



**Sunflag Textiles and Knitwear Mills Limited v Gachoka (Appeal
20 of 2023) [2023] KEELRC 1221 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 20 OF 2023
B ONGAYA, J
MAY 25, 2023**

**BETWEEN
SUNFLAG TEXTILES AND KNITWEAR MILLS LIMITED APPELLANT
AND
PETERSON KARIUKI GACHOKA RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court
at Nairobi Non. D. Mburu Principal Magistrate delivered on 07.12.2017)*

JUDGMENT

1. The appellant filed the memorandum of appeal on 16.01.2018 through Kairu & McCourt Advocates. The appellant appealed against the whole of the judgment and decree by the trial Court upon the grounds that the learned trial Magistrate erred in fact and law as follows:
 - a) In finding that the plaintiff was entitled to general damages that were too high in view of the fact that the plaintiff never suffered injuries of such severity.
 - b) In failing to consider the defendant's submissions on quantum.
 - c) In failing to consider conventional awards for general damages in cases of similar injuries.
 - d) In failing to consider the Doctor's opinion in the medical reports produced and attached to defendant's submissions.
2. The appellant prayed for orders as follows:
 - a) That the appeal be allowed with costs.
 - b) The judgment of Honourable Principal Magistrate dated 07.12.2017 on quantum be discharged and set aside against the appellants.



3. The respondent filed a plaint in the trial Court on 30.03.2016 through Nelson Kaburu Advocates alleging that on 12.09.2014 he was working for the appellant per the parties' contract of service as a machine attendant when the stenter machine malfunctioned and entrapped his right hand onto the padding mangle and the respondent sustained injuries and suffered loss and damage. The respondent attributed the injuries to the appellant's negligence and particulars of which were set out. The respondent prayed for judgment against the appellant for:
 - a) General damages for pain, suffering and loss of amenities of life; and loss of earnings or diminished earning capacity.
 - b) Special damages of Kshs 2, 000.00.
 - c) Costs and interest.
4. The appellant filed a defence on 14.06.2016 denying the occurrence of the injury to the respondent and denying the alleged particulars of negligence on its part. The appellant pleaded that it did not contribute to the injury and that it occurred at the sole negligence of the respondent particulars of which were set out in the defence. The appellant prayed the suit be dismissed with costs.
5. The respondent filed the reply to the defence denying that he had contributed to the accident as alleged by the appellant. He prayed for judgment in his favour as claimed and prayed for in the plaint.
6. On 13.07.2017 the parties agreed to have the documents produced and admitted as filed and entered a consent before the trial Court on liability in the ratio of respondent (plaintiff): appellant (Defendant) as 80:20. The role of the trial Court was to assess the damages.
7. The trial Court in the judgment delivered on 08.12.2017 awarded as follows:
 - a) Liability 80%:20%
 - b) General damages for pain and suffering Kshs 1,000,000.00.
 - c) Diminished earning capacity Kshs 483, 000.00.
 - d) Subtotal Kshs 1, 483,000.00.
 - e) Less WIBA Kshs 216, 209.40.
 - f) Total Kshs 1,266, 790.60.
 - g) Less 20% Kshs 253, 358.12.
 - h) Net awarded Kshs 1, 013, 432.48.
8. As submitted for the appellant, this is a first appeal and the duty of the Court is to consider and analyse the evidence before the trial Court and arrive at its conclusions taking into account that it did not by itself take the evidence as was done by the trial Court. The injuries sustained appear not in dispute. As submitted for the appellant the summary from Nairobi West Hospital indicates that the respondent suffered a crush injury to the right hand with necrossed palmar flap. The medical report filed for the respondent confirms the injuries as pleaded and that the wounds had healed completely save that the respondent would suffer a 45% degree of incapacitation. The respondent was subsequently examined by Doctor P.M Wambugu who confirmed the injuries as pleaded but opined that the respondent had sustained 35% degree of incapacitation. Both medical reports reveal that indeed x-rays of the injuries were taken and there was no bone or joint involvement. It was the appellant's submission that the award of general damages be guided by the nature and extent of the injuries sustained, the degree



of the permanent disability or incapacitation and consideration of recent cases and awards made in comparable injuries. It submitted as much for the respondent. As was held in *Butt v Khan* [1981] KLR 349, “... 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 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.” It is submitted for the appellant that the learned Magistrate in making her determination relied on authorities wherein parties sustained degloving injuries in addition to other severe skeletal injuries suffered such as multiple fractures hence arriving at a figure that was neither reasonable or fair. Thus it is urged for the appellant that the trial Court relied on awards made for non-comparable injuries. The trial Court relied on the *Easy Coach Limited v Emily Nyangasi* [2017] eKLR where Kshs 700, 000.00 were awarded in injuries described as follows, “The most serious injuries were on the right hand which healed with a 10cm scar with keloid formation on the elbow, and on the right leg which was treated through grafting and healed with healed 18cm scar right thigh, 26cm scar right leg below the knee and 12 cm scar right foot with keloid formation.” The trial Court also relied upon *Tononoka Rolling Mills v James To Bozo Were* [2015] eKLR where an award of Kshs 850. 000.00 was made for degloving injury to the left thigh, compound commutated fracture mid third left femur x-ray, soft tissue injuries, pains and blood loss. Further, the respondent therein had undergone several surgeries at Guru Nanak Hospital for surgical toilet, skin grafting and reconstruction and for insertion of drift-k-nail. The trial Court had also relied on *Kim Tea Factory & another v Peterson Watbeka Wanjobi* [2008] eKLR where an award of Kshs 800,000.00 on 18.01.2008 was made for a degloving injury on the right hand with extensive skin and muscle loss on the forearm with fractures of the radius and ulna bones, fracture of the iliac bone in the pelvis and generalised pains over most of the chest but without any fractures indicating soft tissue injuries. The Court has considered the trial Court’s consideration of those cases in awarding Kshs 1,000,000.00 for pain and suffering for permanent disability assessed by the doctors at 35% or 45% respectively. The Court finds that indeed the trial Court relied on cases where the sustained injuries were more severe than in the instant case. The Court further finds that the trial Court offered no explanation for the preference of those earlier decisions over the appellant’s cited and more recent cases as follows:

- a) *Dedan Njoroge Mwangi & another v Jane Wanjiru* [2020] eKLR incapacity at 45% with degloving injuries to right upper limb with tendon involvement, injury on right ring and small fingers, injury on right upper limb and the Court awarded Kshs 500,000.00 in general damages.
- b) *Donald Mwarangi & another v Mejumaa Nuru Mwakio & another* [2017] eKLR the Court awarded Kshs 500, 000.00 for a degloving injury to the scalp, deep cut wound on the left shoulder, blunt injury to the left knee, and dislocation of the left knee joint

9. The Court has considered the submissions and returns that the award of Kshs 1, 000, 000.00 by the trial Court was inordinately high in recent awards for comparable injuries. The Court considers that an award of Kshs 600, 000.00 would be just looking at the severity of the injuries, the recent awards for comparable injuries, and for an incapacitation degree of 35% or 45%. The net award by the trial Court will therefore be recomputed thus $(1, 266, 790.60 - 400, 000 = 866,790.60$ less 20% (being 173, 358.12) = Kshs 693,432.48).

10. The Court has considered the nature of the appeal and the time that has lapsed prior to its determination and owing to jurisdictional predicaments not attributable to the parties. The Court considers that each party to bear own costs of the appeal

In conclusion, the appeal is hereby determined with orders:



- 1) The trial Court's orders per the Judgment are varied to the extent that the net award under the conclusion shall be Kshs 693,432.48 and the decree flowing from that judgment varied accordingly.
- 2) Each party to bear own costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

