



**Khetshi Dharamshi & Company Ltd v Obuyumbi (Appeal 10 of 2023)
[2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2664 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 10 OF 2023
B ONGAYA, J
OCTOBER 30, 2023**

**BETWEEN
KHETSHI DHARAMSHI & COMPANY LTD APPELLANT
AND
SILAS OBUYUMBI RESPONDENT**

(Being an appeal from the Judgment and decree of Honourable P. Muboli, Principal Magistrate given on 20.01.2021 in Nairobi CMCC No. 8569 of 2016 at Milimani Commercial Courts)

JUDGMENT

1. The appellant filed the memorandum of appeal dated 18.02.2021 through Mucheru Law LLP. The appellant appealed against the entire judgment and decree by the trial Court upon the following grounds that the learned trial Magistrate erred in law and fact as follows:
 1. By hearing and determining the matter when he had no jurisdiction to handle a matter under the *Work Injury Benefits Act* (WIBA).
 2. In awarding general damages of Kshs.200,000.00 and Kshs.2,000.00 special damages when he had no jurisdiction to do so.
 3. By awarding manifestly excessive damages.
 4. By finding the appellant 100% liable for the accident in spite of the evidence that the respondent was solely to blame for the accident.
2. The appellant prayed that judgment by the trial Court herein as appealed against be set aside and the suit in the trial Court dismissed with costs.
3. The submissions on the appeal were filed for the appellant. The respondent as well filed the submissions on appeal dated 18.10.2023 through Mwaura Kamau & Company Advocates.



4. To answer the 1st issue, the Court returns that the appellant has made no submissions on the issue of want of jurisdiction by the trial Court per grounds 1 and 2 of appeal and as submitted for the respondent, the appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.
5. The 2nd issue is whether the trial Court erred in finding the appellant was 100% liable for the injury suffered by the respondent in spite of the evidence that the respondent was solely to blame for the accident. The issue is whether the evidence was that the respondent was solely to blame for the accident. The defendant's (appellant's) witness statement does not state that the respondent was solely responsible for the injury. Instead, the witness statement is to the effect that the accident and injury as alleged for the respondent never took place. In his testimony, the appellant's witness (DW1) testified that no accident was reported so that the respondent had not been injured as was alleged. In cross examination DW1 testified the accident's register was maintained for the appellant but it had not been exhibited in Court. The respondent's testimony was that the accident and injury had taken place. The trial Court's judgment found that there was no dispute that parties were in a contract of employment and further that the respondent had by evidence established the accident and injury occurred because the appellant had failed to provide a helmet. By that re-examination of the record before the trial Court, it is obvious that there was no evidence before the trial Court that the respondent was solely to blame for the accident. That ground of appeal must collapse as misguided and inconsistent with the appellant's own pleadings and testimony by DW1 as already highlighted.
6. The 3rd issue is whether the award of Kshs.200, 000 general damages was manifestly excessive. In making the award the trial Court considered *Wiyumiririe Saw Mills -Versus- Paul Kariuki* [2005] eKLR where the High Court (Dulu J) awarded Kshs.230,00.00 for soft tissue injuries (but when infect the cited decision shows the award was with respect to very severe injuries which had healed but for pain on the right hand which subsided with use of analgesic; and, a scar on the right hand which was growing into a keloid and would remain as a permanent feature on the body). The trial Court then awarded Kshs.200,000.00 considering the injuries in the instant case as adequate compensation for pain and suffering. The trial Court appears to have erroneously observed that the appellant had not filed submissions whereas they appear to be on record. The appellant had also cited *Mokaya Mochama -Versus- Julius Momanyi Nyokwaya* [2013] eKLR where the respondent had sustained cerebral concussion, deep cut wound on the back of the head, a cut wound on the hand and bruises on the foreleg and upon appeal an award of Kshs.27,000.00 by trial Court in general damages had been enhanced to Kshs.70,000.00. It was submitted for the appellant that an Award of Kshs.80,000.00 would be just in the instant case.
7. In the instant case, the medical report by Dr Mwaura gave the prognosis and opinion thus, "Silas was pricked on the head during the accident. He suffered a lot of physical and psychological pain and blood loss. Injuries have healed leaving a residual pain which will subside gradually. He suffered bodily harm." The Court has considered the trial Court's judgment and returns that the trial Court misdirected itself in principle in finding that the appellant had not filed submissions despite notice. In any event the trial Court misdirected itself when considering the authority cited for the respondent where the injuries were more severe than in the instant case. The appellant's submission appears justified on the fair general damages and factoring time value of money and inflationary considerations, an award of Kshs.100,000.00 will substitute the Kshs.200, 000.00 awarded by the trial Court. The appeal will partially succeed to that extent and in view of the margins of success, each party to bear own costs of the appeal.

In conclusion the appeal is hereby determined with orders:



1. The judgment and decree of the trial Court is varied only to the extent that the award of Kshs.200,000.00 for general damages is set aside and substitute with Kshs.100,000.00.
2. Each party to bear own costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 30TH OCTOBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

