controvert the Respondent's evidence that he was injured at the Respondent's construction site. I further agree with the trial magistrate that this issue would have been resolved if the Appellant produced the attendance register of the labourers and foremen at on site on the material date.
43. On the quantum, the Appellant submitted that the award was excessive considering the injuries sustained by the Respondent, and urged the court to reduce the same to Kshs. 50,000 relying on the decisions in *Shalimar Flowers Ltd v Noah Muniango Matianyi* [2011] eKLR and *Crown Foods Ltd*



v Emily Wangui [2011] eKLR which the Appellant states related to similar injuries as those suffered by the Respondent. The Respondent on the other hand relied on the award in Goerge Kinyanjui & Another v Hussein Mahad Kuyule (supra) which the trial court relied on. In that case the Plaintiff suffered injuries to his chest, the neck, knees and lost two teeth and was awarded Kshs. 120,000 in 2016.

44. The award of general damages is discretionary and an appellate Court will only interfere with quantum where the Trial Court arrived at the quantum after considering irrelevant factors, or failing to consider relevant factors or where the quantum is inordinately low or inordinately high as to amount to an erroneous estimate of damages. Refer to the case of Bashir Ahmed Butt v Uwais Ahmed Khan (1977) 1 KAR where the Court held as follows:

“An Appellant Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that 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.”

45. The duty of this Court is thus to consider whether the award of the lower Court was inordinately high as to warrant interference by this Court.

46. I have considered the injuries in question and the authorities cited by the parties both at the lower Court and at this stage. I have also in mind previous awards by the superior Courts for comparable injuries. I note that the Appellant relied upon fairly old authorities while that relied upon by the Respondent was for almost similar injuries sustained by the Respondent herein and was in 2016.

47. I find that the award of Kshs.120,000/- as general damages for multiple soft tissue injuries was indeed reasonable and commensurate with awards for similar injuries. I therefore do not find any reason to interfere with the same.

48. In conclusion, I find no merit in the appeal with the result that the same is dismissed with costs.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 23RD DAY OF JANUARY 2025

MAUREEN ONYANGO

JUDGE

