Bhachu Industries Limited v Kula (Employment and Labour Relations Appeal E314 of 2024) [2025] KEELRC 1732 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1732 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E314 OF 2024

JW KELI, J

JUNE 12, 2025

BETWEEN

BHACHU INDUSTRIES LIMITED ..... APPELLANT

AND

JOSEPH KULA ..... RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable C.A. Ogweno (SRM) delivered at Nairobi on the 24th day of October, 2024 in MCELRC No. 3628 of 2018)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable C. A. Ogweno (SRM) delivered at Nairobi on the 24th day of October, 2024 in Nairobi MCELRC Cause No. E3628 of 2018 between the parties filed a memorandum of appeal dated 28th October 2024 seeking the following orders:-

    a. The Appeal herein be allowed and the Judgment and Orders of Honourable Christine A. Ogweno (SRM), in the original MCCC No. 3628 of 2018 delivered at Nairobi on the 24th day of October 2024 be set aside, varied and/or reviewed.

    b. That the Judgment on assessment of general damages made on the 24th day of October 2024 be reviewed and/or varied.

    c. Such further and/or other relief be granted as this Honourable Court may deem fit and expedient.

    d. The costs of this Appeal and suit before the lower court be awarded to the Appellant.

Grounds Of The Appeal

2. That the Honourable Trial Magistrate erred in law and in fact in finding that the Respondent was entitled to the damages awarded and apportioning liability at 100% against the Appellant.

3. That the Honourable Trial Magistrate erred in law and in fact in finding that the amount awarded was deserved for such a minor injury.

4. That the Honourable Trial Magistrate erred in law and in fact in failing to consider the case laws and authorities cited by the Appellant against that of the Respondent in making an award for general damages.

5. That the Honourable Trial Magistrate erred in law and in fact in failing to consider the medical reports and medical documents in relation to the injuries suffered by the Respondent herein and treatment notes supplied.

6. That the Honourable Trial Magistrate erred in law and in fact in failing to consider the 2nd medical re-examination report by Dr. Cyprianus Okoth Okere which literally categorized the injury as a mere minor soft tissue injury on the left little finger and that the same has fully healed.

BACKGROUND TO THE APPEAL

7. The Respondent filed a claim against the Appellant vide a Plaint dated the 19th of March 2018 seeking the following orders:-

    a. Special damages Kshs.2,000/-

    b. General damages for pain and suffering.

    c. Costs and interest.

    (Pages 3-4 of the ROA dated 21st January 2025).

8. The Respondent filed his verifying affidavit dated the 19th of March 2018, his witness statement dated the 15th of February 2018, his list of witnesses (missing in ROA), and list of documents dated 19th March 2018 (pages 7-12 of ROA).

9. The claim was opposed by the Appellant who entered appearance and filed a Defence (pages 19-20 of ROA); list of witnesses (page 21 of ROA); witness statement of Amritpal Bahra Singh (pages 22-23 of ROA), and produced the documents attached to their list of documents dated 25th March 2024 (pages 24-35 of ROA).

10. The Plaintiff's/Respondent's case was heard on the 22nd of July 2024 where the Plaintiff testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the appellant Mr. Kori Beria (pages 85-87 of ROA).

11. The Appellant's case was heard on the same date. DW1, Amritpal Bahra Singh, testified relying on his filed witness statement, and produced the Appellant's documents. He was cross-examined by counsel for the Plaintiff Mr. Kamau Mwaura (pages 87--88 of ROA)

12. The parties took directions on filing of written submissions after the hearing. The parties complied.

13. The Trial Magistrate Court delivered its judgment on the 24th of October 2024 apportioning 100% liability for the injury to the Appellant and awarding the Plaintiff a total sum of Kshs. 252,000/-

comprising of general damages for pain and suffering of Kshs. 250,000/-; and special damages of Kshs. 2,000/- (Judgment at pages 78-82 of ROA).

Determination

14. The appeal was canvassed by way of written submissions. Both parties filed.

15. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. In relation to appeals on general damages the court is guided by the case of Butt vs Khan (1977) 1KAR where Law JA stated that:-

> " An appellate 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 the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low."

Issues for determination

18. Whether the Honourable Trial Magistrate erred in law and in fact in finding the appellant 100% liable for the accident and in awarding the Respondent general damages of Kshs. 250,000/- in respect of the injury sustained.

Question of Liability

Appellant's submissions

19. The Appellant produced into evidence a PPE issuance record dated 19th of January, 2018. The document confirmed that the said Respondent was issued with a pair of leather gloves. (See page 26 of the Records of Appeal). During Pre-trial Conference, there was never an issue raised as to the legitimacy or authentication of the signatures of the document. The same was only raised during trial, a manner prejudicial and unfair to the Appellant. The Document formed part of the records pertaining to the Respondent herein and was produced accordingly to prove that indeed the latter was issued protective gear at work.

20. The appellant relied on the decision in Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 others [2012] eKLR, where the court dealt with issues of document authenticity and admissibility. The Plaintiff challenged the authenticity of certain documents, arguing that the signatures on them were not genuine. The Court allowed the documents to be admitted as evidence, noting that questions about authenticity go to the weight of the evidence rather than its admissibility. The Plaintiff's allegations required evidence to support the claim, and the court stated that it would consider all evidence before determining the credibility of weight of the documents. In this case no evidence rather than the Respondent's sentiments had been adduced to rebut the credibility of the said PPE issuance document.

21. Secondly, looking at the circumstances of the case as to how the Respondent got injured, he admitted at Page 6 of the Records of Appeal, that he failed to communicate with the crane operator leading to his injury, taking away liability from the employer and placing it upon the incompetence of the Respondent. He literally started working for the company in May, 2015 and got injured on 12th February, 2018. 3-vears' experience should have been enough and sufficient for him to attain some sort of credible experience at his work-place. His failure to adapt should not fall upon the Appellant. The latter should not have suffered 100% liability if not at any.

Respondent's submissions

22. The respondent told the court that he had been assigned duties of untying metal tubes after they were lowered by a crane. The metal tubes were tied using a metal chain connected to the crane and according to the respondent he had not yet finished untying the metal tubes when the crane operator pulled the chain before the respondent had removed his hand and consequently the chain pressed the respondent's left small finger against the metal tubes. As a result of the uncoordinated pulling of the chain the respondent sustained the injuries the subject of this matter.

23. Firstly the respondent told the trial court that he had not been provided with protective devices and in this case hand gloves. The respondent told the court that he had sought for hand gloves from his supervisor who kept on promising that he would provide some to the respondent but by the time the accident occurred he had not been provided with any. It was the respondent's evidence that if he was wearing hand gloves the dislocation of the left small finger would not have occurred.

24. On its part the appellant called one witness DW1. DW1 told the court that he joined the appellant in August 2021. He was not present when the accident the subject matter of this appeal occurred. He however told the court that from the records he obtained from the appellant the respondent had been issued with protective devices which included an overall, shoes, leather gloves, leather apron and helmet. DW1 produced a PPE issuance record dated 19th January 2018 as proof that the respondent had indeed been issued with the items mentioned above and that he had signed for it. DW1 joined the appellant in August 2021, he therefore did not witness the accident occurring, he did not witness the respondent being issued with the PPE's and he did not witness the respondent signing the PPE's records dated 19th January 2018 way before he joined the appellant. The respondent denied that the signature appearing on the PPE issuance record belonged to him. He told the court that he had never been issued with protective devices and for that reason he had not signed the PPE's issuance records dated 19th January 2018. The respondent were the ones that had introduced the PPE's records, the same has been denied by the respondent. It is trite law that he who alleges must proof.Section 107 of the *Evidence Act* states as follows:-

    (i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person...."Section 109 of the *Evidence Act* goes further and states as follows:-

'Proof of particular fact.

> The burden of prove as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." Section 70 of the *Evidence Act* states as follows:-
>
> 'If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the hand writing of so much of the document as is alleged to be that person's handwriting must be proved to be in his hand writing". The respondent denied having signed the PPE's issuance records dated 19th January 2018. The appellant had a burden of proving that the said signature belonged to the respondent. The only way the appellant would have proved that the said signature had been made by the respondent was either to call a handwriting expert and/or a person who was present and who witnessed the said signature being made. DW1 was not present and had not even joined the appellant when the alleged signature was made. DW1 further told the court that the protective devices were issued to the workers by the safety officer by the name Mr. Masinde. The said safety officer was not called as a witness before this court. Secondly the said PPE's record was also not signed by the safety officer who had allegedly issued them on behalf of the appellant but by the Human Resource Manager. The human resource manager did not issue protective devices and was not even present when they were issued. The human resource manager was only relying on the information given to him by the safety officer. The safety officer was a very crucial witness in this case since it was alleged that he is the one who issued the protective devices to the respondent. The injury to the respondent was to the right forearm. It goes without saying that if the respondent had been issued with protective devices and specifically hand gloves the injury to his right forearm would not have occurred. The evidence by DW1 that protective devices had been issued to the respondent has no probative value since he did not witness the respondent being issued with the protective devices and neither did he witness the respondent signing the record. DW1's evidence was at best hearsay evidence and should be treated so by this court.

25. The appellant also produced an investigation report by Uptown Loss Assessors (K) Limited dated 18th January 2019 found at page 27 to 35 of the record of appeal. Item 4 of the said investigation report found at page 30 of the record of appeal and underlined as OBSERVATION at paragraph 2 thereof the said assessor stated as follows:-'During our visit to the insured premises, we noted negligence in provision of safety clothing. As a matter of facts, a good number of the employees don't have all the protective gears that can prevent them from sustaining the reported minor injuries. Most have torn shoes some of which are not compatible with the work they do, excessively torn overalls and do not have hand gloves." At the conclusion of the said report the same investigator made the following observations:-'Based on the above highlighted factors, we opine that the insured employees have been sustaining injuries of varying degrees but usually minor some due to lack of protective gears while at work."The investigation report is dated 18th January 2019 approximately two years after the respondent sustained injuries. The said investigation report was done before DW1 joined the appellant since he joined in August 2021.The investigation report which was an internal document by the appellant clearly painted a grim picture of the working condition at the appellant's premises. From the investigation report it is clear that the appellant did not issue its workers with protective devices

and in particular hand gloves. The report by the investigator indicts the appellant for failing to issue hand gloves to its workers which had significantly increased the number of accidents to its workers.

Decision

26. The court noted that the trial court weighed the probative value of the evidence of the said document which indicated the claimant received the PPE material and took into account that the witness was not present when it was signed nor was a witness to the issuance called. The respondent stated it was prejudicial to raise issue of signature at the trial while the documents had been produced. The court found no fault in the decision of the trial court as it was corroborated by the appellant's own investigation report on the terrible state of affairs at its shop floor. The report indicated majority of workers had no protective gear. The lack of protective gear was linked to the injuries and the lack of proper supervision of the respondent. The court found no basis to fault the respondent on the crane as he was not its operator and in any case there should have been a supervisor on site to warn the respondent. I find no reason to disturb the finding of 100% liability (Butt v Khan).

Quantum merit

Appellant's submissions

27. The appellant contended that the injury itself was so minor, the Trial court was incredibly too generous to award Kshs. 250,000/-. It is extremely exorbitant and unfair. It is Judicial Notice that when calculating an award for compensation, the Director of DOSH usually applies the following formula: Monthly earning 96 months Disablement. The Respondent provided no proof of his earnings. All the medical reports provided no percentage of disablement. The Trial Magistrate simply awarded compensation exorbitantly over an injury too minor. The appellant relied on the case of Eva Karemi, Rebecca Mwonja, Judy Lebute Mwiti, Tony Gitonga, Kenfrey Mwiti Mbae & John Lumiri v Koskei Kieng & Wu Xiang (Civil Appeal 56 of 2019) [2020] KEHC 5940 (KLR) (7 May 2020) (Judgment); where Honourable Justice F. Gikonvo outlined the proper compensations for certain injuries while dismissing the Appeal. In the above case the Judge was quick to affirm at Paragraph *21* (c) while fortifying his awards that; "c. In the case of Eastern Produce Lid Vs Mamboleo Khamadi [2015] eKLR the trial court had awarded Kshs. 120,000/- for cut wound on the right middle finger and severe pains incurred during and after the injury. On appeal this was substituted with Kshs. 50,000/-.

Respondent's submissions

28. The respondent told the trial court that he sustained a dislocation of the left small finger. He was treated at Mbagathi District Hospital and then referred to Mama Lucy Kibaki Hospital for an X-ray. The X-ray taken at Mama Lucy Kibaki Hospital showed that the respondent had sustained a dislocation of the left little finger at the level of middle interphalangeal joint. The respondent was later seen by Dr. A. K. Mwaura and by Dr. Cyprianus Okoth Okere on behalf of the appellant. The two doctors prepared their respective medical reports. The two medical reports were produced in court as exhibits. The two medical reports collaborates the respondent's evidence that he sustained a dislocation of the left little finger at the level of middle interphalangeal joint. On physical examination Dr. Cyprianus Okoth Okere medical report indicates that the respondent's left little finger is deformed at the middle interphalangeal joint. The said joint is fixed and has no flexion. Dr. Cyprianus Okoth Okere who examined the respondent on 20th December 2023 classified the degree of injury as severe harm. He utilized the X-ray film as well as notes from Mbagathi District Hospital and an attendance card from Mama Lucy Kibaki Hospital. The trial court awarded the respondent Kshs. 250,000/- as

general damages and which the appellant is aggrieved at and has challenged as inordinately excessive. There are certain principles that guide the court when it comes to appeals on quantum.

29. It is now settled that an appellant court will not interfere with an award of damages by the lower court unless it is satisfied that the lower court acted on wrong principals of law or made an award of damages which is inordinately high or low as to represent a wholly erroneous estimate of damages. This was stated in the case of Mugambi And Silas-Vs- Isaiah Gitiru Civil Appeal NO. 130 OF 2002.That the trial court seriously considered the respondent's injuries. In assessing the damages the trial court did not take into account an irrelevant fact and did not leave out a relevant factor nor did it misapprehend the evidence. The appellant has not pointed out to this court the irrelevant factor the court took into account and/or relevant factor the court failed to take into account in arriving at the judgment herein.

Decision

30. The trial court held that the medical report of Dr. A.K. Mwaura of 20th March 2018 a stated that the respondent sustained dislocation of the small left finger and this was confirmed by the treatment notes from Mbagathi hospital. That the appellant's claim of that their employees being treated at a facility named Likoni Road clinic, the records were not produced. The appellant had the claimant examined and medical report of Dr. Okere filed which confirmed the claimant has left little finger dislocated and was deformed. Essentially the two medical reports were in agreement on the injuries.

31. The trial court on quantum considered the awards submitted for comparison by both parties. In Stanley Maore vs. Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:"...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

32. The court found the authority cited by the appellant Rege v LA where the award was reviewed downwards from Kshs. 400000 to 80000 was not comparable. In Emmanuel Ithau Nyamai & another v Paul Kipsang Samoei [2021] eKLR where the court observed:- ''.... pointed out herein above, the respondent pleaded the following injuries:

    (a) Head injury with loss of consciousness for a while;

    (b) Bruises on the right temporal scalp;

    (c) Blunt injury and bruises on the right hand;

    (d) Fracture of the 1st phalange of the right index finger;

    (e) Blunt injury to the chest;

    (f) Bruises on the back;

    (g) Bruises on the right ankle;

    [30] The medical reports exhibited herein, prepared by Dr. Sokobe and Dr. Gaya, were largely in agreement as to the injuries sustained and the fact that the respondent has healed well from those injuries with no permanent disability. The learned trial magistrate predicated her decision on quantum on the case of Kenya Steel Fabricators Ltd vs. Tom Moki (supra). But as was observed by counsel for the appellants, in that matter, the injuries entailed 4% permanent disability, which is not the case herein; and even then, the award, made on 27 September 2018 was for Kshs. 260,000/= only. For

my part, I find Oluoch Eric Gogo vs. Universal Corporation Ltd [2015] eKLR to be a better guide. The plaintiff in that matter suffered a crushed injury to the left thumb with fracture of mid phalanx. He was awarded Kshs. 200,000/= on 7 May 2015.

(31) In the light of the foregoing, I am satisfied that the lower court's award was on the higher side; and therefore that the learned trial magistrate committed an error of principle in arriving at the sum of Kshs.300,000/= as general damages for the fracture of one finger. I would reduce the same to Kshs. 200,000/=. As the special damage component was not challenged, the same is left undisturbed; with the result that the appeal is partially successful. The lower court's judgment dated 11 October 2019 is hereby set aside and is substituting with the judgment of this court in the sum of Kshs. 212,025/= together with interest and costs, including the costs of the appeal."

33. At appeal the appellant introduced another authority In the case of Eastern Produce Lid Vs Mamboleo Khamadi [2015] e KLR where the trial court had awarded Kshs. 120,000/- for cut wound on the right middle finger and severe pains incurred during and after the injury. On appeal this was substituted with Kshs. 50,000/-.

34. The court noted that there were more injuries to the employee in Emmanuel Ithau Nyamai & another v Paul Kipsang Samoei [2021] eKLR who was awarded Kshs. 200000 on appeal. The injury before the trial court was of deformed little finger only. I am satisfied that the lower court's award was on the higher side; and therefore that the learned trial magistrate committed an error of principle in arriving at the sum of Kshs.250,000/= as general damages for the deformed little finger. I would reduce the same to Kshs. 100,000/=. As the special damage component was not challenged, the same is left undisturbed; with the result that the appeal is partially successful.

35. The appeal is partly allowed. Judgment and Orders of the Honourable C.A. Ogweno (SRM) delivered at Nairobi on the 24th day of October, 2024 in MCELRC No. 3628 of 2018 is set aside and substituted as follows:-

Judgment is entered for the plaintiff against the respondent as follows:-

a. Liability at 100% in favour of the Plaintiff as against the Defendant.

b. General damages at Kshs 100,000/-

c. Special damages of Kshs 2,000/-

d. Costs of the suit.

e. Interest on (b), (c) and (d) at Court rates from the date of judgment till payment in full.

36. Each party to bear own cost in the appeal.

37. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – absent

Respondent: -absent