



**Devki Steel Mills Limited v Oduori (Employment and Labour Relations Appeal 10 of 2021) [2023] KEELRC 2169 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2169 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 10 OF 2021  
MA ONYANGO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**DEVKI STEEL MILLS LIMITED ..... APPELLANT**

**AND**

**ELIYA EGESA ODUORI ..... RESPONDENT**

**JUDGMENT**

1. Devki Steel Mills Limited, the Appellant herein filed an appeal against the Judgment and Decree of the Senior Principal Magistrate at Machakos in CMCC No. 539 of 2015 delivered on 30<sup>th</sup> November, 2017. In the suit the parties compromised the issue of liability and recorded a consent on the same at a ratio of 70:30 in favour of the Respondent who was the Plaintiff in the said suit. After hearing the parties, the Court awarded the Respondent Kshs 3,736,847.20 being compensation for general damages, loss of earnings and special damages together with costs and interest thereon.
2. The Appellant being dissatisfied with the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal;
  - i. That the learned trial magistrate erred in law and in fact in assessing general damages at Kshs. 3,000,000 for pain, suffering and loss of amenities which amount was/is manifestly excessive in the circumstances.
  - ii. That the learned trial magistrate erred in law and in fact assessing loss of earnings at Kshs. 2,330,496 which amounts was/ is manifestly excessive in the circumstances.
  - iii. That the learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues/ factors not supported by evidence adduced and/ or the applicable law.
  - iv. That the learned trial magistrate erred in law and in fact in failing to take into account the Appellant's submissions on quantum or at all



- v. That the learned trial magistrate erred in law and in fact in failing to take into cognisance the fact that the Kenyan economy cannot sustain such huge awards.
3. The Appellant seeks the following orders: -
    - i. That this appeal be allowed
    - ii. That the judgment of the subordinate court in respect of quantum be set aside, and this Appellate Court to reassess damages as it deems fit to deal
    - iii. Any other relief that this Honourable Court deems fit to grant
    - iv. That the Respondent be ordered to pay the costs of the Appeal and the cost of the subordinate court.

### **Background of the case**

4. The Respondent was the Plaintiff in the trial court. In his Amended Plaintiff dated 2<sup>nd</sup> February 2017, he contended that he was an employee of the Appellant. That on 25<sup>th</sup> April 2014, while in the course of his lawful duties at the defendant's premises, a roll mill cabling/roller crashed him as a result of which he sustained serious injuries.
5. The Respondent attributed the occurrence of the accident to negligence, carelessness, breach of statutory duty and breach of contract on the part of the Appellant.
6. In its Statement of Defence dated 20<sup>th</sup> August 2015, the Appellant denied the allegations made in the plaint and in particular that on instructions of the Appellant, it failed to provide to the Respondent safe system of work or that while he was tightening a nut the roll cabling/rollers crushed the Respondent as a result of which the Respondent sustained serious injuries as alleged or at all.
7. The Appellant pleaded that the accident was wholly caused or substantially contributed to by the Respondent's own negligence.
8. The Trial Magistrate upon considering the evidence on record and submissions by the parties awarded the Respondent Kshs 3,000,000 as general damages, Kshs. 2,330,496 for loss of earnings and Kshs. 5,500 as special damages less 30% contributory negligence leaving a balance of Kshs. 3,736,847.20.
9. When the appeal came up for hearing of the appeal, the court directed the parties to dispose of the same by way of written submissions. The Appellant filed its submissions on 14<sup>th</sup> November 2019 whereas the Respondent filed his submissions on 30<sup>th</sup> January 2020.

### **Appellant's Submissions**

10. In its submissions, the Appellant submitted that the Learned Trial Magistrate completely failed to consider the submissions of the Appellant and dismissed the cited case law as unreported and delivered over 20 years ago. It averred that the Trial Magistrate failed to appreciate that the Appellant took into consideration the element of passage of time and inflation by adjusting the figures awarded in the case law. It was submitted that the amount assessed by the Learned Trial Magistrate in the sum of Kshs 3,000,000 for general damages was manifestly excessive in the circumstances. The court was referred to the cases of Alpharama Limited v Joseph Kariuki Cebron (2017) eKLR and Nairobi HCCA No. 222 of 2012 City Engineering Works(K)Limited v Venatsio Mutua Wambua.
11. The Appellant further submitted that the Respondent was not entitled to damages for loss of future earnings because there was no medical certificate to the effect that the Respondent was unable to work.



It is the Appellant's contention that the Respondent is able to perform light duties which he did upon returning to work for 3 months before he was declared redundant. It is on this basis that the Appellant submitted that the damages under lost earnings or loss of future earnings was not proved.

12. The Appellant submitted that what the Respondent pleaded and prayed for was not supported by the evidence adduced and that loss of future earning falls under the heading of special damages that requires to be specifically pleaded and also specifically proved. Reliance was placed on *SJ v Francesco Di Nello & Another* (2015) eKLR where the Court of Appeal made a distinction between claims made under loss of future earnings and loss of earning capacity by stating:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

13. Counsel for the Appellant submitted that the Respondent in his amended pleadings pleaded for loss of future earnings and not loss of earning capacity or reduced earning capacity. It was further submitted that had the Respondent pleaded for loss of earning capacity, that would have fallen under General damages and the Trial Magistrate would have been right in assessing damages as he did by applying the formula of multiplier and multiplicand.
14. According to the Appellant, the damages prayed for under the heading of lost future earnings was not payable unless the Respondent had demonstrated that he was not paid while undergoing treatment which amount would not have reached Kshs 2,330,496 that the Trial Magistrate awarded.
15. The Appellant therefore urged the court to allow the appeal, set aside the trial court's judgment and re-assess the damages downwards.

### **Respondent's Submissions**

16. The Respondent on his part identified the issues for determination to be;
- i. Whether the award of damages of Kshs 3,000,000 was inordinately high considering the injuries sustained by the Respondent, and,
  - ii. Whether the trial court erred in awarding the Respondent loss of future earning of Kshs 2,330,496.
17. In addressing the first issue, counsel for the Respondent submitted that at the trial the Respondent testified as to the injuries he sustained which injuries were confirmed by the Appellant's medico-legal report by Dr P.M Wambugu who assessed the degree of permanent functional incapacity at 60%. Counsel cited the case of *Geoffrey Mwaniki Mwinizi v Ibero(k) Limited & Another* (2014) eKLR where the plaintiff sustained almost similar injuries, and had a permanent disability of between 55-60%.



- An award of Kshs. 2,500,000 made. It was submitted that this position resonates with that of the Respondent herein, as he underwent pain and suffering after the accident and was admitted at Kenyatta National Hospital for two months undergoing treatment for the injuries sustained.
18. The Respondent's counsel submitted that the Appellant has not demonstrated the excessiveness of the award. To buttress this position, counsel cited the case of SBI International Holdings (AG) Kenya Vs William Ambuga Onger (2018) eKLR.
  19. As to whether the trial court erred in awarding the Respondent loss of future earning, it was the Respondent's submission that the loss of future earnings was specifically pleaded and proved.
  20. According to the Respondent, his employment by the Appellant was not contested and neither was the income he received. That it is therefore possible to realize assessable loss due to the injuries sustained. It was further submitted that the medical evidence produced confirmed the Respondent's inability to carry out duties due to the 60% incapacitation.
  21. The Respondent further submitted that by recording a consent on liability in favour of the Respondent, the Appellant admitted the averments in the amended pleadings including those referring to the Respondent's employment, income and future earnings. Reliance was placed on the case of Alex Otieno Amolo & Another vs Hayer Bishan Singh & Sons Ltd (2016) eKLR in support of this position.
  22. In conclusion, counsel for the Respondent argued that the Respondent had proved his case on a balance of probabilities during trial. It was thus submitted that the Appeal lacks merit and that the court should dismiss it with costs to the Respondent.

### **Analysis and Determination**

23. The duty of the first appellate court was explained in the case of Abok James Odera T/A A.J. Odera & Advocates v John Patrick Machira T/A Machira & Co., Advocates (2013) eKLR as;  

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
24. Having considered the grounds of appeal herein as well as the submissions filed by the rival parties, I find that the issues for determination are;
  - i. Whether the award of Kshs 3,000,000 was inordinately high, and
  - ii. Whether the Trial Magistrate erred in awarding damages for loss of future earnings.
25. The fact that the Respondent suffered serious injuries is not contested. The medical report by Dr. P. M. Wambugu filed by the Appellant assessed the Respondent's injuries at 60%. It is noted in the medical report that the Respondent had hypertrophic scars at the left axilla and proximal arm with scratch marks, the wrist joint was distorted and scarred on the ventral aspect and there was loss of movement of the fingers including the thumb. That there was no apprehensible function of the hand. The doctor concluded that the Respondent had lost the functions of the left hand.
26. The medical report of Dr. D. K. Mwaura filed by the Respondent also assessed incapacity at 60% and noted the injuries as follows:
  - a. De-gloving injury- left wrist anteriorly



- b. Bruises and swelling- left arm and hand
  - c. Dislocation- left wrist joint
  - d. Deep cuts and bruises-chest left side
  - e. Deep cuts and bruises- left shoulder
  - f. Bruises- both shoulders posteriorly
  - g. Open wounds-occipital region
  - h. Fracture-neck of left scapular
  - i. Pain, swelling and blood loss
  - j. Severe damage-ligaments of the left wrist
27. At the time of the accident the Respondent was 22 years old and was earning Kshs. 9,024 plus house allowance of Kshs. 2,400 making a total of Kshs. 11,424 per month.
28. In the judgment the Trial Court observed that the Occupational Therapist Juliet Mugga recommended that the Respondent be placed on light duties especially duties that involved one hand. That the Respondent was sacked 3 months later although the Appellant claimed he had been declared redundant.
29. The Appellant has in support of its contention that the award of Kshs. 3,000,000 was inordinately high referred this court to the case of Alpharama Limited v Joseph Kariuki Cebon and SJ v Francesco Di Nello & Another. In the former case the court awarded kshs. 900,000 as general damages for pain and suffering to an employee whose left hand was amputated at the wrist and general damages of Kshs. 1,368,000 awarded for diminished earnings. The Respondent was 41 years at the time of the accident. In the latter case the Court of Appeal awarded Kshs. 2.2 million for pain, suffering and loss of amenities and a further sum of Kshs. 1.5 million for loss of earning capacity to the Appellant who was 15 years old at the time of injury.
30. The Respondent on the other hand urged the court not to disturb the award, relying on the decision in Geoffrey Mwaniki Mwinizi v Ibero(k) Limited & Another where the court awarded kshs. 2,500,000 for an amputation of the left leg above the knee.
31. The Appellant's assertion that the Trial Magistrate disregarded its submissions and dismissed its authorities on grounds that they were unreported and over 20 years old is not supported by the evidence on record. In the judgment at page 7 of the record of Appeal, the trial court stated
- “I have looked at the authorities cited by both sides. I have also considered that there were severe injuries. There was loss of income too.”
32. At page 8 of the record of Appeal the Trial Court stated:
- “I find that with the multiple injuries suffered, the proposal by the defence slams in the face of realities of this case. ...”
33. It is my view that the injuries suffered by the Respondent were similar to those in Alpharama Limited above. The case was however in respect of injuries suffered in 2009 and a judgement of 2012.



34. As was stated in the case of Geoffrey Mwaniki (supra), no two injuries are ever the same. I must also keep in mind the caution that has been repeated time and again that an appellate court should not disturb the award of damages unless it is inordinately low or high or was arrived at on the misapprehension of the evidence before the court or on wrong principles of the law.

35. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

36. In the case of Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730, the Court of Appeal went ahead to set out the principles which should guide a court in awarding damages as follows;

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment... It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award... it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary



terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

37. The Respondent in his submissions at the trial court had sought for Kshs 5,000,000 as General damages relying on the case of Farida Kimotho vs Ernest Maina (2002) eKLR where the High Court awarded Kshs 880,000 for pain suffering and loss of amenities to the plaintiff who had sustained a crush injury to the right hand, cut wounds on the dorsal aspect of the left hand, comminute fracture of the left clavicle (collar bone), deep wounds on the right upper arm, wounds on the left wrist and amputation of the right hand and middle finger. The Respondent also cited the case of Easy Coach Limited v Emily Nyangasi (2017) eKLR where on appeal, the court upheld the award on general damages of Kshs 700,000 where the plaintiff had sustained injuries to the face, chest, back, injuries to right hand with a cut wound and injuries to right leg with cut wounds.
38. The Appellant on the other hand had urged the court in their submissions to award Kshs. 500,000 to the Respondent while placing reliance on the cases of S Nairobi HCC No. 3678 of 1990, Jane Wanjiku v John Mbothu, Mombasa HCCC No. 375 of 1998, Ibin Mwati v Benard M. Muthingi & Anor, Mombasa HCCC No 667 OF 1985, Hamisi S. Juma v Barunguo Mwanza and Anor; and the case of Texcal House Service Station Ltd & ANOR
39. Although I find the award to have been on the higher side, I do not find any fault with the reasons given by the trial court and neither do I find it so excessive as to warrant my interference with the same. I therefore decline to interfere with the award of general damages for pain, suffering and loss of amenities.
40. With regard to the second issue for determination, the Appellant has submitted that the Respondent was entitled to damages under reduced earning capacity and not loss of future earnings. According to the Appellant, there is no medical certificate stating that the Respondent ought to be retired on medical grounds. It is the Appellant’s submission that the Respondent is right handed and did not require the assistance of any person in pulling up his clothing to show the trial court the extent of his injuries. It was thus submitted that the Respondent’s claim for loss of future earnings is in the nature of special damages which must not only be specifically pleaded but specifically proven. Nairobi Court of Appeal case No 192 of 1992 Coast Bus Service Ltd and Sisco E. Murunga Ndanyi & Others was cited.
41. A perusal of the Respondent’s amended Plaint reveals that the claim on loss of earnings was pleaded under the head of special damages. At the hearing the Respondent testified that his left hand cannot do any work. That he left school in class 7 and went to work as a mason. That his training was in masonry and metal works which he cannot do with one hand. He testified that his employment was terminated three months after he resumed duty and that the Respondent attributed the termination to redundancy. He testified that he was jobless since the termination of his employment and was being taken care of by his mother.
42. In the judgment the Learned Trial Magistrate found that the Respondent could no longer engage actively in the skills he had learned. That as a casual labourer he would not always be guaranteed employment. The Court therefore assessed his loss of income at half of the time he would have worked till retirement at age 60, and applied a multiplier of 17 derived from  $(60-22=39/2=17)$ . This was applied to the Respondent’s monthly income of 11,424.
43. The Appellant’s argument is that loss of future earnings and loss of earning capacity are different and that loss of future earnings must be specifically pleaded and proved. In SBI International Holdings (AG) Kenya v William Ambuga [2018] eKLR the Court observed:

“Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own head ... Once it is in principle



accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

44. In the judgment the Trial Court awarded loss of earnings. It is not specified whether it was awarded as special damages or as part of general damages. The Court does not have the benefit of the written submissions filed by the Respondent before the Trial Court as the same are not included in the Record of Appeal.
45. In the case of *Butler vs Butler* (1984) KLR the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:
- “i. A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
  - ii. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
  - iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
  - iv. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
  - v. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading;
  - vi. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”
46. In the Amended Plea the Respondent prayed for loss of future earnings. The evidence on record is that the Respondent’s employment was terminated three months after he resumed duty following the injury. It is not in dispute that after the injury the Respondent was no longer able to carry on with his previous engagement which required him to use both hands. Both the medical reports from the Appellant’s and Respondent’s doctors opined that his left hand was completely incapacitated by the accident. At the time of the hearing he was jobless and was being taken care of by his mother. The Appellant did not call any evidence to controvert the evidence of the Respondent.
47. In my view the Respondent proved that as a result of the accident he was no longer able to carry on with his employment. I find that the Learned Trial Magistrate correctly assessed the Respondent’s loss of future earnings at Kshs. 2,330,496. I find no reason to interfere with the judgment.



48. In the end I find no merit in the appeal and accordingly dismiss the same with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21<sup>ST</sup> DAY OF  
SEPTEMBER, 2023**

**MAUREEN ONYANGO**

**JUDGE**

