



Board of Management & Trustees Catholic Diocese of Kakamega v Shirietso (Employment and Labour Relations Appeal 6 of 2024) [2024] KEELRC 1684 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 6 OF 2024**

**JW KELI, J
JUNE 27, 2024**

BETWEEN

**BOARD OF MANAGEMENT & TRUSTEES CATHOLIC DIOCESE OF
KAKAMEGA APPELLANT**

AND

JOSEPHAT MBOYA SHIRIETSO RESPONDENT

*(An Appeal from the Judgment of Honourable Hazel Wandere SPM delivered
on 23/08/2022 Kakamega Chief Magistrate's Court Civil Case No. 386 of 2015)*

JUDGMENT

Representation

C/A Lucy Macheso

For Appellant- Nyikuli, Shifwoka & Company Advocates

For Respondent- MS/ Elizabeth Chungu & Company Advocates

1. The Appellant, being dissatisfied with the Judgment and or decision of the Honourable Hazel Wandere SPM delivered on 23/08/2022 Kakamega Chief Magistrate's Court Civil Case No. 386 of 2015 filed the Memorandum of Appeal dated 19th September 2022 and Record of Appeal dated 23rd June 2023, seeking the following orders: -
 - a. That the appeal herein on quantum be allowed
 - b. That the decision of the Honorable Trial Court in entering a judgment on quantum for the sum of Kshs 900,000/- for loss of 2 fingers in favour of the Respondent be set aside and in its place be substituted with an order of the Honorable Court awarding quantum as reasonably proposed by the appellant herein in their submissions.



- c. That the respondent be condemned in the costs of the appeal.
2. The appeal was premised on the following grounds: -
 - i. The Honorable Trial Court erred in both law and fact in rendering a judgment on quantum and awarding the sum of Kshs 900,000 for loss of 2 fingers and which award was manifestly high, exaggerated, unjustified, and unsubstantiated in view of the injuries supposedly suffered by the respondent.
 - ii. In the circumstances, Honorable Trial Court erred in both law and or fact in rendering a decision and or judgment on quantum for the sum of Kshs 900,000 which was /is arbitrary, excessive contrary to established principles and trends on awards of general damages, and clearly an abuse of discretion.
 3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Nyikuli, Shifwoka & Company Advocates were dated 23rd June 2023 and received in Court on 19th July 2023. The Respondent's written submissions drawn by M/S Elizabeth Chunge & Company Advocates were dated 29th May 2023 and received in Court on 29th May 2023.

Background to the appeal

4. The Respondent filed a suit Kakamega CMC Civil Case No. 386 of 2015 against the Appellant for soft tissue injuries compensation sustained at the workplace. Through the amended Memorandum of Claim dated 4th April 2017 and filed on 20th April 2017, the Respondent sought for the following reliefs: -
 - a. General damages
 - b. Special damages Kshs 2,500/-
 - c. Costs of the suit
 - d. Interest thereon at Court rates
 - e. Any other relevant orders and reliefs this Honourable Court may deem fit and just to grant.
(pages 68-71 of the record is the Appellant's amended claim).
5. The Respondent relied on his witness statement dated 31st August 2015, the list of documents, and the bundle of documents (pages 85-102 of the Record).
6. The Appellant entered appearance through the law firm of Nyikuli Shifwoka & Company advocates and filed a statement of defence dated 10th June 2016 which was filed out of time pursuant to the leave of the trial Court granted vide its ruling delivered on the 30th August 2016 (Pages 53-55 of the Record was the defence).
7. The Trial Court proceeded with the hearing of the Respondent's case on the 2nd February 2021 where the Claimant (PW1) was cross-examined by counsel for the defence (page 45). On the 17th of August 2021, the Doctor(PW2) produced the medical report on the Respondent and was cross-examined by counsel for the defence (pages 48-49 of the Record).
8. The defence case was scheduled for the 22nd March 2022, where one Mr. Otieno held a brief for Mr. Shifwoka for the defence and recorded consent on liability with counsel for the Respondent at 70:30% against the Appellant. Parties agreed to file written submissions on quantum.



9. The trial Court delivered its judgment on the 23rd of August 2022 where on quantum relied on the medical report and awarded the Claimant general damages for Kshs 900,000. It is this amount that is contested as being excessive for soft tissue injury to 2 amputated fingers (pages 5-7 of the Record was the Judgment).

Determination

Issues for determination.

10. The Appellant submitted that the sole issue for determination was whether the award by the trial Court was excessive and manifestly high as to warrant an interference by the Appellate Court.
11. The Respondent identified the following issues for determination: -
- a. Whether the quantum of damages awarded to the respondent was inordinately too high in the circumstances as complained in the memorandum of appeal.
 - b. What order and favourable relief should this Honourable Court make?
 - c. Who pays the costs of the appeal?
12. The Court sitting on the first appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen nor heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
13. The Court guided by Selle's decision, that the Court sitting at first appeal has to evaluate the facts and evidence before the trial Court while making allowance of not having seen the witnesses to reach their own conclusion, finds the issue for determination in the appeal are as follows: -
- a. Whether the award by the trial Court was excessive and manifestly high as to warrant an interference by the Appellate Court.

(a). Whether the award by the trial Court was excessive and manifestly high as to warrant an interference by the Appellate Court.

14. The Appellant was aggrieved with the quantum award of Kshs 900000 because: -
- a. The Honorable Trial Court erred in both law and fact in rendering a judgment on quantum and awarding the sum of Kshs 900,000 for the loss of 2 fingers and the award was manifestly high, exaggerated, unjustified, and unsubstantiated in view of the injuries supposedly suffered by the respondent.
 - b. In the circumstances, the Honorable Trial Court erred in both law and or fact in rendering a decision and or judgment on quantum for the sum of Kshs 900,000 which was /is arbitrary, excessive contrary to established principles and trends on awards of general damages, and clearly an abuse of discretion.
15. The Appellant further to Selle decision relied on similar jurisprudence enunciated in *Mwangi v Wambugu* (1984) KLR and *Kiruga v Kiruga* and another (1988) KLR 348 to submit that the Appellate Court would be justified to interfere with the trial court's award in cases of disproportionate, excessive and unjustified awards to remedy the excesses of discretion in restoring justice.



16. The Appellant submits that the quantum award of Kshs 900,000 for traumatic amputation and deformity of the 2nd and 3rd fingers, pains at the stumps, undisclosed soft tissue injuries, and unestablished psychological trauma was manifestly too high, excessive contrary to the principle that comparable injuries must be granted comparable awards given that at the trial the Respondent complained no pains at the time and continued to work and was right-handed. The Appellant contends that the award be substituted with a reduced amount as submitted before the trial Court for the sum of Kshs 351,750/- made up as follows:- Special damages 2500, general damages 500,000 less 30% contribution to net award of Kshs 351,750/-.

Respondent's submissions

17. The Respondent submits that general damages were properly assessed and awarded. That the figure was somehow low considering permanent disability of 30%. That it was trite that the Court sitting on appeal can only interfere with the award for damages if the award is inordinately low or excessively too high to be an erroneous estimate of the damages. The appellate Court must be convinced that the trial Court acted on the wrong principles of law.
18. The Respondent to buttress the foregoing submissions relied on the decision in *Butt v Khan* (1981) KLR 349 where it was held:- 'An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate, it must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or too low.'
19. The Appellant further relied on the authority on *Simon Taveta v Mercy Mutitu Njeru* (2014) e KLR where the Court of Appeal stated: - 'The context in which the compensation for the respondent (*sic*) must be evaluated by the nature and extend of the injuries and comparable awards made in the past.'

Decision

20. The Court finds that the trial Court did not compare the quantum award to any past awards contrary to the principle that comparable injuries must be granted consistent with comparable past awards. See *Simon Taveta v Mercy Mutitu Njeru* (2014) e KLR. The trial Court erred in law by failing to refer to comparable awards hence its award was not substantiated.
21. The Court finds that the medical report by PW2 confirmed the injuries to be soft tissue injuries being traumatic amputation of 2nd and 3rd left hand fingers from the 1st joint. PW2 told the Court that the plaintiff suffered psychological trauma and requires counselling due to the permanent finger stamps with functional disability. He had no report of a doctor to support that testimony of suffering trauma. PW2 told the trial Court that the finger stamps would never grow but would be just pain (pages 48-49 of the Record).
22. The Court then examined the comparable awards as submitted by the parties before the Trial Court. The plaintiff in written submission filed in Court on the 29th March 2022 relied on past award in *Saleh Suleiman Mwabakura v Nashidas Company Ltd Mombasa* HCC NO. 911 OF 1990 where a 29-year-old suffered a crush injury to his left hand resulting in loss of fingers and was awarded Kshs 440,000. The plaintiff informed the Court that taking into account the lapse of time award of Kshs 900,000 was adequate considering the permanent and severe injuries (the submissions by the plaintiff were not in the record and the Court accessed them from the original Trial Court file).
23. The Respondent/Appellant filed written submissions in the trial Court on the 10th May 2022. It was its case that there was no report of psychological trauma by any doctor hence no percentage of



the disability was attributable to the injury. That it was not clear how the claimant was substantially impaired yet he was right-handed. The Respondent/Appellant relied on two past awards. In *Blowplast Ltd v Julius Ondari Moses* (2018) e KLR where the claimant was awarded Kshs 600,000/- for similar injuries. In *Victor Mutua Kamolo v Joseph M. Mbugua* (2018) e KLR where the claimant was awarded Kshs 800,000/- for the traumatic amputation of 4 fingers subject to apportionment of liability. The Respondent/Appellant then proposed the award of Kshs 500, 000/- subject to agreed liability proportionality.

24. The Court re-evaluated the evidence and the past awards before The Trial Court. The injuries to the Respondent were assessed as permanent with painful stamps. The award in *Victor Mutua Kamolo v Joseph M. Mbugua* (2018) e KLR was on injuries of amputated left hand 4 fingers hence comparable albeit more severe. There was no evidence that the claimant who was a carpenter was capable of using the left hand minus the 2nd and 3rd fingers. The fact of traumatic amputation and painful stamps was not controverted. The issue of psychological trauma was not proved.
25. The Court re-evaluated the injuries sustained by the Respondent/claimant giving allowance to fact that it had not seen the witness and took into account the past awards submitted by the parties before the Trial Court. The Court holds that the quantum award of Kshs 900,000 was on the higher side. At least it should not have exceeded the Kamolo award which had more severe injuries. The authority by the Respondent was for the past award of Kshs 440,000/-. The time lapse was pleaded. The ground of appeal that the award was manifestly too high /excessive was merited. The Court allows the appeal by awarding Kshs 700,000 less the 30 % contributory negligence agreed by the parties.
26. In conclusion and disposition of the appeal, the Court allows the appeal and sets aside the Judgment and Decree of Honourable Hazel Wandere SPM delivered on 23/08/2022 in Kakamega Chief Magistrate's Court Civil Case No. 386 of 2015 and substitutes it as follows: -
The Claimant is awarded as follows:-
 - a. Special damages Kshs 2,500.
 - b. General damages Kshs 700,000.
Less 30%contribution Kshs (490,000).
Total award Kshs 492,500/-.
 - c. The Claimant shall have costs of the suit and interest from the date of Judgment of 23rd August 2022.
27. No Order of costs in the appeal.
28. It is so Ordered.

DATED, SIGNED, AND DELIVERED ON THE 27TH DAY OF JUNE 2024 IN OPEN COURT AT BUNGOMA

J.W. KELI.

JUDGE

In the presence of

C/A Lucy Macheso

For Appellant: Absent

For Respondent: Absent

