



REPUBLIC OF KENYA



**Bagala v Doshi & Company (Hardware) Limited (Appeal 109 of 2023)  
[2024] KEELRC 370 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 370 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 109 OF 2023  
M MBARŪ, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JUMAA NYAMAWI BAGALA ..... APPELLANT**

**AND**

**DOSHI & COMPANY (HARDWARE) LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon. A. S. Lesootia  
delivered on 16 December 2019 in Mombasa SPMC No.1831 of 2017)*

**JUDGMENT**

1. The appeal arises from the judgment in Mombasa SPMC No.1831 of 2017 delivered on 16 December 2019. The background of the appeal is a claim filed by the appellant on 6 November 2017 on the grounds that he was an employee of the respondent company. It was a term of the employment contract that the respondent would ensure a safe working environment and not expose him to injury and to ensure safe working conditions. On 2 February 2015, while the appellant was on duty as a machine attendant at the Miritini Factory, upon instructions to tighten a bolt around a levelling machine, the spanner slid causing the machine to slide and his right hand was caught in between the machine. As a result, the appellant suffered severe physical injuries.
2. The appellant claimed that his injuries arose from the negligence and breach of contract by the respondent who was required to ensure safe working conditions and to protect him from such injuries. Due to the negligence and breach of duty on the part of the respondent, he suffered injury with a crush to the right upper limb, fracture of the humerus arm bone, segmental fractures of the right radius and ulna forearm bones, nerve and muscle degloving tissue loss injury and paralysis (neropraxia) of the right upper limb.
3. The appellant claimed special damages at Kshs. 2,000 for a medical report, general damages for pain and injury, and costs of his suit.



4. In response, the respondent denied all the claims made and that while the appellant was on duty, he was required to take all reasonable precautions for his own safety which he failed to do. There was an accident involving the appellant but this was not as a result of any negligence or breach of duty on the part of the respondent. The appellant substantially contributed to the accident and injury to his person by failing to take adequate precautions of his own safety while at work. He failed to carry out his duty with due care and attention and also exposed himself to risk of damage.
5. The learned magistrate heard the parties and delivered judgment on 16 December 2022 and allowed the claim with an award of general damages at Kshs. 600,000, special damages at Kshs. 2,000 less 15% apportioned liability.
6. Aggrieved by the judgment, the appellant filed this appeal on the grounds that;
  1. The learned magistrate erred in law and fact in disregarding the appellant's evidence on the issue of liability and quantum.
  2. The learned magistrate erred in law and fact by apportioning liability in the ratio of 85%:15% with the appellant bearing the 15% despite their being no evidence to controvert the appellant's oral and documentary evidence.
  3. The learned magistrate erred in law and fact by awarding an inordinately low quantum of Kshs. 600,000 as general damages.
  4. The learned magistrate erred in law and fact in finding that the prayer for loss of earning capacity ought to have been specifically pleaded whereas the same can be awarded under the heard of general damages which had been pleaded.
  5. The learned magistrate erred in law and fact in failing to award the appellant loss of future earning capacity despite the same having been pleaded and proved.
  6. The learned magistrate erred in law and fact by failing to substantially and adequately consider the appellant's submissions and further submissions.
7. The appellant is seeking that the judgment of the lower court on liability of the appellant be set aside and the court be pleased to find the respondent 100% liable for the accident. The appellant is also seeking that the judgment on quantum be set aside and this be re-assessed.
8. Both parties attended and agreed to address the appeal by way of written submissions.
9. The appellant filed written submissions and supplementary written submissions. The respondent filed written submissions.
10. The appellant submitted that the claim before the trial court arose from breach of contract of employment and negligence on the part of the respondent where, on the 2 February 2015 the appellant while in the course of his duties as a machine attendant had an accident. The appellant blamed the respondent for permitting him to work in a dangerous environment and failing to take any precautions for his safety.
11. The trial court in judgment on 16 December 2019 apportioned liability at 15% against the appellant and then declined to make an award of loss of future earnings on the reasoning that these had not been pleaded but awarded Kshs. 600,000 as general damages. There was error in the trial court apportioning liability at 15% whereas the appellant had been allocated his duties by the respondent as the employer who had a duty to ensure a safe working environment. The appellant testified that on 2 February 2015 he was assigned duties as a machine attendant when he had an accident. Under Section 107 and 108 of



- the *Evidence Act*, the respondent had the burden to disprove the existing facts. The appellant testified and produced documents on his accident and the medical report. The response that the appellant had failed to take personal precautions while at work was just mere denials.
12. In the case of **Stakeley Iron and Chemicals Co. Limited v Jones (1956) AC** cited in **Isinya Roses Limited v Zakayo Nyogesa [2016] eKLR**, the court held that the obligation imposed on the employer to protect the employees against injury should not be applied to a contributory negligence such standard would defeat the object of the statute.
  13. The appellant testified that he was not trained to repair the machine. When his supervisor directed him to repair it, he did not have the necessary expertise to do so. He was not given the necessary tools and apparels required for such duties leading to injury, damage and loss. The respondent pleaded contributory negligence on the part of the appellant but failed to prove it. In the case of **Esther Nduta Mwangi & another v Hussein Dairy Transporters Limited, Machakos HCCC No.46 of 2007** the court held that although the respondent denied the accident but pleaded there was negligence on the part of the employee, no evidence was called to support such allegations. In this regard, liability ought to be 100%.
  14. On the finding that the appellant failed to plead loss of earning capacity, in the case of **Butler v Butler (1984) KLR** the court held that a person's loss of earning capacity occurs where as a result of injury and his chances in the future for work and labour market is reduced. Such loss should be assessed and awarded.
  15. The appellant submitted that he pleaded for payment of general damages including loss of future earning capacity. He produced a medical report and the doctor established that due to the accident, he could only remove his shirt with the use of his left hand only. His right hand was left paralysed and had sustained 40% permanent disability. Being right handed, the appellant was experiencing difficulties in trying to conduct functions using his left hand. This conclusion was supported by the Doctor called by the respondent.
  16. Since the accident, the appellant who was a machine attendant and required the use of both his hands was unable to continue with such position. He has not been able to work in any other place and his claim for loss of future earnings should be assessed.
  17. The appellant submitted that the award of general damages at Kshs. 600,000 was too low. In the case of **Bashir Ahmed v Uwais Ahmed Khan (1982-88) KLR** the court allowed a review of an award of damages that were found too low. On the 40% permanent disability medical assessment, an award of Kshs. 2,400,000 is appropriate as held in **Roba Doti Guyo v Jiang Zhongemei Engineering Company [2015] eKLR**. in the case of **Simon Ano Mua v Kionga Mukwano t/a Kiongaa Mukwano Transporters 7 2 others [2013] eKLR** a claimant who sustained 35% percent disability was awarded Kshs. 3,000,000 in general damages.
  18. The respondent submitted that a court must have jurisdiction before addressing a matter as held in **Kenya Power & Lighting Company Ltd v Veko & Another [2018] eKLR**. In **Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] eKLR** the Court in this case held that a court without jurisdiction should stop and there would be no basis for a continuation of proceedings pending other evidence.

## Determination

19. This being a first appeal, the court is mandated to re-evaluate the evidence and make own conclusions but take into account, the lower court had the chance to hear the witnesses in evidence.



20. The appellant has challenged the trial court with regard to apportionment of liability and failure to take into consideration loss for future earning capacity.

### Should liability have been apportioned?

21. In *Dubai Electronics v Total (K) Ltd & 2 Others HCC NRB Civil 870/98*, the same court had stated,

Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.

22. Where the facts are contested as to the cause of the accident with a view of legal liability, this is a most difficult task. This question must be decided as a properly instructed and reasonable person would decide it, by applying common sense to the fact of each particular case. There may be the sole cause of the accident, but also consider whether the accident could have been avoided altogether.
23. In this case, the appellant was a machine operator, he was assigned duty to repair a machine. It goes that as a machine operator, he was assigned such duty correctly. Did he have appropriate gear to minimise the risk of injury? This was the burden on the respondent to address. In this case, there is no effort to address such matter.
24. The appellant as the employee cannot be held liable where the employer fails to discharge its duty of care and to demonstrate what measures were taken at the shop floor to prevent injury or minimize the damage.
25. In the case of *Baker v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476* the court held that;

Every day proof of collision is held to be sufficient to call on the dependents for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them.

26. The findings by the learned magistrate apportioning liability are hereby reviewed and the same appointed at 100% against the respondent.
27. On the failure to award loss for future earnings, the appellant submitted that the trial court erred in addressing such a matter on the basis that this was not pleaded. Upon the finding the appellant suffered 40% permanent disability, this is supported by the medical report and not challenged by the respondent, such loss ought to have been assessed and awarded. In the case of ***Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment)***, the court in addressing a similar matter held that;

Diminished earning capacity refers to a decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.



Usually, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss.

However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future to get an award under that head.

28. In *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR, the court held that the issue of award of loss of earnings where a Claimant cannot prove employment;

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 for the award, when a plaintiff is employed, is to compensate the plaintiff for the risk that the disability has exposed him to either losing his job in the future or case he loses the job, his diminished 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 trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

29. Hence, for loss of future earnings and loss of earning capacity, the former being an award of special damages and the latter an award of general damages. See ***Koyi v Obanga & 2 others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment)***. The learned magistrate analyzed that the Appellant had not specifically pleaded or proved his loss of future earnings and was thus not entitled to such earnings. However, due to the disability sustained at 40%, this court holds the view that the Appellant would be entitled to compensation for loss of earning capacity. Such loss should be a head in general damages and does not require proof of employment or liquidated loss. Consequently, in the absence of such evidence of earnings, a lump sum award is appropriate.

30. In the case of *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR stated thus;

...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.

31. In the case of ***Achacha v Litunya (Civil Appeal E044 of 2021) [2022] KEHC 3332 (KLR) (30 June 2022) (Judgment)*** an award of Ksh. 800,000 general damages were confirmed upon appeal. In ***Benuel Bosire vs Lydia Kemunto Mokora (2019) eKLR***, the court reduced an award of Kshs. 2,000,000 to Kshs. 700,000 where the respondent had a single compound fracture for which disability had been assessed at 40%. In ***SBI International Holdings (AG) Kenya vs William Ambunga Ongeru (2018) eKLR***, the respondent sustained 40% permanent disability. The court upheld the trial court's award of General Damages at Ksh. 800,000/=.



32. In the case of **Koyi v Obanga & 2 others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment)** the appellant court awarded Kshs.400,000 general damages where the medical report assessed the injured persons at 40% permanent disability.
33. The two doctors for the appellant and the respondent arrived at a permanent disability of 40%. In this case, the evidence showed that the Appellant suffered 40% disability due to the fractures in his right hand. From comparable cases, an award of Kshs. 200,000 is appropriate to compensate him for this loss.
34. Accordingly, the appeal succeeds with an award of Kshs. 200,000 losses for future earning capacity; liability apportioned at 100% against the respondent; each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

