



**Gitogo v Shengli Engeneering Construction Company Limited & 2 others (Civil Appeal 9 of 2017) [2023] KEELRC 534 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 534 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL 9 OF 2017**

**K OCHARO, J**

**FEBRUARY 28, 2023**

**(BEFORE HON JUSTICE OCHARO KEBIRA ON 28/2/2023)**

**BETWEEN**

**GEORGE KARIUKI GITOGO ..... APPELLANT**

**AND**

**COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SHENGLI ENGENEERING CONSTRUCTION COMPANY LIMITED .... 2<sup>ND</sup>  
RESPONDENT**

**MUKETHA SIMON ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The appellant herein was a plaintiff in Civil Suit number 560 of 2011, before the Chief Magistrates' Court, Thika. The Respondents were the defendant and interested party therein. The suit was commenced by way of a plaint dated the 26<sup>th</sup> August 2011. In his pleadings, the Appellant contended that he was at the material time an employee of the 1<sup>st</sup> Respondent at its construction site along Thika Road and that in the course of his employment, he suffered a work injury. The appellant sought for general and special damages upon basis of the alleged injuries.
2. Upon being served with the summons to enter appearance, the 1<sup>st</sup> Respondent did enter appearance on the 5<sup>th</sup> October 2011 and filed a statement of defence on the 13<sup>th</sup> October 2011.
3. After filing the said documents, the 1<sup>st</sup> Respondent issued a third-party notice dated the 15<sup>th</sup> October 2013 against the 2<sup>nd</sup> Respondent claiming against it for indemnity and contribution.
4. Consequently the 2<sup>nd</sup> Respondent entered appearance in the matter on the 4<sup>th</sup> December 2013 and filed its statement of defence on the 25<sup>th</sup> July 2014. The matter consequently got destined for hearing inter partes on merit, before the trial court.



5. On the 8<sup>th</sup> March 2016, the matter came up for hearing before the learned Chief Magistrate, L. Komingoi, when the Appellant and the Respondent testified and closed their cases.
6. At the hearing, the Appellant moved the trial court to adopt his witness statement as evidence. The court did adopt the same as such. Then he testified orally apparently touching on areas that needed clarification.
7. The Appellant stated that at all material times he was employed by the Respondent Company, as a labourer charged with controlling lorries delivering materials to the Respondent's construction site. On 28<sup>th</sup> May 2010 he sustained injuries while in the course of employment. This happened when the Respondent's workers allowed another vehicle to drive through the site as he was directing a lorry that had delivered marram, knocking him down. He stated that his legs were broken, the left kneecap was out. He was admitted at Thika Level Five Hospital where he was first taken for two weeks and later transferred to Kenyatta National Hospital where he was operated on and a metal inserted on the broken bones. The kneecap was later removed. Subsequently, at different times, he underwent four more operations at Kijabe Mission Hospital.
8. The Claimant asserted that on the material day, he was working outside the official hour under instructions from his supervisor. He was instructed to wait for three lorries that hadn't delivered material at the site, direct them to offload before he would leave.
9. Under cross-examination by the Respondent's counsels, the Appellant testified, he used to work from 7.00 a.m. to 6.00 pm. According to him, workers at the site would only sign a job card when reporting in the morning. At the construction section other vehicles wouldn't overspeed while driving through thereat, as he could use flags to caution them. His reflective Jacket was another cautionary item.
10. After the accident, he neither reported the same to the management of the accident nor back to work. The accident was reported to the police by his relatives. He was injured while on duty. His fellow workers reported to the accident to the Respondent. He testified that he did not know the vehicle that hit him.
11. The Respondent's witness stated that whenever an injury occurred at its construction site occurred, it was reported to the supervisor on the ground who would then report to the management. She knew the Appellant as he was working with the Respondent as a general worker/Labourer, however, he could be assigned any duty by the supervisor.
12. She stated that at the material day he was a flagman. A flagman's duty was to control traffic. There was a signage, before the point of the flagman. The flagman would stop the other vehicles for the Lorries to enter and deliver the materials. The signage would be 100 metres, or 50 metres.
13. On the day of the accident the Appellant came in at 7.00 a.m. and left at 6.30. Employees were expected to sign a Job card at the time of departing in the evening. After all the employees had departed, the site would be handed over to the guards.
14. She testified that no accident report was made on that day. She only came to learn of the accident when the Claimant visited her office, six months after the alleged date of the accident. This prompted her to commence investigations, she spoke to Mr. Lithe, the supervisor, who informed her that on the material day, the Claimant had left for home at 6.30 pm, after signing out.
15. She testified that the Appellant got involved in the accident at around 7.30 pm to 08.00pm, thus after working hours might have gotten injured after the working hours. The police Abstract that was



obtained indicated the time of accident as 7.00 pm. It involved motor vehicle registration numbers, KAZ 306 Z Toyota matatu.

16. Under cross-examination, the witness testified that it was after a follow up of the matter, that the motor vehicle that was involved in the accident came to be known. Further, that upon inquiries, it was discovered that the accident occurred at between 7.30 p m to 8.30 pm, a kilometre away from the construction site.
17. The learned trial Magistrate rendered herself on the matter through her judgment dated 30<sup>th</sup> May 2017. In the judgment, the learned trial magistrate found that indeed the Appellant was an employee of the 1<sup>st</sup> Respondent but was not injured in the course of his employment.
18. The learned trial Magistrate then found that the 2<sup>nd</sup> Respondent was to be blamed for the accident as the motor vehicle search indicated that he was the true owner of the motor vehicle KAZ 306 Z. The Learned trial Magistrate, consequently entered judgment against the 2<sup>nd</sup> respondent in the sum of kshs 1.5 million as general damages.

### **The Appeal.**

19. Aggrieved with the learned trial Magistrate's judgment, the Appellant filed the appeal herein, putting forth three principal grounds thus;
  - i. That the Honourable Chief Magistrate erred in dismissing the Appellant's case against the 1<sup>st</sup> Respondent.
  - ii. That the Honourable Chief Magistrate erred in making an award inordinately low in general damages in the circumstances of this case.
  - iii. That the Honourable Chief Magistrate erred in law when she failed to make an award on lost capacity to earn in future despite evidence of serious disability which inhibited the Appellant's capacity to work and earn in future.

### **The Appellant's Submissions**

20. The Appellant in his written submissions stated that the learned Honourable Magistrate erred gravely when she placed reliance on police Abstract that was not produced in evidence, which indicated that the accident occurred at 7.00. Reliance which influenced her finding that the accident didn't occur at the Appellant's work place, as he had checked out therefrom at 6.30 pm. The motor vehicle search certificate was equally not produced in and admitted as evidence.
21. It was further argued that the learned trial Magistrate failed to appreciate and properly consider the Appellant's evidence that after checking out, his supervisor Mr. Ling, assigned him a task that he had to undertake, wait for the three lorries that were yet to deliver material at the site, and direct the offloading. The supervisor was never called to testify, his evidence was not challenged therefore.
22. The Appellant submitted that it was improper and insufficient for the trial Court to rely on circumstantial evidence such as the time indicated in the police abstract while ignoring the unchallenged evidence of a direct witness and a victim of the accident. It was imperative for the Court to consider that in fact, it wasn't clear as to who filed the accident report with the police, identifying the hit and run motor vehicle.
23. It was contended that in the absence of an eye witness account on the part of the 1<sup>st</sup> Respondent and that the Appellant having pleaded Res Ipsa Loquitur, coupled with the fact that the 1<sup>st</sup> Respondent's witness testified in acknowledgement that the construction site is in control, direction and physical



possession of the contractor until completion of the works and that the duty to keep the Appellant safe while in the course of duty lay squarely with the 1<sup>st</sup> Respondent, the trial Court erred in not finding the 1<sup>st</sup> Respondent liable. Properly, the learned trial Magistrate ought to have held the Respondents jointly and severally liable.

24. On quantum, the Appellant's Counsel submitted that the award of Ks 1 million by the trial court was inordinately low considering inflation trends. With this the Appellant submitted that an award of Kshs. 3 million as was sought in the trial court would be an adequate compensation in terms of general damages. The counsel for the Appellant in fortification of his submissions relied on five authorities; HCCC No 106 of 2007, Machakos HCCC No 232 of 2004, Nakuru HCCC No 209 of 1991, Kakamega, HCCC No 485 of 1999 and Nairobi HCCC No 889 of 2004 where the High Court in the cited authorities awarded amounts ranging from Kshs. 1.1 Million to 2 Million.
25. The learned trial Magistrate correctly noted that the Appellant had pleaded an amount of Kshs. 150,000 for future medical expenses but erred when she declined to award the same.
26. He further submitted that it was an error on the part of the trial court to employ a global figure of Kshs. 500,000 in awarding the lost capacity to earn in future. The Appellant's counsel contended that where a person was active in employment, the multiplicand principles apply in assessment of damages for the lost earnings and the lost capacity to earn in future not the global figure principle.
27. Lastly it was submitted that the Honourable Learned Magistrate declined to make an award for the special damages that the Appellant had sought, on account that no receipts had been produced in evidence to prove the same. According to counsel, the converse is true, the Appellant's documents that were filed under the list of documents dated 26<sup>th</sup> August 2011 and filed on the 29<sup>th</sup> August 2011 and the supplementary list of documents dated the 23<sup>rd</sup> February 2016 and filed on the 26<sup>th</sup> February 2016 were all produced in evidence to support the Appellant's case.
28. In conclusion, the counsel submitted that the Appellant had made out a case for setting aside the learned trial Magistrate's judgement.
29. On the 27<sup>th</sup> April 2022, when this appeal was placed before this court for mention for directions, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents didn't not appear notwithstanding that they had been notified of the mention. Consequently, the court gave directions for the filing of submissions, which they didn't file. This judgement is therefore without the benefit of considering their submissions as they are not on record.

### **Analysis and determination.**

30. From the onset let me appreciate the scope, ambit and the power of a first Appellate Court while deciding first appeals. The jurisdiction of the first Appellate Court while hearing an appeal is wide like that of a trial Court. It is open for it to assess all issues of fact and law in the appeal. It is duty upon the first Appellate court to consider and appreciate the entire evidence, and may come to a different conclusion away from that of the trial court. The judgment of a first Appellate Court must be in texture one that reflects its conscious application of mind, and record findings supported by reasons on all issues, along with the contentions put forth and pressed by the parties. If the first Appellate Court has reversed the findings of fact, it must come into a close quarter with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding.



31. In the case of *Prudential Assurance Company of Kenya Limited v Sukhinder Singh Jutley and Another* [2007] eKLR on the role of a first Appellate Court, the Court of Appeal stated;

As a first appellate court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this - *Selle v Associated Motor Boat Company Limited* [1968] EA 123.

In dealing with this Appeal, I will give due consideration to the foregoing premise, having it in mind that the appeal herein is both on quantum and liability.

32. In this Appeal, there is no contestation on the learned trial Magistrate's finding that the Appellate was an employee of the Respondent at the material date of the accident, at the centre of it however, is her finding that the Appellant did not establish to the requisite standard, that he was injured at the workplace or rather during authorised working hours.
33. Counsel for the Appellant stated that the trial Magistrate erred in so finding. According to him, the Appellate had placed ample evidence before her to demonstrate the contrary. He further stated that his evidence regarding the fact that the accident occurred while he was at work controlling vehicles as was assigned by the supervisor, Mr Ling, remained uncontroverted, as the said supervisor was not called to testify. Instead of calling the supervisor as a witness, the Respondent presented a witness, who treated the court to hearsay evidence.
34. The Appellant's counsel submitted that the learned trial magistrate erred when she in her judgment heavily relied on a document, the police abstract which had not been produced and admitted in evidence as an exhibit, to the prejudice of the Appellant's case. I have carefully considered the learned trial magistrate's judgment, and I am persuaded by the submissions that she placed reliance on the police abstract, and that the contents therein materially informed her decision on liability. Having stated as I have, it becomes imperative then to consider whether or not the abstract was ever produced and admitted as evidence, and if not, the consequence of reliance on it, as the learned magistrate did.
35. On the 8<sup>th</sup> March 2016, after its first witness cleared testifying, the 1<sup>st</sup> Respondent sought for an adjournment to call a police officer to testify, and sought for summons to issue to the Base Commander, Thika. The matter was adjourned by the Learned trial Magistrate, for the purpose issued the summons, and fixed the matter for defence hearing for the 5<sup>th</sup> April 2016. On this day, Counsel for the 1<sup>st</sup> Respondent sought for a further adjournment, alleging that the police hadn't been able to trace the occurrence book and that they needed some time to trace the same. The court adjourned the matter once more, to the 10<sup>th</sup> May 2016. On the 10<sup>th</sup> May 2016, Counsel for the 1<sup>st</sup> Respondent stated to court, "I was not able to secure the attendance of the witness. I close the defence case."
36. I have no doubt in my mind that the 1<sup>st</sup> Respondent did not produce the police abstract as an exhibit for admission by the Court as part of its documentary evidence. That being so, it is my finding that the Learned trial Magistrate erred in law when she placed reliance on police abstract that, had not been admitted to evidence, and proved, was, untested, unauthenticated and, at best hearsay, to the prejudice of the Appellant's case. In the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, the Court of Appeal expressed itself;

- " 18. The mere marking of a document for identification does not dispense with the formal proof. How does a document become part of the evidence for the case? Any evidence filed and /or marked for identification by either party, passes through three stages before it is held proved or disapproved. First, when



the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence should not be confused with proof of the document. Third, the document becomes proved, not proved or disapproved when the court applies its judicial mind to the relevance and veracity of the contents—this at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon for a judicial opinion whether a document has been proved or disapproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of the document is only for purposes of identification and is not proof of contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
  20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as part of the record. If a document is not marked as an exhibit, it is not formally produced and proved, the document would only be hearsay, untested and unauthenticated account.
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37. It was the Appellant's case before the trial court that he was knocked and injured by a hit and run motor vehicle, when the workers of the Respondent negligently allowed, the hit and run motor vehicle to be driven through the construction site, when he was directing one of the Respondent's motor lorries to offload construction materials. He further asserted that the accident occurred after he had signed out on the job card. He explained the circumstances under which he found himself working after he had signed the card at 6.30pm. The learned trial magistrate considered the job card, concluded that the Appellant wouldn't have been involved in an accident at the construction area, as it was clear to her on basis of the card that he had already checked out of his work place. I have carefully considered the judgment of the trial court, I have not sighted any point at which she analysed the evidence by the Appellant as to why he was at the construction site after he had signed out, to believe or disbelieve it.
  38. The trial magistrate didn't analyse the evidence of the evidence by the Appellant as to why, against that of the Respondent's witness on the card, and the time that accident occurred. In my view, the evidence of the Respondent's witness was heavily hearsay that the Honourable magistrate shouldn't have preferred against that of the Appellant not unless she had a sufficient explained reason not to believe his evidence.
  39. The Respondent's witness alleged that she spoke to the Appellant's supervisor, Mr. Ling and other worker in the course of her inquiries on the accident and that that is when she picked the information as regards the time and place of the accident. Neither the supervisor nor any of the witness[es] who



gave her the information was called to testify on the aspect[s]. The 1<sup>st</sup> Respondent was alleged that the accident occurred elsewhere after the Appellant had left the construction area/place of work. Section 107 of the *Evidence Act* not be placed a duty upon it to prove this fact. The duty wouldn't be discharged by hearsay evidence.

40. In my view, the Appellant's evidence as regards the time and where, the accident occurred was not rebutted. I am persuaded with his evidence as regards how and where the accident occurred. In the case of *Kimatu Mbuvi v Beson Ngale* [2012]eKLR it was held;

“Liability cannot be challenged where a party calls no evidence to rebut the allegation of negligence and hardly challenge the circumstances of the accident’. In *CMC Aviation Limited v Cruise Air Limited* [1978] E.A,103, Madan J stated; ‘Pleadings contain averments of those concerned until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is foundation of evidence.”

41. I have carefully re-evaluated the evidence that was placed before the trial court therefore, and come to a conclusion that in the circumstances of the accident as was explained by the Appellant in his evidence, liability against the 1<sup>st</sup> Respondent was proved to the requisite standards, on a balance of probabilities. Consequently, I hold that the learned trial magistrate erred in law when she didn't attach any liability against it.

42. I now turn to consider the Appellant's call on this Court to relook at the awards on general damages by the first court. An award of damages by court is an exercise of discretion. Discretion being the latitude given to judges and judicial officers in the course of their work. *Black's Law Dictionary* (Tenth Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

43. Considering the principle that an award of damages is an exercise of discretion, the approach to be given by an appellate court whenever the exercise is assailed by way of an appeal, is now well settled. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, stated;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

44. The Appellant contended that the award of Kshs.1.1 that million was awarded as general damages was inordinately low, considering the injuries that he sustained. I have carefully considered the decisions that were placed before her, to guide her arrive at a fair award on general damages in the circumstances of the case, and get convinced not, that the damages awarded were inordinately low as alleged by the



Appellant. The Appellant has not convinced me that any of the conditions set out in the above case obtain here, to attract setting aside of the trial court's decision on the award.

45. The Appellant had pleaded Kshs. 150,000 as cost for future medication. In his medical report, dated the 26<sup>th</sup> April 2011 by Dr. Moses Kinuthia, the Appellant's permanent disability as a result of the injuries of the accident was assessed at 30%. According to the doctor the fractures of the left distal tibia/Fibula had not yet resolved and could require alignment to avoid gross malunion and fusion of that joint at the estimated cost of Ksh 150,000. I am totally unable to fathom out how else the Appellant was required to prove his claim under this head, besides through the medical report and the doctor's opinion.
46. The Appellant appealed against the global sum of Kshs. 500,000 as damages for the lost capacity to earn in future. He argued that the learned trial magistrate, in assessing the damages under the head, employed a wrong approach, leading to an under- award. It was his view that a multiplier approach would have been more appropriate to employ, than just giving a global sum. The Appellant urged this court to apply the multiplier/Multiplicand formula of 12,234 X12 months X 34 years hence Kshs. 4,991,472 as damages for lost capacity to earn in future.
47. The Court of Appeal in *Mumias Sugar Company Limited Francis Wanalo* [2007] eKLR stated as follows: -

“...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 the 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 in case he loses the job, his diminution of chances of getting an alternative job in the labor 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 the loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”
48. From the Judgement of the first court, I have not been able discern how the figure of Kshs.500,000 was arrived at. The factors that influenced the award of the amount cannot be sighted. It is at this juncture that it should be stated that the learned trial magistrate erred when she awarded a figure without ascribing reasons for it. I note that the Appellant was working as a general labourer. His injuries definitely diminished his working capability and chances of getting employed in same capacity as he was with the Respondent Company. The Respondent was 24 years when he got involved in the accident, a prime working age. Having stated that the approach employed by the first court, led to an under assessment of the award on the claim for loss of future earning capacity, I set aside the global figure of Kshs. 500,000, employ the multiplier/multiplicand approach,  $12,324 \times 12 \times 34 = 734,040$ . In my view, this approach attracts accountability, and even transparency, and public confidence in the judicial system. One is able to see how the amounts awarded were arrived at. Room for speculation gets diminished.



49. Citing the decision in *Moeliker Reyrolle & Co. Ltd*, [1971] 1 WLR, the Court of Appeal in the above-cited matter stated;

“The Characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more compressively in *Moeliker v Reyrolle & Co. Ltd* [1971] 1WLR 132. In that case Browne L.J said at page 40, paragraph B:

“

50. In the upshot, the Appellant’s appeal herein is allowed in the following manner;

- a. The learned trial magistrate’s decision on liability is hereby set aside and in place thereof judgement on liability entered against the Respondents jointly and severally.
- b. The Appellant is awarded the sum of Kshs.150,000 for future medical expenses, and Kshs. 734,040 for lost capacity for future earnings.
- c. Costs of this Appeal are to the Appellant.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**

**OCHARO KEBIRA**

**OCHARO**

In the presence of;

Mr. Muturi for the Claimant.

No appearance for the Respondents.

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**OCHARO KEBIRA**

**JUDGE**

