West Kenya Sugar Company Limited v Kiyesi (Employment and Labour Relations Appeal 25 of 2023) [2023] KEELRC 1621 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1621 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL 25 OF 2023

JW KELI, J

JUNE 29, 2023

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

TIMOTHY AGENO KIYESI ..... RESPONDENT

(Appeal against the entire judgment of Hon. E .W. MULEKA (SRM) delivered on the 20{{^th}} September 2018 in Butali SRMCC NO. 103 of 2016)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Hon. E.W Muleka (SRM) in Butali SRMCC NO.103 of 2016 delivered on 20th September, 2018 filed Memorandum of Appeal dated 28th January 2022 pursuant to leave of the court issued on the 27th January, 2022 against the decision of the learned Magistrate 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 law and in fact and grossly misdirected himself in treating the evidence and submissions on record more so the Appellant's superficially thereby arriving at a wrong conclusion on liability.

b. The Learned Trial Magistrate erred in law and in fact and grossly misdirected himself in treating the evidence and submissions on record more so the Appellant's superficially thereby arriving at a wrong conclusion on the award of damages.

c. The Learned Trial Magistrate erred in fact and law in arriving at a finding that the appellant was liable for the accident and/or Respondent's injuries when there was no evidence of breach of duty of care and/or contract at all on the part of the Appellants.

d. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-a -vis the Respondent's claim.

e. The Learned Trial Magistrate failed to apply judiciously 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 vide a plaint dated 27th June 2016 and filed on the 30th June 2016 sought before the trial magistrate court damages for pain and suffering for the injuries sustained at work and special damages for Ksh 6000/- (page 6) in which the trial magistrate awarded him against the appellant as follows:- 'apportioned liability at 80:20 against the defendant jointly and severally and on quantum awarded general damages for Kshs. 200,000/- (80%)for pain and suffering making a total of Kshs. 160,000/- plus 6000 and costs and interests."(page 62).

Written Submissions At Appeal

4. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by L.G . Menezes & Company Advocates were dated 25th January, 2023 and received in court on the 9th February 2023. The Respondent's written submissions drawn by Z.K Yego Law Offices were dated 8th March 2023 and received in court on the 14th March, 2023. On the 15th March 2023 the court gave the judgment date of 4th May 2023 but the court was out on official duty and the new date of today was issued.

Determination

5. The principles which guide this court in an appeal from a trial court are now well 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."
>
> Further in David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & 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 point of law and facts and come up with its findings and conclusions."

Issues for determination

6. The Appellant in its submissions identified the following issues for determination in the appeal:-

   a. Whether or not the learned trial magistrate erred in apportioning liability on the ratio of 80:20 in favour of the respondent.

   b. Whether or not the respondent deserved an award of damages and if the answer is positive whether the damages awarded were inordinately high?

7. The Respondent addressed the merit of appeal with respect to liability and quantum of damages.

8. The court finds that the issues placed by the parties for determination in the appeal are with regard to the apportioning liability and the quantum of damages and formulates the issues for determination in the appeal as follows:-

   a. Whether the trial learned Magistrate arrived at the wrong conclusion on liability.

   b. Whether or not the respondent deserved an award of damages and if the answer is positive whether the damages awarded were inordinately high?

   c. Whether the appeal is merited.

   Issue 1. Whether the trial learned magistrate arrived at the wrong conclusion on liability.

The Respondent's case at trial court.

9. The respondent at the trial court alleged negligence on part of the Appellant and gave particulars of the same in the plaint to be:- Exposing the plaintiff to risk and injury by instructing him to work with improper and improvised method of unfastening the wires used to hold sugar cane onto trailer while on transit, failing to provide a proper system of working or prevent the accident, failing to warn the plaintiff of impending danger which the appellant ought to have known and failure to take measures to protect the plaintiff from sustaining injuries, instructing the plaintiff to work in unsafe environment, failure to keep the work place safe, instructing the plaintiff to work with old, dilapidated and defective wire which broke and snapped while the plaintiff was unfastening it to release sugarcane which was on the trailer severely injuring the plaintiff when he was hit by heavy metallic pipe he was working with and suffering bodily injuries. The plaintiff produced as his evidence to proof his claim the following exhibits: - (page 106 of the record).

   i. Sick sheet (page 15)

   ii. Gate pass(page 16)

   iii. Medical report dated 22nd June 2016 by Dr. Joseph Sokobe (page 17)

   iv. Receipt of Kshs. 6000 for the medical report by Dr. Joseph Sokobe(page 18)

   v. Demand letter. (page 10)

10. The Respondent testified on oath and produced his said documents (page 54-56). During cross-examination the Respondent told the court he was engaged as off loader but it was not stated so in the gate pass, the clinic was outside the factory, Godfrey Shilibwa was his boss, he got injured while working in the cane yard, after the injury he never went back to work, they used to be given labour

sheets like one produced by the defendant, the document belonged to cane yard, his name was not in the labour sheet shown for 5th November 2015 and he did not know anyone listed in the sheet, his name was not in the sheet which shows the name and ID of the employee, he got injured on 5th November 2015, he got injured in the chest and had not healed well, he did not have the x-ray request form as alleged, he obtained a copy of the book from the company around 11am. The Respondent told the trial court he was not the one who did the record in the hospital booklets and did not know where DMFI came from as it had no stamp. That he was paid fortnight and not daily.

11. The court noted that the medical report , sick sheet and receipt were produced by consent.

Appellant's Case at trial court

12. The Appellant in its defence at trial court dated 21st October, 2020 denied the entire claim and submitted that the sick sheet and gate pass relied on by the plaintiff were forgeries. The defence filed list of documents being patient register for Kabras Action Group, labour sheets and accident register. At the hearing the defence called its witness DW1 Dancan Shihandula who stated he worked at West Kenya Kabras Action Group, he stated the P-exhibit 2 was a forgery as it did not indicate who treated the plaintiff and that it did not have serial number or stamp. That he had the register for the day and the plaintiff was not treated there (page 54-56). During cross examination DW1 told the trial court that the accident register was for West Kenya(Appellant) and he did not have the outpatient register. That P-exhibit 1 was not signed and did not show who treated the patient, the appellant paid for the treatment services at their clinic, they made entries in the patient's register , he was on duty in 2015 but did not evidence to collaborate that, the sick sheet was by a quack and their clinic does not belong to the appellant. DW1 told the court accidents are reported in the register and patients are treated and that P-exhibit 2 was not from their company (page 57).

13. DW2 (erroneously recorded as DW3 in the proceedings at page 59) was Geofrey Shilibwa who stated that he was a superintendent at the cane department of the appellant for 7 years and was working there on 5th November 2015, he knew the plaintiff and had worked with him. The plaintiff left in 2016 and was not at work on 5th November 2015 and his name was not in the daily attendance register(D-exhibit 2) During cross-examination DW2 stated his statement referred to date of 5th November 2019, he was supervising employees including the plaintiff, he did not have the accident register, he prepared D-exhibit 2 and the document was not stamped, there were signatures without names, he was the supervisor and he prepared P- exhibit 1.

Decision of the trial court

14. The learned Magistrate observed on liability (page 62) :- " from the evidence of both parties it is clear that the plaintiff was an employee of the defendant who was on duty on the material day and for that reason the court will not belabor itself in establishing proof of employment.' On proof of injury the trial court observed:- 'The plaintiff states in detail how the accident happened in his statement filed and adopted by his court, during the hearing he produced medical documents in support as analyzed earlier." On liability the learned Magistrate observed :- 'That then brings me to the issue of liability. It cannot wholly be blamed to the defendants and he confirmed himself that the work environment was okay therefore he ought to have been more careful as he executed his duties so in my view he too contributed to this accident . I therefore apportion liability to the ration of 80%:2% against the defendants jointly and severally".(the court noted a clerical error of 2% instead of 20% and the quote was verbatim)

The appellant's submissions

15. The Appellant submits that to establish a duty of care owing from the appellants to the respondent, the respondent ought to have proved within the balance of probabilities that he was an employee of the appellant, an accident actually occurred, he was injured in the course of work and that the accident was caused by the negligence and/or breach of duty of care by the Appellant and relied on the decision in Caparo Industries PLC v Dickman (1990)1ALL ER 568 and Chun Pui v Lee Chuen Tal(1988)RTR 298 where the court highlighted the determinants of negligence as follows:- 'the requirements of the tort of negligence are as Mt. Batt has submitted, fourhold, that is, the existence of a duty of care , a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused... What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of breach of the duty of care , there is equally no question that the onus of proof on a balance of probabilities , that the defendant has been careless falls upon the claimant throughout the case.''

16. The appellant further submits that the Respondent was not able to establish a nexus between his injuries and the purported negligence of the Appellant. That injuries alone were not sufficient to hold them liable. That there was no prove of employment relationship between the respondent and the appellant on the alleged date of the accident. That D-EXHIBIT 2 indicated the respondent was not at work on the alleged ill fated day and that he did not provide evidence to the contrary. That it was clear the respondent was not an employee of the respondent and if he was, he was not on duty on the date hence the purported chest injuries were not sustained in the course of work hence no duty of care arose. That the trial court erred in holding the Appellant was 80% liable for the accident as the appellant was not negligence in the circumstances and no link was established between any action and/or omissions on the part of the appellant and the injuries sustained.

Respondent's submission on liability

17. The Respondent submits that the plaintiff was employed by the respondent with the 1st respondent (at lower court) as the contractor contracted to hire and supply casuals to the appellant and produced P-exhibit1 being the casual worker gate pass serial no. 106550. The respondent submits he was involved in accident on 5th November 2015 while on duty and injured at work as cane loader. That he reported on duty at 6am and was to work to 2 pm. He indicated his shift supervisor was one Kennedy and he was working with a colleague namely James. He was offloading a job requiring to unfasten wire ropes used to hold the sugarcane on the trailer on transit. The appellant was the owner of the factory. The plaintiff led evidence that while he was exerting pressure to loosen the wire rope, the thick coiled metallic wire placed around the a heavy metallic hollow pipe snapped and broke and as a result the metal pipe hit him on the chest. The supervisor was notified and witnessed the accident and instructed he be taken for medical treatment at the clinic affiliated to the appellant and his supervisor issued him with a sick sheet which he used to get treatment at the clinic known as Kabras Action Group clinic. That that sick sheet (C-exhibit 2)issued to the Respondent and Dr. J.C. Sokobe's medical report was produced as C-exhibit 3(a) were produced by consent of parties. Dr. Sokobe examined the claimant and prepared a medical report produced by consent of parties as C-exhibit 3(a) where the injuries to the plaintiff were confirmed as pleaded in the plaint and as stated in the sick sheet.

18. The respondent further submits 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 and health environment to its employee and relied on various decisions to wit:- Nakuru HCCA NO. 38 OF 1995 Sokoro Saw Mills- Vs Benard Muthimbi where the court held that the duty to provide safe environment was absolute and in Nakuru HCCA NO. 111 of 2015 Timsales Limited -vs Daniel Karanja where the court held that the Appellant was liable for non-provision of protective gear. In Kisii HCCA NO. 179 OF 2006 Kaberigo Tea Factory v Jared Raini (2008) e KLR where the appellant alleged the respondent was not in their employment on the date of the accident but failed to produce the original muster roll for the relevant month the court held that the duty to disprove the issue lay with appellant producing the relevant and original muster roll and in this case that did not happen. That the allegation of fraud was not proved. That no documentary evidence was produced in terms of labour sheet, muster roll, accident register, protective gear issuance register, work allocation sheet, signed payment sheets to disprove the claim and thus the evidence by the claim remained uncontroverted as held in Edwards Muriga through Stanley Muriga v Nathaniel D Schluter Civil Appeal No. 23 of 1997 cited in Billiah Matiangi v Kisii Bottlers Limited and Another (2021)e KLR as follows;- '11. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations." In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that: "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence"

Decision

19. The appellant challenged the finding on negligence on its part for lack of proof. The term "occupier" means 'the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer under the *Occupational Safety and Health Act*." In the instant appeal the court finds the appellant was an occupier under the Act. Section 6 of the Act provides duties of the occupiers as follows:-' (1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace. (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes— (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health; (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; (c) the provision of such infromation, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed; (d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health; (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work; (f) infroming all persons employed of— (i) any risks from new technologies; and (ii) imminent danger; and (g) ensuring that every person employed participates in the application and review of safety and health measures. (3) Every occupier shall carry out appropriate risk assessments in relation to the safety and health of persons employed and, on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and processes under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in this Act. (4) Every occupier shall

send a copy of a report of risk assessment carried out under this section to the area occupational safety and health officer. (5) Every occupier shall take immediate steps to stop any operation or activity where there is an imminent and serious danger to safety and health and to evacuate all persons employed as appropriate. (6) It is the duty of every occupier to register his workplace unless such workplace is excepted from registration under this Act. (7) An occupier who fails to comply with a duty imposed on him under this section commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both."

20. The court opines that under section 6 of the *Occupational Safety and Health Act* outlined above that the employer is required to take all reasonable precaution to ensure the safety of the employee and to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk. The Court upholds the decision by Onyanja J to apply in the instant appeal in Boniface Muthama Kavita -vs- Canton Manufactures (2015) e KLR to wit:- "The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employer to provide appropriate and safe system of work which does not expose the employee to unreasonable risk.".

21. The court finds there was prove of employment of the plaintiff by the respondents as held by the trial court for reason of the production of casual workers gate pass for the period and of which DW2 stated the card was for one month. The card was issued on 1st November 2015. The accident happened on 5th November 2015. DW2 admitted he issued the gatepass similar to the one produced by the plaintiff. The plaintiff in his witness statement identified his supervisor for the day as Kennedy who witnessed the accident and instructed he be taken to the company clinic at Kabras Action Group and a colleague James. The appellant did not controvert the foregoing evidence. The 1st respondent in his written statement stated he was on duty as a supervisor on the said day supervising employees including the plaintiff who was in his supervision(page 25). Parties are bound by their pleadings.

22. The Plaintiff produced the sick sheet (P-EXHIBIT 2) and the medical report which documents were produced by consent of the parties. The issue of fraud or credibility of the documents could not arise when the appellant agreed to their production by consent. The court holds that the statutory obligation of the employer/occupier to provide safe environment of work and protective gear where relevant to an employee in the place of work is mandatory. The court upholds to apply in the instant appeal the decisions cited by the Respondent in Nakuru HCCA NO. 38 OF 1995 Sokoro Saw mills-Vs Benard Muthimbi where the court held that the duty to provide safe environment was absolute and in Nakuru HCCA NO. 111 of 2015 Timsales Limited -vs Daniel Karanja where court held that the Appellant was liable for non-provision of protective gear. The defendant called DW1 who alleged to work with the Kabras Action Group clinic but produced accident register authored by the appellant and not the records of the clinic. DW2 produced the attendance register dated 5th November 2015 which did not bear any evidence it was from the appellant and some signatures had no names. In conclusion following the foregoing analysis of the evidence as summarized the court finds and upholds the decision of the trial court on prove the plaintiff/ respondent was on duty with the appellant on the 5th November 2015 when the accident occurred and the accident incident occurred. The court upholds the trial court finding on liability of the appellant who owed the claimant duty of care to ensure safety at work as held in Boniface Muthama Kavita -vs- Canton Manufactures (2015) e KLR to wit:- "The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee to provide appropriate and safe system of work which does not expose the employee to unreasonable risk.".

23. In the circumstances the court holds that the learned magistrate arrived at the right conclusion on the liability. The court finds no basis to disturb the award on liability. The court holds that the role of

employer to provide safety to employee is not absolute and that the apportionment of liability was justified. The award on liability at ratio of 80:20 in favour of Respondent is upheld.

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

24. According to the medical report P-exhibit3 (a) (page 17) the injuries sustained were:-

    a. Blunt injury to the chest

25. The diagnosis was that:- 'Timothy Ageno sustained soft Injury from which he has recovered."

26. The Appellant challenged the quantum award on ground that Kshs. 200,000/- was inordinately high for a single soft tissue injury and an abuse of the discretionary power of the trial court and miscarriage of justice against the appellant. The appellant relied on the Court of Appeal decision on the circumstances under which the court can interfere with the quantum award of damages in Catholic Diocese of Kisumu v Tete(2004) e KLR as follows:- 'The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate." And further in Sheikh Mustag Hassan v Nathan Mwangi Kamau Transporters and 5 others (1986) KLR 457 where it was stated: 'the judge of both courts should recall that inordinately high awards as such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. ''

27. The appellant submits the respondent should not be awarded more than Kshs. 120,000/- in general damages for pain and suffering as per their submission in the trial court (page 43) where in the case of Simon Muchemi Atako & another v Gordon Osore (2013)e KLR the Court of Appeal awarded Kshs. 120,000/- for blunt injury to the chest among other injuries. The respondent/plaintiff relied on a similar holding as Catholic Diocese of Kisumu v Tete(2004) e KLR on interference with award of general damages in Kenya Pipeline Company Limited v Lucy Njoki Njuri (suing as legal representative of the estate of John Wamae deceased)(2016)e KLR.

28. The respondent submits that the trial court explained the award and did not take into factor irrelevant considerations and relied on the decision in Joseph Henry Ruhui v Attorney General (2004)e KLR where the court held, 'the test as to whether an appellate Court may interfere with an award of damages was stated by Law, J.A. in Butt v. Khan (1977) IKAR as follows: "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 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."

Decision

29. The trial court on the award stated that the defence prayed for award of Kshs. 100,000/- and produced authorities while the plaintiff prayed for Kshs. 350,000/- and annexed authorities too. The court upholds the principle that award of damages should be as per comparable injuries and as far as possible by comparable awards. The court applies the principles set out in Catholic Diocese of Kisumu v Tete(2004) e KLR as follows:- 'The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate." And by the same court in Sheikh Mustag Hassan v Nathan Mwangi

Kamau Transporters and 5 others (1986) KLR 457 where it was stated: ' the judge of both courts should recall that inordinately high awards as such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. ' and in Joseph Henry Ruhui v Attorney General (2004)e KLR where the court held, 'the test as to whether an appellate Court may interfere with an award of damages was stated by Law, J.A. in Butt v. Khan (1977) IKAR as follows: "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 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.", In upholding the foregoing decisions the court finds the award of the trial court did not explain why it deviated from the 2013 authority by the Court of Appeal in Simon Muchemi Atako & another v Gordon Osore (2013)e KLR which was binding on it being on similar soft tissue of blunt chest injury and more severe injury compared to inferior High Court authority in Nyeri HCCC No. 320 of 1998 Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi where Justice J.M Khamoni(rtd) on the 1st july 2005 awarded a sum of Kshs, 300,000/0 for soft tissue injuries(PAGE 37).

30. The court finds that trial court erred in law by failing to analyze the authorities and justify the award hence issuing an arbitrary figure of Kshs. 200,000/- which the court finds was inordinately high considering the injuries which had healed as per the medical report (C-exhibit 3a). Consequently, the court is satisfied the appellant established a basis for the court to interfere with the award. The court considered almost 3 years had passed since the court of Appeal decision in Simon Muchemi Atako & another v Gordon Osore (2013)e KLR when the trial court delivered its decision. Taking into consideration the lesser injury and time lapse of 3 years the court finds that an award of Kshs. 140,000/- was adequate compensation for the pain and suffering from the blunt chest injury which had healed.

31. On the special damages the court looked into the submission of the defence at trial court (page 43) and did not find any challenge to the special damages of Kshs. 6000/-. The memorandum of appeal did not challenge the award of special damages. The said receipt of Kshs. 6000{P-Exhibit 3(b)} was produced by consent of the parties. The court finds the claim of stamp duty by the appellant was an afterthought and only raised in the written submissions which the court holds are not pleadings. The award of special damages of Kshs. 6000 is upheld.

Conclusion

32. In the upshot the appeal dated 28th January 2022 succeeds on the issue of quantum award of general damages and the decision on liability and apportionment of 80:20 in favour of the respondent is upheld . The judgment of Hon. E .w. Muleka (SRM) delivered on the 20th September 2018 in Butali SRMCC NO. 103 of 2016 is set aside and substituted as follows:

    a. Liability apportionment 80:20 in favour of the respondent

    b. General damages for pain and suffering award of Kshs. 140,000/- total award of Kshs 112,000/- awarded upon apportionment of liability with interest at court rates from date of judgment of the trial court

    c. Cost of the suit at trial court to the claimant.

33. Each party to bear own costs in the appeal.

34. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29th DAY OF JUNE 2023.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF

Court Assistant: Lucy Macheso

Appellant : Njoga

Respondent: Chanzu