Isl Kenya Limited v Ilovi (Appeal 4 of 2021)
[2025] KEELRC 909 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 909 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL 4 OF 2021

MA ONYANGO, J

MARCH 21, 2025

(FORMERLY MACHAKOS HIGH COURT CIVIL APPEAL NO. 126 OF 2019)

BETWEEN

ISL KENYA LIMITED ..... APPELLANT

AND

PAUL MULI ILOVI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Honourable J.A Agonda (SRM) at Mavoko delivered on 6th September 2019 in Civil Suit No. 637 of 2016)

JUDGMENT

1. ISL Kenya Limited, the Appellant herein filed an appeal against the Judgment and Decree of the Senior Resident Magistrate at Mavoko in CMCC No. 637 of 2016 delivered on 6th September 2019. In the suit the Respondent herein who was the Plaintiff in the trial court had sued the Appellant for compensation in respect of injuries he sustained in an industrial accident at the workplace.

2. The parties compromised on the issue of liability and recorded a consent on the same at a ratio of 80:20 in favour of the Respondent (Appellant herein) who was the Plaintiff (Respondent herein) in the said suit. After hearing the parties, the Court awarded the Respondent Kshs 1,000,000 as general damages for pain and suffering and loss of amenities, Kshs. 3,192,681.60 for loss of future earning capacity, Kshs 200,000 as future medical expenses and Kshs. 3,000 as special damages.

3. The Appellant being dissatisfied with the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal dated 29th September 2019: -

    i. That the Learned Magistrate erred in law and in fact in awarding Kshs.1,000,000/= as general damages for pain, suffering and loss of amenities that is inordinately high and not consistent with the injuries sustained, submissions by Counsel for all parties and legal precedents.

ii. That the Learned Magistrate erred in law and in fact in arriving at the said general damages at an amount not supported by the evidence on record.

iii. That the Learned Magistrate in awarding the Respondent 100% damages for loss of earning capacity yet the Respondent had healed and suffered permanently incapacity to the extent of 30% and that he could still engage in gainful work.

iv. That the Learned Magistrate erred in concluding that the Plaintiff could no longer work despite being incapacitated to the extent of 30% permanent incapacitation.

v. That the learned Magistrate misdirected herself on the law on loss of earning capacity.

vi. That the Learned Magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.

vii. That the Learned Magistrate erred in law and in fact in failing to consider the documentary evidence tendered by the Appellant.

viii. That the Learned Magistrate erred in law and in fact in applying wrong principles of law on arriving at the said Judgment.

4. The Appellant seeks the following orders: -

a. The judgment and decree in Mavoko CMCC No. 637 of 2016 on general damages, loss of Earnings Capacity and Future Medical Expenses be set aside.

b. In the alternative, this Court do make its own, independent assessment on quantum of damages.

c. Costs of the Appeal.

Background of the case

5. The Respondent was the Plaintiff in the trial court. He filed the suit giving rise to this appeal against the Appellant vide a Plaint dated 20th June, 2016 as amended on 29th May 2017 in which he prayed for general damages for pain, suffering and loss of amenities, Special damages of Kshs 3,000, future medical expenses, costs and interests as a result of an accident he alleged to have occurred while he was in the course of his employment with the Appellant.

6. The Respondent averred that on 23rd March 2016, while he was on duty setting metal bars into a twisting machine, the machine operator switched the machine on and it rolled and trapped his right hand as a result of which he sustained serious injuries.

7. The Respondent attributed the occurrence of the accident to negligence, carelessness, breach of statutory duty and breach of contract of employment on the part of the Appellant.

8. It was the Respondent's case that he was aged 44 years at the time of the accident and was predominantly right handed. That he earned his living through doing manual casual jobs. He contended that as at the time of the accident, he was employed as a casual worker at the Respondent's company earning Kshs. 11,616 a month.

9. In its Statement of Defence dated 12th January 2017, the Appellant (Defendant) as amended on 10th July, 2017, denied the Respondent's claim and in particular that on 23rd March 2016, he was injured while in the course of his lawful duties on instructions of the Defendant. The Defendant averred that if at all any accident occurred as alleged, the same was solely caused by the Plaintiff's negligence,

recklessness and carelessness. The Appellant pleaded that the Respondent was wholly liable for the accident.

10. The Trial Magistrate upon considering the evidence on record and submissions by the parties entered judgment in favour of the Respondent and it is the said judgment that is the subject of this appeal.

11. On 24th September 2021 when the matter came up for mention for purposes of taking directions for the hearing of the Appeal, counsels for the parties agreed to dispose of the Appeal by way of written submissions. The Court then directed parties to file written submissions.

12. I have perused the record and only found submissions for the Appellant dated 20th April 2022.

The Appellant's Submissions

13. In its submissions, the Appellant framed the issues for determination to be: -

    a. Whether the award of kshs.1,000,000 as general damages for pain and suffering and loss of amenities is inordinately excessive?

    b. Whether the court ought to factor in the degree of permanent incapacitation in computing diminished earning capacity?

    c. Whether the multiplicand of 24 years was excessive in assessing diminished earning capacity?

14. On the first issue, the Appellant submitted that the Respondent sustained a degloving injury to the right arm, tone extensor tendon to the right arm, comminuted fracture of the right radius bone and communited fracture of the right ulna bone. According to the Appellant, these injuries did not warrant the high award of Ksh.1,000,000/=. The Appellant while citing the case of Jackline Syombua v BOG & Ekalakala Secondary School Embu HCCC No. 118 Of 2006 (UR), submitted that the general principles applicable in assessment of damages require that assessments should not to be excessive and that comparable injuries ought to attract comparable awards.

15. In submitting that an award of Kshs. 500,000 would be adequate as general damages for pain and suffering, the Appellant cited the cases of Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR, Peter Gakere Ndiangui v Sarah Wangari Maina [2021] EkLR, Julie Akoth Onyango v Daniel Otieno Owino & Another [2020]eKLR and Justine Nyamweya Ochoki & Another v Francis Ndurya Thoya & Another [2020] eKLR where the appellate courts constituted differently found that the awards of Kshs 500,000 as general damages for pain and suffering was sufficient as compensation for injuries sustained that were almost similar to the injuries sustained by the Respondent herein.

16. On the second issue whether the court ought to factor in the degree of permanent incapacitation in computing diminished earning capacity, the Appellant submitted that the Respondent was not 100% incapacitated to warrant the full award for loss of earning capacity. The Appellant contended that the lower court ought to have taken into account the degree of permanent incapacitation and the extent of his reduced earning ability. In support of this position, the Appellant cited the case of Butler v Butler [1984] KLR 225.

17. The Appellant further submitted that the adoption of a multiplier of 24 years by the lower court was excessive in the circumstances as the Respondent was aged 44 years at the time of the accident. It was submitted that the retirement age in Kenya being 60 years, the Respondent had 16 years of active service.

18. The Appellant therefore urged the court to adopt a multiplier of 16 years in calculating loss of earning capacity.

Analysis and Determination

19. The duty of the first appellate court was explained in the case of Abok James Odera T/A A.J. Odera & Advocates v John Patrick Machira T/A Machira & Co., Advocates (2013) eKLR as;

> " On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

20. Having considered the grounds of appeal herein as well as the submissions filed by the Appellant, the only issues that present themselves for this court's determination are: -

    i. Whether the award of Kshs 1,000,000 as general damages for pain and suffering and loss of amenities was inordinately high

    ii. Whether the award of loss of earning capacity was made without consideration of the applicable principles.

21. The court notes that although in the Memorandum of Appeal the Appellant prayed for setting aside of the award in respect of future medical expenses, the same was not included in the grounds of appeal or in the submissions of the Appellant. I will therefore assume that the award is not contested and confirm the same as awarded by the trial court.

Whether the award of Kshs 1,000,000 as general damages for pain and suffering and loss of amenities was inordinately high

22. It is trite law that an appellate court can only interfere with the trial court's assessment of damages where it is satisfied that the court took into account an irrelevant factor or left out a relevant factor or the award was either inordinately high or low as to amount to an erroneous estimate of the damage or that the assessment was not based on evidence (see Kemfro Africa Ltd v A M Lubia & another (1982 – 88) 1 KAR).

23. It is not in dispute that the Respondent sustained serious injuries while in the course of his employment with the Appellant.

24. In the Medical Report by Dr. Mwende K. Ndibo filed by the Respondent, the doctor noted that the injuries sustained by the Respondent were comminuted fracture of the right radio-ulna and crush injury of the right. She assessed the Respondent's permanent disability at 20%.

25. In the second Medical Report filed by Appellant and prepared by Dr. Ashwin Madhiwala who assessed the Respondent and confirmed the injuries sustained by the Respondent, the doctor opined that the Respondent has a permanent disability of 25% as a result of the accident. Dr Ashwin further noted that the normal anatomy of the Respondent's hand was destroyed and he had weakness over the right thumb and index finger and therefore could not grip with his right hand, will be unable to lift heavy loads and will never work with his right hand like before.

26. In the case of Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730, the Court of Appeal set out the principles which should guide a court in awarding damages as follows;

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

27. In its submissions before the trial court, the Appellant had proposed an award of Kshs. 850,000 as general damages for pain, suffering and loss of amenities while the Respondent sought for Kshs 2,500,000. In its judgement, the trial court in awarding damages relied on the case of Agnes Wakaria Njoka vs Josephat Wambugu Gakungi(2015)eKLR and Zachary Kariithi vs Jashon Otieno Ochola (2016)eKLR

28. I have perused the trial court records and more so the medical reports produced therein. In assessing the general damages for pain, suffering and loss of amenities the Learned Magistrate correctly laid down the factors taken into consideration when awarding the Respondent Kshs. 1,000,000. I see no justification to disturb this award.

Whether the award of loss of earning capacity was made without consideration of the applicable principles.

29. A party is awarded loss of earning capacity when the party shows that as a result of the accident, the party suffered disability which has affected his earning capacity. In the case of Mumias Sugar Limited v Francis Wanalo [2007] eKLR the court had this to say with regard to award of loss of earning capacity: -

> " The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification of the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market, while the justification for the award where the plaintiff is not employed at the date of the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future."

30. In his Amended Plaint, the Respondent averred that he was employed by the Appellant as a casual labourer and was aged 44 years at the time of the accident. He also stated that he was predominantly right handed and he earned his living through doing manual casual jobs only. It was his case that he was earning Kshs. 11,616 a month at the time he was involved in the accident.

31. Dr Ashwin, the medical doctor who prepared the Medical Report produced by the Appellant noted in the report that the Respondent could not make a grip with his right hand, will be unable to lift heavy loads and will never work with his right hand like before. I agree with the trial court that there was loss of earning capacity.

32. In the case of Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR , the court held as follows:

> " To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired."

33. The trial court in its judgment found that the Medical Report filed by the Respondent assessed disability at 30% and that the Appellant did not file a medical report to counter the said assessments. This was not the position. From the record and as mentioned earlier, the medical report filed by the Respondent assessed the disability at 20% while the second medical report assessed the Respondent's disability at 25%.

34. The Appellant invited me to make my own assessment and make an award in place of that of the trial court.

35. The accident herein occurred on 23rd March 2016. As per Regulation of Wages (General) (Amendment) Order, 2015, the minimum wages for a machine attendant was Kshs. 11,553.90 plus 15% house allowance making a total of Kshs. 13,287. The Respondent was 44 years at the time and had

16 years to attain the retirement age of 60 years as per NSSF. In the pleadings and proceedings there is no indication of the retirement age for employees of the Respondent.

36. As noted, the second medical report filed by the Appellant indicated that the Respondent suffered 25% disability while the Respondent's doctor assessed injury at 20%.

37. My considered view of the injuries based on 1st Schedule of the *Work Injury Benefits Act* would be to tend more towards 30% as both doctors were agreed that the Respondent who is a right-handed man. Loss of thumb alone is assessed at 25% and loss of index finger another 25% under the 1st Schedule while loss of four fingers and thumb of one hand is assessed at 60%. The Respondent's injuries can be classified somewhere between the two according to the Appellant' doctor's medical report. It must further be taken into account that minimum wages are reviewed almost every year. For instance, the statutory minimum wages were reviewed in 2017, 2018, 2019, 2022 and 20224. As at 2024 the minimum wage for the position held by the Respondent in Mavoko is Kshs. 19,550. This means that the earning capacity of the Respondent should be considered after based on the fact that he would not have earned the same wage until retirement.

38. I would therefore award loss of earning capacity based on the Appellant's medical report at 30% incapacity as follows: 30% x Kshs. 13,287x12x16 years totalling to Kshs. 765,331.20. I would factor in the changes in the minimum wage and enhance this to Kshs. 1,000,000.

39. On the other hand, consideration must also be given to the fact that the Respondent may have lost his job through other causes.

40. I agree with the Appellant that the trial court applied the wrong principles of law by using 24 years instead of 16 years. I however agree with the application of 30% disability contrary. As such there is justification to disturb the award of the trial court. Consequently, award the Respondent Kshs. 1,000,000. under this head.

41. Accordingly, the appeal succeeds in part. The award for loss of earning capacity of Kshs 3,192,681.60 by the trial court is set aside and substituted with an award of Kshs. 1,000,000 under loss of earning capacity.

42. The rest of the award of the trial court is undisturbed.

43. Each party shall bear its own costs of the appeal.

44. The award of costs and interest in the lower court are not disturbed as the Respondent still remains the successful party in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF MARCH 2025

MAUREEN ONYANGO

JUDGE