



**West Kenya Sugar Co. Ltd v Kalibo (Employment and Labour Relations Appeal E001 of 2022) [2023] KEELRC 939 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 939 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2022**

**JW KELI, J**

**APRIL 20, 2023**

**BETWEEN**

**WEST KENYA SUGAR CO. LTD ..... APPELLANT**

**AND**

**JASON WAFULA KALIBO ..... RESPONDENT**

*(Appeal against the judgment and decree of Hon. E.W. Muleka (SRM) delivered on the 12th March 2018 Butali Law Courts in Butali SRMCC No. 104 of 2016)*

**JUDGMENT**

1. The Appellant being dissatisfied by Judgment of Hon. E.W. Muleka (SRM) in Butali SRMCC NO.104 of 2016 delivered on 12<sup>th</sup> March 2018 filed Memorandum of Appeal dated 30<sup>th</sup> December 2022 against the entire decision seeking the following reliefs:-
  - (a) The Appeal be allowed and the judgment and decree of the court appealed from be set aside and in place judgment be entered for the appellant dismissing the Respondent's case in the subordinate court.
  - (b) Costs of the appeal and the primary suit be awarded to the appellant.
2. The appeal was premised on the following grounds:-
  - (a) The Learned Trial Magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
  - (b) The Learned Trial Magistrate erred in fact and law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.



- (c) The Learned Trial Magistrate erred in fact and in law in finding that the Respondent had proved his case on a balance of probability.
- (d) The Learned Trial Magistrate erred in fact and law in failing to dismiss the Respondents suit with costs to the Appellant.
- (e) The Learned Trial Magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.
- (f) The Learned Trial Magistrate erred in fact and in law in failing to appreciate sufficiently or at all the evidence tendered in favour of the Appellants controverted and rebutted the Respondents evidence thus lowering the Respondent's probative evidentiary value.
- (g) The Learned Trial Magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances that it represented an entirely erroneous estimate vis a vis the Respondent's claim.
- (h) The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

### **Background to the Appeal**

3. The Respondent/Claimant sought before the trial magistrate court damages for injuries sustained at work for which the trial magistrate awarded him against the appellant as follows:-
  - (a) Liability apportioned plaintiff liable at 20% as against 80% of the two defendants jointly and severally
  - (b) General damages of Kshs.100,000 for pain and suffering
  - (c) Special damages of Kshs.6000/-  
Total award of KES. 86,000/-.
  - (d) Cost and interest. ( page 72 of the record of appeal)

### **Appeal Hearing Directions**

4. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by LG Menezes & Company Advocates were dated 5<sup>th</sup> February, 2023 and received in court on the 7<sup>th</sup> February 2023. The Respondent's written submissions drawn by Z.K Yego Law Offices were dated 27<sup>th</sup> February 2023 and received in court on the 1<sup>st</sup> March,2023.

### **Determination**

5. The principles which guide this court in an appeal from a trial court are settled in *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a 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. In particular this 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."

6. Further in *David Kaburuka Gitau & Another v Nancy Ann Wathithi Gatutu & Another* Nyeri HCCA No. 43 of 2013 the court opined:- 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.'

#### **Issues for determination**

7. The Appellant in its submissions addressed prove of negligence and liability and whether the quantum of damages awarded to the plaintiff was in excess and or exorbitant with regard to the injuries sustained.
8. The Respondent addressed the merit of appeal with respect to liability and quantum of damages. The court finds that the issues placed by the parties for determination in the appeal are with regard to the liability and quantum of damages and formulates the issues as follows:-
  - (a) Whether the trial learned Magistrate arrived at the wrong conclusion liability.
  - (b) Whether the quantum of damages awarded to the Respondent/Plaintiff was exorbitant with regard to injuries sustained.

#### **Whether the trial learned magistrate arrived at the wrong conclusion on liability.**

9. The claimant testified on oath and adopted his witness statement. In the plaint dated 29<sup>th</sup> June 2016 the claimant at trial court claimed for general and special damages from the appellant herein as a result of injuries sustained while working at the appellant's premises. The evidence by the claimant to confirm having been a worker and as proof of injuries was :-
  - i. Gate pass P exhibit 1
  - ii. Outpatient treatment card Friends Lugulu Mission Hospital P exhibit 2.
  - iii. Medical report by Dr. J.C. Sokobe P exhibit 3 (a) and receipt of KShs. 6,000/- P exhibit 3b
  - iv. Demand letter P exhibit 4. (exhibits produced at page 52)
10. The respondent/claimant was cross examined by counsel for the appellant stated to be Samba Advocate (page 52). PW told the court at cross-examination that he was a casual labourer and his supervisor was Muniyifwa (1<sup>st</sup> Defendant ) and that one Olubisi was the assistant to Muniyifwa. That Muniyifwa paid cash after every two weeks and they signed counter book on payment. That the gate pass was not employment. The card was valid of the date issued. The card was for 1.2.2014 and he got injured on the 18.12.2014. PW stated he did not sign labour sheet but the counter book. That he was taken to Lugulu after the injury by the company motor vehicle, treated and released. He had bruises on left fingers and had healed. He blamed the appellant for the injuries suffered stating he was working for them at time of the accident and had no gloves and was cut by iron sheets. PW admitted he knew the risk of carrying the iron sheets. That the roof was made of iron sheet. On re-exam the respondent/claimant stated it was the company to provide him with the safety equipment, the gate pass was the casual gate pass and nothing else was given and that the counterbook was with the company.



## Defence Case

11. On 4<sup>th</sup> December 2017 after 4 adjournments of defence hearing by the appellant's counsel, the court ruled defence case as closed. The respondent submitted their evidence was unchallenged and the trial magistrate court agreed with that position (page 60). The court finds no basis to disagree with that finding.
12. Having considered the evidence the learned Magistrate concluded (page 60) "the plaintiff's exhibits were unchallenged and so balance of probabilities his claim succeeds". The court found the gate pass (pexhb1) was proof of employment, there was medical treatment notes (pexhibit 2) and medical report exhibits 3a and b respectively.

## Submissions

13. The Appellant submits that the respondent admitted on cross-examination the gate pass was not proof of employment. That the claimant stated he was injured working as helper at construction site and there must have been a witness who could have been called to corroborate the evidence relied on. The appellant to buttress this submission relied on the decision in *Nyamache Tea Factory Co Ltd v Convas Ontomwa Buge* [2010] eKLR where Justice Musinga observed that:- "The respondent did not call any witness to support his evidence. Surely there must have been some people who witnessed the accident, if at all it occurred. The sick sheet that he produced did not bear the name of any supervisor or Factory Manager, who issued it to the respondent. He alleged that the supervisor on duty was one Ogeto while the Unit Manager was one Gitau. None of them were called as witnesses. The respondent was aware that the appellant had denied that he was in its employment on the material day and further that no such accident ever occurred. Strict proof was therefore called for." That the court dismissed the case.
14. The appellant submits that there was no proof of negligence on their part for the accident and relied on decision in *Stapley v Gypsum Mines Ltd (2)* [1953] AC 663 at page 681 cited by justice Nyakundi in *Kihindi Kifaru Chiengo (legal representative of the estate of Baraka Kibindi) v Auto Industries Limited* to wit:- Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681 as follows:-

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it..."

"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally." The appellant further relied on the holding in *Stat Pack Industries v James Mbithi Munyao* [2005] eKLR where the court (Visram J as he then was) stated:- "Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between



someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

### Respondent's submission

15. The Respondent submits that the Appellant failed to produce the accident register hence failed to disprove the claimant's case he was injured at work and relied on such holding in *[Kebirigo Tea Factory v Jaren Raini](#)* [2008]eKLR to effect that where the employer denied the employee was never injured whilst on duty it was incumbent upon the employer to disprove the employee's assertion that he was not injured while on duty working. The respondent submitted that their evidence on causation was not controverted and or rebutted by defence. That the appellant failed to provide safe working environment and relied on decision in Nakuru HCCA No. 38 of 1995 *Sokoro Saw Millis -vs Bernard Muthimbi* where the court held that the duty to provide safe environment was absolute and in Nakuru HCCA NO. 111 OF 2014 *Timsales Limited -vs- Daniel Karanja* where the court held that the Appellant is liable to provide safety gear. That the appellant failed to provide gloves which would have prevented the cut by the sharp iron sheets. That the Appellant was vicariously liable for breach of duty of care leading to the suffering of damage. That the Appellant was the occupier under Section 2 of the *[Occupational Safety and Health Act](#)* 2007 hence bound by Section 6 of the Act to provide safe an health environment to its employee.

### Decision

16. The appellant did not call any witness to produce its evidence in court, the claim and evidence of the claimant was unchallenged as held by the trial magistrate court.
17. Section 107 of the *[Evidence Act](#)* obliged the claimant to prove its case on balance of probabilities. The respondent demonstrated industrial leather gloves if supplied would have prevented the cut by the sharp iron sheet. The court finds that the employer is required to take all reasonable precaution for the safety of the employee to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk under section 6 of the *[Occupational Safety and Health Act](#)*. The court finds there was prove of employment of the plaintiff, that the gate pass was corroborated by the fact the 1<sup>st</sup> defendant was sued as the contractor and supervisor of the site where accident happened within the premises of the appellant, there was prove of treatment at Lugulu hospital and the claimant evidence was he was taken to the hospital by the appellant's ambulance and the medical treatment notes were produced. The evidence of the respondent was corroborated and unchallenged.
18. The court holds that the statutory obligation to provide safe environment of work and protective case is mandatory and the appellant breached that duty towards the respondent. The court upholds the decision cited by the Respondent in Nakuru HCCA NO. 38 OF 1995 *Sokoro Saw mills v Bernard Muthimbi* where the court held that the duty to provide safe environment was absolute and in Nakuru HCCA NO. 111 of 2015 *Timsales Limited v Daniel Karanja* where court held that the Appellant is liable for non-provision of protective gear. The court further upholds decision in *[Kebirigo Tea factory](#)* (*supra*) on statutory obligation of Employer to keep accident register and produce the register in court when disputing the happening of accident. This was not complied with despite notice to produce. The appellant did not produce evidence in defence. The respondent's evidence was uncontroverted as rightly held by the learned trial magistrate. In the circumstances the court finds the learned magistrate arrived at the right conclusion on the liability. The court finds no basis to disturb the award on liability. The court finds that the role of employer to provide safety to employee is not absolute hence will not disturb the ratio of liability. The award on liability is upheld at 20:80 in favour of Respondent.



**Whether the quantum of damages awarded to the Respondent/plaintiff was exorbitant with regard to injuries sustained.**

19. According to the medical report P exhibit 4 (a) ( page 16) the injuries sustained were:-

(a) Blunt injury

(b) Two deep cut wounds on the right shoulder about 7 cm and 5 cm long.

The diagnosis was that the injuries sustained were soft tissue injuries which had healed.

20. The Appellant challenged the quantum award on ground that the same was in ordinary high in the circumstances and represented erroneous estimate vis a vis the respondent's claim. That the learned magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered merely arriving at a decision unsustainable in law. The learned Magistrate court award on quantum was for Kshs. 100,000/- (One Hundred Thousand only). The principles to apply on appeal against award of damages was set out in Butt -Khan [1982-88] KAR wherein the court held that :- 'An appellate court will not disturb an award of 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 so arrived at a figure which was either inordinately high or low'. The said principle were upheld in Joseph Henry Rubii v Attorney General ( Nairobi HCC a No. 701 of 2001 ) cited by the Respondents.

21. In assessing damages comparable injuries should be as far as possible be compensated by comparable award as held in Simon Taveta v Mercy Mutitu Njeru [20140] eKLR where the court of Appeal opined : " the context in which the compensation for the Respondent must be evaluated is determined by nature and extend of injuries and comparable awards made in the past". The court agrees with that position and in upholding the decision finds that the learned magistrate erred by failing to make comparison between past awards in arriving at her award.

22. The court then proceed to evaluate the past awards as per submission by the parties. The Appellants proposed a figure of Kshs. 50,000 and relied on the decision in Sinohydro Corporation Ltd v Hezra Odbiambo [2016]eKLR where the court awarded Kshs. 50,000/- for soft tissue injury to the left foot and further in Eastern Produce (K) Ltd (Savani Estate) v Gilbert Mubunzi Makotsi [2013]e KLR where on appeal an award of Kshs. 130,000 was reduced to an award of Kshs. 70,000/- for soft tissue injuries and was held to be sufficient as compensation.

23. The respondent submits that relying on the Butt v Khan case(*supra*) the trial magistrate did not take into account irrelevant factors or omit relevant factor as magistrate explained in his decision how he arrived at the general damages award. The respondent urged the court not to disturb the award.

**Decision on quantum award**

24. The court holds that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries The judgment of the learned magistrate on quantum was as follows:- "The plaintiff suffered soft tissue injuries as per the medical report, in my view general damages of Kshs 100,000/- would suffice as adequate for pain and suffering that the plaintiff suffered out of the accident which I do hereby award." The learned magistrate erred for failure to state the past award relied on for comparison purposes. In Simon Taveta v Mercy Mutitu Njeru [20140] eKLR the court of Appeal guided : " the context in which the compensation for the Respondent must be evaluated is determined by nature and extend of injuries and comparable awards made in the past".



25. The plaintiff submitted that under the injuries he was entitled sum to award of Kshs. 350,000 and relied on the decision in *Catherine Wanjiru King'ori & 3 Others v Gibson Theuri Gichubi in Njeri* HCCC NO. 320 of 1998 where Justice JM Khamoni awarded sum of Kshs. 300,000 for soft injuries on 1.5.2005.(page 36)
26. The respondent/appellant proposed a figure of Kshs 50000 and relied on the past award in *Eastern Produce (K) Ltd(Savani Estate) v Gilbert Mubunzi Maktsi* [2013]eKLR where on appeal an ward of KSHS. 130000 was reduced to Kshs, 70,000 for soft tissue injuries and was held to be sufficient. (page 42)
27. The court finds the authority of 2005 relied on by the plaintiff was too old yet there are many recent past awards. The court finds the proposal by the plaintiff of Kshs 350,000/- was too high in comparison with the injuries sustained which were soft tissue injuries and the respondent had recovered as per medical report(page 16). The court taking into account the past awards finds an award of Kshs. 60,000/- was adequate to compensate for the soft tissue injuries suffered in this case as the claimant had no complaints of pain at time he was examined for the medical report . The respondent had recovered. The learned magistrate award on quantum of Kshs. 100,000 is set aside and substituted with award of Kshs. 60,000/-.

### **Conclusion and disposition**

28. In conclusion the appeal is allowed on quantum and the court substitutes the award of general damages by the lower court from Kshs. 100,000/= to Kshs. 60,000/-. The award of special damages was not challenged and is upheld. The 20:80 liability ratio was upheld hence damages payable are substituted as a would to be 80/100x60,000 plus Kshs 6000 total net substituted award on appeal to the Respondent is Kshs. 48,000. (Forty Eight Thousand Only ) plus cost and interest from judgment date at the lower court.
29. Each party to bear own cost in the appeal.
30. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**JEMIMAH KELLI,**

**JUDGE.**

In the Presence of :-

Court Assistant: Lucy Macheso

Appellant : Otieno Njoga

Respondent: Absent

