



REPUBLIC OF KENYA



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**Fubeco China Fushun Company v Kimakuti (Appeal 28 of 2016)
[2025] KEELRC 1387 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 28 OF 2016
NJ ABUODHA, J
MAY 9, 2025**

BETWEEN

FUBECO CHINA FUSHUN COMPANY APPELLANT

AND

ELUDE WANJALA KIMAKUTI RESPONDENT

(Being an appeal from the Judgment of Hon. L. Wachira (Mrs) (SPM) delivered on 30th September 2016 in Civil Case N. 2343 of 2016 at the Chief Magistrate's Court, Milimani)

JUDGMENT

1. Through the Memorandum of Appeal dated 30th September 2016, the Appellant appeals against the Judgement of Honourable L. Wachira, Senior Principal Magistrate.
2. The Appeal was based on the grounds that:
 - i. The Learned trial Magistrate erred in both fact and in law by failing to appreciate that the occurrence of the alleged accident was not proved.
 - ii. The Learned trial Magistrate erred in fact and in law by not appreciating that the Plaintiff had not produced the initial treatment notes or other contemporaneously prepared documents confirming the alleged accident and resulting injuries.
 - iii. The Learned trial Magistrate erred in fact and in law by failing to appreciate that in the absence of the initial treatment notes there was no nexus between the injuries set out in Dr. A. K Mwaura's Medical Report dated 17th March 2014 and the alleged subject accident.
 - iv. The Learned trial Magistrate erred in fact and in law by failing to appreciate that the Respondents liability testimony was inadequate, un-corroborated and did not prove the



particulars of contractual obligations and particulars of obligations pursuant to statute alleged in the Plaintiff.

- v. The Learned trial Magistrate erred in fact and in law by holding the Appellant wholly liable which finding was not supported by evidence.
 - vi. The Learned trial Magistrate erred in both fact and in law by ignoring the authorities cited in the Appellant's written submissions and all authorities cited therein in assessing damages.
 - vii. The Learned trial Magistrate award of general damages for pain suffering and loss of amenities to the Respondent is so manifestly excessive in the circumstances as to the amount to an erroneous estimate of the loss suffered by the Respondent.
3. The Appellant prayed that the Learned Magistrate's finding on liability and the award of damages against the Appellant be set aside and the same be substituted with an order dismissing the claim against the Appellant and assessing general damages for pain, suffering and loss of amenities at a substantially lower amount commensurate with the Plaintiff's injuries and the available authorities for the award made with respect to comparable injuries with the costs of appeal and lower court proceedings.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Muchui & Co. Advocates filed written submissions dated 23rd December 2024 and submitted that the Appeal challenged both the liability finding and quantum of damages award. Counsel abandoned grounds 1-5 of the Memorandum of Appeal challenging liability finding and argued grounds 6 and 7 on award of general damages for pain suffering and loss of Amenities.
6. Counsel relied in the case of *Kemfro Africa Limited vs Aziri Kamaumudika Lubia* [*CA 21 of 1984*](#) and submitted that the court can disturb a trial court's assessment of damages if it is established that trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be an erroneous estimate of the damage. That the appeal satisfied the criteria herein and general damages award should be disturbed.
7. Counsel submitted that the Respondent's injury pleaded in the Plaintiff proved vide Dr. A.K. Mwaura's report comprised deep cut to the right small finger 2nd joint palmar aspect. That at trial the Appellant proposed award of Kshs 50,000/= as general damages for pain suffering and loss of amenities citing among others the case of *Eastern Produce (K) Limited v Joseph Mamboleo Khamadi* [2015] eKLR. That the Respondent had sustained a deep cut wound on the right middle finger and severe pain. That the trial magistrate awarded Kshs 120,000/= as general damages. That the award was set aside on appeal and substituted with an award for Kshs 50,000/=.
8. Counsel also relied on the case of *Megspin Limited v Gabriel Otieno* (2007) Eklr where the Respondent suffered a deep cut wound on the left middle finger and severe soft tissue injuries of the left middle finger and the trial court awarded Kshs. 80,000/= and on Appeal the same was set aside and substituted with Kshs. 30,000/= as general damages.
9. Counsel submitted that the trial magistrates did not specifically mention or address the above authorities and assessed general damages at Kshs. 180,000/= without indicating the authorities the award is premised and alluded to previous decisions of superior courts without citing any specific authority.
10. Counsel submitted that the above authorities were relevant and involved comparable injuries to those in question and that the *Eastern Produce Limited* case related to a similar injury and was rendered a



year before the subject judgment and the trial court was unjustified in failing to cite, rely on and or distinguish that authority and the others cited. That had it done so it would have assessed General Damages at proposed Kshs 50,000/=.

11. Counsel submitted that the assessment of Kshs 180,000/= is manifestly excessive and amount to an erroneous estimate of due compensation and more than 3 times of award due as supported by Appellant authorities. Counsel argued the court to refer to the case of Kipkebe Limited v Peterson Ondieki Tai [2016 eKLR and submitted that having sustained a deep cut wound on the left leg, chest contusion and bruises on the left shoulder, an award of Kshs 90,000/= was made for general damages which was set aside on appeal and substituted with an award for Kshs 30,000/=.
12. Counsel also relied on the case of Buds and Bloom Ltd vs Lawrence Emusugut Obwa(2016) eKLR where the Respondent sustained a deep cut wound on the left leg and soft tissue injuries on the leg. That the trial court awarded Kshs 70,000/= as general damages which on appeal was set aside and substituted with Kshs 50,000/=
13. Counsel submitted that the award for general damages for pain suffering and loss of Amenities is inordinately high and warrants disturbance and be substituted at Kshs 50,000/=.

Respondent's Submissions

14. The Respondent's Advocates Mwaura Kamau & Co. Advocates filed written submissions dated 30th January 2025 and submitted that the Respondent told the trial court that he sustained a deep cut wound to the right small finger 2nd joint palmar aspect and he was examined by Dr. Mwaura and a medical report detailing the extent of the injuries produced as exhibit. That the trial court assessed quantum of general damages at Kshs 180,000/=
15. Counsel submitted that the Appeal is strictly limited to the issue of quantum. Counsel relied on the case of Mugambi and Silas v Isaih Gitiru [2002] and submitted on circumstances the appellate court will interfere with an award of damages. That the trial court seriously considered the Respondent's injuries and in assessing damages did not take into account or leave out an irrelevant fact nor did it misapprehend the evidence. That the Appellant did not point out to this court the irrelevant factor the court took in to account and or relevant factor the court failed to take in to account in arriving at the judgment.
16. Counsel submitted that the trial court was clear that it had taken into account the evidence by Respondent, injuries sustained, medical documents as well as submissions by both parties in making its decision. That Kshs 180,000/= as general damages for the deep cut wound was not excessive to warrant the court interference.
17. Counsel relied on the case of Meru HCC No. 17 of 1983 Lucy Ntibuka vs Benard Mutwiri where the Plaintiff sustained head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm. (elbow). That general damages were assessed at Kshs 500,000/= in 2007. Counsel also relied on the case of Embu Civil Appeal No. 61 of 2017 Francis Ndungu Wambui & Others vs Benson Maina Gatia where the Respondent sustained soft tissue injuries that included a cut wound to the eye and damages on appeal were assessed a Kshs 300,000/= in 2019.
18. Counsel also relied on the case of Nyamira Civil Appeal No. E046 of 2021 Anthony Nyamweya vs Jackline Moraa where the Respondent sustained soft tissue injury to the temporal region and tenderness of the chest lower back and shoulders. That she was awarded Kshs 250,000/= as general damages where appeal on award of general damages was dismissed in 2022. That soft tissue injuries of



such nature attract awards between Kshs 150,000/= to Kshs 300,000/= and an award of Kshs 180,000/= cannot be termed as excessive.

Determination

19. The court has considered the grounds on quantum of general damages, the Record of Appeal and submissions filed by the parties herein as well as authorities relied on and proceed to analyse them as follows. The principles which guide this court in an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that: -

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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.

20. The Judgment of the trial court was entered as against the Appellant and the Respondent awarded Kshs 180,000/= in general damages for pain and suffering which the Appellant alleged was excessive and abandoned the claim of liability. The sole issue for this court therefore remains whether the trial court by awarding Kshs 180,000/= as general damages acted excessively.
21. The Court has considered the parties' submissions on the quantum of damages, the authorities cited by counsels in their submissions for this appeal and it is for this court to determine whether the award is consistent with comparable awards made.
22. Upon studying the cited authorities relied upon by the parties, the court notes that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanour of witnesses made by the Learned Trial Magistrate which advantage an appeal court by its mode of delivery lacks as held in *Simon Tavera v Mercy Mutitu Njeru* [2014] eKLR.
23. In coming to the sum of Kshs.180,000/= the trial court at page 14-15 of the record, took into account the evidence of injuries suffered as told by the Respondent and the inflationary trends in the country.
24. The High Court, pronounced itself on these principles in *Kemfro Africa Ltd t/a Meru Express Service v AM Lubia & Another* 1957 KLR 27 cited by the Appellant that: -

'The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 a wholly erroneous estimate of damages.'

25. So the duty of the appellate court is threefold regarding quantum of damages: -
- (a) To ascertain whether the court applied irrelevant factors or left out relevant factors.
 - (b) To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
 - (c) The award is simply not justified from evidence.
26. The Court has considered the nature of injuries suffered by the Appellant vis a vis the authorities tendered by the advocates for the respective parties. It is the considered view that the awards in the



authorities cited by the advocates for the Respondent for Kshs. 150,000/- and Kshs. 300,000/- were inordinately high for soft tissue injuries. The respondents in those cases had not healed without any permanent disability. The court therefore declined to follow those authorities.

27. This court in perusing Dr Mwaura's report on page 32-33 of the record of appeal notes that the injuries healed well without any permanent disability but with residual pain to subside gradually. Clearly, the injuries therein were less severe than in the cases under consideration.

28. The Court while taking into account other decided cases on soft tissue injuries and in particular finds relevance in Bungoma HCCA No. 6 of 2012; Global Trucks Ltd -Vs- Titus Osule Osoro where Gikonyo J expressed himself as follows: _

“The injuries suffered ordinarily attract an award between Ksh.50,000/= - Ksh.200,000/= depending on the extent and severity of the injuries. Since there is a fracture of the right upper incisor tooth, loosening of other two teeth, and post accident pains on the left elbow and the abdomen, I will hereby make an award of Kshs 200,000/= as general damages.”

29. This court finds that an award of Kshs. 180,000/= was on the higher side for soft tissue injuries as at 2016 but due to inflation and the time this Appeal has taken this court is of the view the award of Kshs 180,000/= in 2025 is commensurate due to inflation in the circumstances.

30. In conclusions the appeal is therefore found unmerited and is hereby dismissed with costs.

31. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF MAY, 2025

DELIVERED VIRTUALLY THIS 9TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

