



**SS Mehta & Sons v Kiminza (Employment and Labour Relations Appeal
8 of 2020) [2025] KEELRC 1151 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL 8 OF 2020**

MA ONYANGO, J

APRIL 4, 2025

BETWEEN

SS MEHTA & SONS APPELLANT

AND

KITAVI KIMINZA RESPONDENT

(Being an appeal from the Judgment of Honourable E.K. Too delivered on 16th March 2016)

JUDGMENT

1. This is an appeal from the judgment and decree of the Principal Magistrate's court at Mavoko by Hon. E.K. Too (SRM) dated 16th March 2016 in PMCC No. 498 of 2013. The Respondent who was the Plaintiff before the trial court, sued the Appellant (the defendant in the lower court) for damages as a result of injuries he sustained while in the course of his employment.
2. After a full trial, the trial court rendered its decision where it found the Appellant 80% liable for the accident in which the Respondent sustained injury. The trial court proceeded to award the Respondent general damages of Kshs 150,000 and Special damages of Kshs 2000 as well as costs of the suit.
3. The Appellant was aggrieved by the judgment on both liability and quantum and filed a memorandum of appeal dated and filed on 24th October 2016 and raised the following grounds of appeal: -
 - i. That the Learned trial Magistrates erred in fact and in law awarding a quantum of general damages in the sum of Kshs. 120,000/= in the Respondents favor and against the evidence submitted at the trial.
 - ii. The Learned Trial Magistrate erred in failing to consider whether the Third Party already enjoined in the proceedings had been duly served with a Hearing Notice by the Respondent's Advocates, informing them of the hearing of the suit on 10th August, 2015



- iii. The Learned Trial Magistrate erred in failing to appreciate the impact of the admitted failure by the Respondents Advocates, to notify the Third Party of the ensuing hearing of the main suit, upon the final determination of the suit.
 - iv. The Learned Trial Magistrate erred in fact and in law in failing to appreciate the impact of the uncontroverted enjoinder of the Third Party into the proceedings on 30th May, 2014 and the imperative need to notify them of all subsequent hearing proceedings.
 - v. The Learned Trial Magistrate erred in fact and in law in making findings which were not supported by the pleadings and evidence on the Court record, that the Respondent discharged his burden of proof on a balance of probabilities to warrant the said findings.
 - vi. The Learned Trial Magistrate misapprehended and misunderstood the circumstances surrounding the events that are the subject of this suit on liability and quantum against the Appellant.
 - vii. The Learned Trial Magistrate misapprehended and misunderstood the extent and severity of the injuries sustained by the Respondent, thereby leading to an excessive award of damages.
 - viii. The Learned Trial Magistrate erred in fact and in law in making a manifestly high award in general damages in view of the contradictory evidence pleaded and adduced by the Respondent in proof thereof as to the Appellant's culpability and the eventual erroneous estimate of loss/damages suffered by the Respondent.
4. The Appellant prayed that the appeal be allowed and the Judgment of the trial court be set aside. It further prayed for costs.
 5. The Appeal was disposed of by way of written submissions. The Appellant's submissions are dated 4th February 2020 while the Respondent's submissions are dated 16th December 2019.

Appellant's submissions

6. In its submissions, the Appellant stated that on 28th October 2013, it filed an application dated 25th October 2013 before the trial court seeking a 3rd Party notice to be issued to Efil Enterprises Limited.
7. The Appellant submitted that the basis of the application was that the only site involving the Appellant in the general vicinity of Athi River, Mavoko Area was a construction site it had subcontracted to Efil Enterprises to undertake and manage the Golden Africa Kenya Limited Project at Athi River, Mavoko Municipality for a period of the 1.5 years.
8. According to the Appellant, on 9th December 2013, the 3rd Party notice application was allowed by consent of the parties dated 24th April 2014, and the 3rd Party Notice was served upon Efil Enterprises who acknowledged its receipt. It is further submitted that on 26th June 2014, 3rd Party Directions were taken where liability as between the Appellant and Efil Enterprises was to be determined at the hearing of the main suit.
9. The Appellant submitted that Efil Enterprises were officially made a party to the Proceedings as a Third Party and was entitled to be informed of all ensuing Court process by the Respondent.
10. It is the Appellant's submission that the hearing commenced on 10th August 2015 in the absence of the Third Party and that the Trial Magistrate did not address this issue. The Appellant further contended that the trial court proceeded to enter judgement in favor of the Respondent without considering



important facts that were revealed during trial by the Plaintiff or the contents of the pleadings in the court file.

11. The Appellant averred that even after failing to determine how the Respondent was allegedly employed by the Appellant and without any supporting evidence, the trial court erroneously made a finding that the Appellant was under a duty of care to provide a safe working environment for the Respondent.
12. The Appellant further submitted that the trial magistrate failed to consider that the Third Party was made a party to the proceedings on 5th March 2014 when the Defendant's application for leave to issue third-party notice upon Efil Enterprises was allowed by consent of the parties.
13. As to whether the Respondent was its employee, the Appellant submitted that the Respondent did not provide any evidence of his alleged employment and that by failing to plead the existence of facts such as the place of alleged employment at the time of the alleged accident or even the fact of employment, he did not satisfy the required legal burden of proof stipulated under section 107 and 109 of the *Evidence Act*. In support of this position, the Appellant cited the case of Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi & Another (2014) eKLR and Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another (2004) eKLR.
14. It is the Appellant's submission that in the absence of fulfilment of the burden of proof that the Respondent was actually employed by the Appellant as a consequence of which he got injured by an alleged negligent act or omission by the Appellant, the subsequent need to prove whether the Appellant owed the Respondent a duty of care or that there was some breach of that duty does not arise.
15. On the issue of general damages awarded by the trial court, it is the Appellant's submission that even if the claim was evidentially and properly proven, the award of Kshs.150,000/= by the trial court was excessive for a mere cut wound to one finger as no permanent incapacity was occasioned nor was any stitching done to show the severity of the injury. According to the Appellant, an award of Kshs.50,000/= for general damages would have been sufficient. In support of this position, the Appellant cited the case of John Ndungu v Ochieng (2015) eKLR and Eastern Produce (K) Limited v Edith Kavere (2019) eKLR.
16. In conclusion the Appellant urged the court to allow the appeal

The Respondent's submissions

17. On his part, the Respondent submitted that the trial court was correct in holding the Appellant 80% liable for the accident as the Respondent had proved that the Appellant failed to provide him with protective gear.
18. It is also the Respondent's submission that from the evidence on record, no document or proof was ever tendered to show that the 3rd Party was enjoined in the suit or that it was ever involved and hence the trial court was justified to decide as it did.
19. With regard to the issue of quantum awarded to him by the trial court, the Respondent while placing reliance on the case of Butt v Khan (1981) KLR submitted that the award of Kshs 120,000/= cannot be so high to warrant this Appellate court to interfere with the same given the seriousness of the injuries he sustained.
20. The Respondent submitted that as per the Patient Discharge Summary Form from Athi River Community Hospital and Medical Report by Dr Titus Ndeti which were tendered as exhibits, the Respondent had suffered injury of the left 2nd finger.



21. It is the Respondent's submission that from the evidence on record, the injuries he sustained while in the course of his employment had left a permanent mark hence the reason for the trial court's award of Kshs. 120,000 as general damages.
22. The court was urged to uphold the trial court's judgment and dismiss this Appeal with costs to the Respondent.

Analysis

23. The duty of the first appellate court is set out in the case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123 as follows: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of Fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally.”

24. PW1 Kitavi Kiminza, the Plaintiff in the lower court, adopted his statement dated 20th May 2013 filed together with his Plaint. He told the court that on 15th May 2013 he was working at the Appellant's premises, that while constructing a metal column the metal cut him on the hand. The plaintiff blamed the Respondent for the accident alleging that he was not issued with protective gears. It was his testimony that he never worked for Efil company.
25. On cross examination, the Plaintiff explained that he sustained the injury after his finger was pressed by the metal. He stated that he had worked for the Defendant for 2 months and was paid his wages by the Defendant. He denied ever working for Efil Enterprises or Panafric Enterprises.
26. The medical doctor who examined the Plaintiff and prepared a medical report testified as PW2. He stated that the Plaintiff suffered soft tissue injury to his index finger and that in preparing the report he relied on treatment notes from Athi River Community Hospital. The doctor stated that he charged Kshs. 2,000 for preparing the report.
27. The Defendant on its part called Geoffrey Kaurando who testified as DW1. DW1 in his testimony denied the averment of the Plaintiff that he was an employee of the Defendant. According to DW1, the Respondent had subcontracted Efil Enterprise to do the construction and on the day the Plaintiff alleges that he was injured while at work, the defendant was not operating on the site.
28. During cross examination, DW1 stated that the Third Party was enjoined in the proceedings and that the Plaintiff was not a party to the contract between the Defendant and Efil Enterprises.
29. After the case was heard, the trial court delivered its judgment on 16th March 2016. The trial court's judgment read in part: -

“I have carefully and cautiously considered the evidence on record, submissions filed, authorities cited and the relevant law. From the evidence on record it is clear that the plaintiff was injured working at a site in which the Defendants had been contracted to construct. No evidence has been availed by the defendants in regard to the circumstances under which the accident occurred to rebut the clear evidence adduced by the plaintiff. The defendants were under a duty of care to provide a safe working environment for the plaintiff. The defendant purports/alleges that a 3rd party was involved in these proceedings. No evidence has been adduced to demonstrate this. In fact the only attempt to produce an agreement was shot



down by the plaintiff as he had not been served with the said documentation before the close of the plaintiff's case.

From the foregoing, the defendant's case against 3rd party has not been clearly prosecuted. I therefore find the defendant substantially liable for the plaintiff's injury on the material day. They were the ones having the contract for the construction of the said premises and therefore responsible for the same.

I find them 80% liable for the plaintiff's injury.

I find the plaintiff 20% liable for his injuries as he should have been more careful at his place of work.”

30. The court went ahead to award the Plaintiff general damages of Kshs 150,000 less liability contribution of 20%, Kshs 2000 as special damages and costs of the suit.

Determination

31. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are whether the trial court erred in failing to apportion liability to the Third Party and whether the award made by the trial court was commensurate to the injuries sustained by the Respondent.

Whether the trial court erred in failing to apportion liability to the third party

32. In grounds ii, iii and iv of the Memorandum of Appeal, the Appellant faulted the trial court for failing to appreciate the impact of the admitted failure by the Respondent's Advocates to notify the Third Party of the ensuing hearing of the main suit.
33. I have perused the record and found that the Appellant filed the application dated 25th October 2013 seeking leave to issue third party notice against Efil Enterprises Limited. When the matter came up in court on 5th March 2014, the trial court allowed the application. On 30th May 2014, Mr. Kokul appeared holding brief for Nganga for the Defendant and informed the court that the 3rd party notice had been served. However, the third party did not enter appearance or file a defence. Notably, from the record, on 23rd June 2014, the matter was in court for mention for third party directions where the coram indicated that the Defendant and the third party were absent. Counsel Mochama for the Plaintiff made an oral application that liability be determined at the hearing on the main suit which application was allowed. The matter was then fixed for hearing on several dates but did not proceed until on 10th August 2015 when the Plaintiff testified. On 14th September 2015 and 30th November 2015, the Defendant's case proceeded with one witness. After the close of the defence case, the court directed parties to file submissions and thereafter judgment was delivered.
34. From the above analysis, the third-party case was not dealt with. It was neither started nor closed. The parties proceeded as if the third party was not a party to the case. There is no evidence on record that it was served.
35. The purpose and procedure for lodging third party proceedings is provided for under Order 1 rule 15 – 22 of Civil Procedure Rules, 2010. Rules 15 and 17 of the same provide as follows:

“ 15.

- (1) Where a defendant claims against any other person not already a party to the suit (herein after called the third party) –



- (a) that he is entitled to contribution or indemnity; or
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

- (2) A copy of such notice shall be filed and served on the third party according to the rules relating to the service of a summons.

17. If a person not a party to the suit who is served as mentioned in rule 15 (herein after called the “third party”) ... must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.”

36. In the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR, the Court held:

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

37. The Appellant herein having blamed a third party, Efil Enterprises Limited, for the alleged accident suffered by the Respondent in the course of his employment by virtue of the third party being the alleged employer of the Respondent, it was incumbent upon the Appellant to ensure that the third party was properly served with the hearing notices. The Appellant cannot be heard blaming the Respondent for failing to serve the third party when the issue of liability was to be determined between it and the third party. Further, the Respondent’s case was against the third party. Without participation of the third party in the proceedings, the trial court could not find liability against it.



38. For the said reasons, I find that the learned trial Magistrate analyzed the evidence properly and arrived at the right conclusion. There is thus no reason for this court to interfere with the said decision. The appeal on liability as between the Appellant and the third party is therefore dismissed.

Whether the award the trial's award was commensurate with the injuries sustained by the Respondent.

39. The principles which guide appellate courts on interference with awards of damages by lower courts have been laid down in several court decisions. In the case of *Kemfro Africa limited –vs- Lubia & Another (No.2)* [1987] KLR 30, Kneller JA held as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”

40. In his testimony before the trial court, the Respondent stated that his finger was pressed by a metal when in the course of performing his duty. Although the medical report by Dr Titus Ndeti was not filed in the record of Appeal, I have analyzed the evidence of the medico-legal doctor who testified as PW2. In his testimony at the trial court, PW2 stated that the Respondent suffered soft tissue injury on the left index finger.

41. The Appellant in its submissions on appeal averred that the award of Kshs. 150,000 awarded to the Respondent by the trial court was excessive for a mere cut wound to one finger. In its submissions before the trial court, the Appellant had proposed an award not exceeding Kshs 40,000 as general damages.

42. In *Timsales Limited v Penina Achieng Omondi* [2011] eKLR where the Respondent sustained a deep cut wound on the left index finger and severe soft tissue injuries to the left index finger the court awarded Kshs. 60,000/= in general damages.

43. The Court has re-evaluated the injuries sustained by the Respondent and finds that the injury sustained by the Respondent was minor and that the award of Kshs. 150,000 to the Respondent in general damages on the higher scale. The ground of appeal that the award was manifestly too high is thus merited. In the view of the court an award of Kshs. 50,000 is reasonable and commensurate with the injury taking into account the nature of the injury and awards in comparable cases.

44. The appeal therefore succeeds on this head. The award of Kshs. 150,000 as general damages by the trial court is set aside and substituted with an award of Kshs. 50,000.

45. The award on contribution of 20% by the Respondent is upheld.

46. The award on special damages is also upheld.

47. Each party shall bear its costs in the appeal.

48. The orders of costs in the lower court is upheld.

49. In conclusion, the Court allows the appeal and sets aside the Judgment and Decree of the trial court delivered of 16th March 2016 and substitutes it as follows:



- i. The Respondent is awarded as follows:-
 - a. Special damages Kshs. 2,000
 - b. General damages Kshs. 50,000
Less 20% contribution
- ii. The Respondent shall have costs of the suit and interest from the date of judgment on 16th March 2016.

50. There shall be no orders as to costs in the appeal.

51. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF APRIL 2025

MAUREEN ONYANGO

JUDGE

