



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAKURU**

**CIVIL APPEAL NO. 4 OF 2015**

**VAN DEN BERG (K) LTD.....APPELLANT**

**VERSUS**

**CHARLES OSEWE OSODO....RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. In a Judgment dated and delivered on 4<sup>th</sup> February, 2015 (S. M. Mwinzi SRM) the Appellant was ordered to pay the Respondent a sum of kshs.1,500,000/= as damages for pain and suffering, kshs.5,000/= in special damages, plus costs. The Appellant was held liable at 100% for the injuries suffered by the Respondent while working for and in employment of the Appellant.

2. In a Ruling dated 12<sup>th</sup> June, 2015 (Radido J) the Appellant was granted a conditional stay of execution and ordered to pay to the Respondent a sum of kshs.1,000,000/= and the balance of kshs.505,000/= be deposited into an interest earning account in joint names of the Advocates for the parties.

3. It is the Judgment in paragraph 2 above that the Appellant is now challenging on a number of grounds as per the Memorandum of Appeal dated 6<sup>th</sup> February, 2015. The Appellant lists the following grounds of appeal: -

- 1. The Learned Trial Magistrate erred both in law and in fact by finding that the Respondent has proved his case on a balance of probability.**
- 2. The Learned Trial Magistrate erred both in law and in fact by shifting the burden of proof to the Appellant.**
- 3. The Learned Trial Magistrate erred both in law and in fact by failing to consider the injuries sustained and the treatment undergone by the Respondent.**
- 4. The Learned Trial Magistrate erred both in law and in fact by failing to properly scrutinize the Respondent's treatment records and medical report which clearly exaggerated Respondent's alleged injuries.**
- 5. That the Learned Trial Magistrate erred both in law and in fact by making the exaggerated medical documents the basis of awarding the Respondent a sum of kshs.1,500,000.00 general damages which was too excessive in the circumstances.**

4. The Appellant prays for: -

- a. This appeal be allowed with costs and the Judgment by the lower court be set aside.**
- b. In the alternative and without prejudice to the foregoing the award be reviewed and reduced.**
- c. Costs.**
- d. Any other relief that this Honourable Court may deem fit to grant.**

5. By consent of counsel for both parties the matter proceeded by way of written submissions. Appellant's written submissions were filed on 5<sup>th</sup> December 2019 and Respondent's on 9<sup>th</sup> December, 2021. Of course, the Respondent opposed the appeal.

## **II. ISSUES FOR DETERMINATION**

6. This court has gone through the Memorandum of Appeal, the written submissions, and the entire record of appeal (the record) and the following issues manifest for determination: -

**i. To what extent was the Appellant responsible and or liable for the accident and injuries suffered by the Respondent while on duty working for and in employment of the Appellant on 7<sup>th</sup> April, 2012?**

**ii. What injuries did the Respondent suffer?**

**iii. Is the compensation awarded to the Respondent in the lower court appropriate, fair, and reasonable in the circumstances?**

**iv. What orders should this court issue?**

**v. Who meets the costs of this appeal?**

7. This being a first appeal this court has powers to consider the evidence tendered during the trial court and evaluate the same subject to the understanding that it is the trial court that had the advantage of seeing and hearing the witnesses. This legal position has been affirmed in many decisions and counsel for the Appellant has relied on **Kiruga Vs Kiruga & Another (1988) KLR 348** and **Kamau Vs Mungai & Another (2006) 1 KLR 150**. See also **Selle Vs Associated Motor Boat (1968) EA 123**.

8. Without destroying or overlooking the substance of any of the grounds raised in the Memorandum of Appeal, the Appellant's counsel argued the appeal from two broad fronts, that is on liability and on quantum. It is those same grounds and issues, together with the response from the Respondent through the written submissions that this court has processed in coming up with the five (5) issues for determination stated above.

## **III. LIABILITY**

9. It is a fact that during the trial the Appellant called no evidence and the only evidence on record is that from the Respondent and his two (2) witnesses.

10. The evidence by the Respondent is found at page 44 of the record wherein the Respondent stated as follows: -

**“I was building a green house. I got an accident on 7/4/2012 while constructing a green house. I was on top of the green house and had a spanner and was on a ladder. I was about 9 metres above the ground. Two people were below. The ladder slid and fell. I had no safety belt.”**

11. Under cross-examination at page 45 of the record the Respondent states: -

**“The ladder slipped. Two people were holding the ladder for me below. I could not clutch on anything as I had two spanners. The ladder was leaning on the metal rod and was not hooked to anything. I did not contribute to the accident.”**

12. There is no evidence on record controverting the evidence adduced by the Respondent as above. It is not disputed that the Respondent was Appellant's employee. From the evidence above, it is clear that the Appellant was aware of the risk and danger that it was exposing the Respondent to in allocating him the duty to build the greenhouse, to the extent that two persons had to hold the ladder to enable the Respondent climb up. The Appellant did not provide the Respondent with safety belts or such other tools or safety measures to avert an accident occurring.

13. The Appellant did not avail evidence to inform the court what safety measures it had put in place or whether the Respondent ignored or went against any safety policy in performing his duties in the manner he did.

14. In the circumstances this court agrees with the finding of the Learned Magistrate and finds and holds that the Appellant was 100% liable for the accident and the resultant injuries suffered by the Respondent.

## **IV. INJURIES**

15. In grounds 2 and 3 of the Memorandum of Appeal the Appellant questions the extent of the injuries suffered by the Respondent and the treatment undertaken. The Appellant argues that the trial court failed to assess and scrutinize the two aspects properly based on the evidence adduced.

16. The medical evidence on the injuries and medical treatment received by the Respondent is found in the evidence of PW1 and PW2 at pages 40 to 42 of the record and the documentary evidence tendered at pages 16 to 19, 24 to 25, and 32 to 37 of the record.

17. At page 40 of the record PW1 states that the Respondent suffered **“fracture of the left radices, fracture femur, soft tissue injuries of the pelvis”**. He categorically stated that there was no fracture of the pelvis and he classified the injuries as harm.

18. However, the medical report allegedly prepared by PW1 was not produced as exhibit and the same is not on record. What PW1 produced as exhibits 1 and 2 are receipts for his change of kshs.5,000/= for preparation of the report and kshs.10,000/= for court attendance.

19. In cross-examination at page 41 of the record PW1 confirmed that as at the time he examined the Respondent he had fully recovered from the injuries and that was on 7<sup>th</sup> November, 2012.

20. At paragraphs 3 and 13 of the Judgment found at pages 64 and 66 of the record the Learned Trial Magistrate listed the injuries suffered by the Respondent as: -

**a. Fracture of the left ulna/radice,**

**b. Fracture neck femur,**

**c. Fracture of ribs,**

**d. Fracture of left hip joint; and**

**e. Pelvic fracture.**

21. The above finding by the Learned Magistrate is contrary to the oral evidence adduced by PW1 and PW2 and the documentary evidence tendered. In particular PW1 confirmed in his testimony that the Respondent did not suffer pelvic fracture. There is no evidence on fracture of ribs.

22. As this court has noted above, the medical report by PW1 does not form part of the record as far as this court has checked the record again and again. However, from the oral testimony by PW1, the only expert in that regard, the Respondent suffered **“fracture of left radices, fracture of femur, soft tissue of the pelvis”**. Those are the only injuries that this court can verify based on the evidence availed on record.

23. In the circumstances, this court finds and holds that the learned trial magistrate proceeded on the wrong footing and failed to ascertain and appreciate the injuries suffered by the Respondent which affected the assessment of the general damages awarded upwards.

## **V. COMPENSATION**

24. As noted above the learned trial magistrate misapprehended the extent of the injuries suffered by the Respondent. That finding and holding by this court is further affirmed at page 67 of the record wherein the learned trial magistrate in his Judgment wrote **“what I have before me is a case of multiple fractures including a fracture of the ulna and radius, ribs, femur, hip joint and pelvic bone.”** This finding is wrong and not supported by any evidence on record.

25. A number of factors must be considered in arriving at reasonable compensation to the Respondent. Although there is no evidence as to whether the Respondent returned to work or not the sick off note from AIC Kijabe Hospital for 12<sup>th</sup> to 17<sup>th</sup> April, 2012 indicates that the Respondent was to return to work on 19<sup>th</sup> April, 2012 to **“work as tolerated coz has severe pains on the arm, hip joints and abdomen.”** This is curiously interesting because if the Respondent had suffered the serious injuries leading to fractures on 7<sup>th</sup> April, 2012 how possible was it for him to return to work by 19<sup>th</sup> April 2012, just a week and a half after the accident?

26. From the foregoing, it is hard for this court to assess with reasonable accuracy the nature and extent of the injuries suffered by the Respondent. However, as noted elsewhere in this Judgment this court opts to go by the oral testimony of PW1, DR. Obed Omuyoma, as that is the only available evidence on record. The injuries suffered by the Respondent as per PW1 are: -

**a. Fracture of left radices**

**b. Fracture of femur**

**c. Soft tissue injuries of pelvis**

27. The principles applicable when an appellate court is to interfere with an award of damages were set out in **Butt Vs Khan (1981) KLR 349** and that position has been affirmed in many other decisions. The principles are that an appellate court shall interfere where the award is so inordinately high or low in the entire circumstances of the case, or where the trial court misapprehended the evidence or the law applicable and hence proceeded on the wrong legal footing in making the award.

28. This court has already found that the trial court misapprehended the evidence adduced and hence proceeded to make the award based on erroneous and wrong conclusion of the injuries sustained by the Respondent. This misapprehension logically and significantly pushed the award made upwards.

29. In the case of **Mary Wanjah Gachombah Vs Josinta Adhiambo Ogana (2021) eKLR**, an appeal to the High Court at Homabay

against the decision of a Subordinate Court, the Respondent had suffered serious injuries including bruises on the scalp, chest contusion, fracture of right humerus, deep cut on the left arm, cut wound on the right lower limb, and fracture of the right tibia. She was awarded kshs.2,000,000/= as general damages in 2019 and the High Court on appeal upheld that award.

30. The injuries suffered by the Respondent in the above case were by far more serious compared to those suffered by the Respondent in the case before this court. The award was made in 2019, five (5) years after the award in the case before this court.

31. In **Michael Njagi Karimi Vs Gideon Ndungu Ngurubi & Another (2013) eKLR** the plaintiff suffered injuries including bruises, swelling and tenderness of the right arm and a displaced fracture of the right humerus. He also suffered deformed and swelling of the right forearm and fractures of the right radius and ulna, injury to right lower limb, fracture of the right tibia and fibular. He also suffered fracture of the left femur with marked displacement. He was awarded kshs.2,000,000/= in 2013. These injuries are by far worse than those suffered by the Respondent in this appeal.

32. In **Jane Wanjiku Ng'ang'a Vs Bin Company Limited & Another (2020) eKLR** the plaintiff suffered fracture of a leg, fracture of ribs, chest, breast, and the face. She was awarded general damages in the sum of kshs.1,500,000/= in September, 2020. Again, the injuries to the plaintiff were more serious than those suffered by the Respondent herein.

33. In view of the foregoing this court finds, holds, and concludes that the sum of kshs.1,500,000/= awarded to the Respondent by the trial court is excessive in the circumstances considering the injuries suffered based on the evidence tendered. The trial court clearly misdirected itself in making that award which is exaggerated and off the mark.

34. This court finds and holds that an award of kshs.1,000,000/= in general damages is fair and reasonable compensation to the Respondent for the injuries suffered as established by the oral and documentary evidence tendered.

35. A sum of kshs.1,000,000/= has already been paid to the Respondent by the Appellant, as per the terms of the conditional stay of execution granted on 12<sup>th</sup> June, 2015 (Radido J). Hence general damages were settled way back in 2015 and this court holds so.

36. On special damages, the Respondent was awarded kshs.5,000/=. This court has no reason of interfering with that award with interest thereon at court rates from the date of the Judgment of the trial court on 4<sup>th</sup> February, 2015 till payment in full.

#### **VI. COSTS**

37. This appeal has succeeded to a large extent. However, in the interest of justice, each party shall bear own costs. The Respondent was awarded costs in the lower court and this court shall not interfere with that order.

#### **VII. DISPOSAL**

38. In conclusion, this court therefore makes the following orders: -

**a. The award of kshs.1,500,000/= for pain, suffering and loss of amenities by the trial court is hereby set aside and a sum of kshs.1,000,000/= substituted therefor. This amount has already been paid to the Respondent and hence it is settled.**

**b. The award of kshs.5,000/= in special damages is upheld with interest thereon at court rates till payment in full.**

**c. Each party shall meet own costs in this appeal; the Respondent was awarded costs in the lower court and it is so upheld.**

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2022**

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**HON. JUSTICE DAVID NDERITU**

**JUDGE**

In the presence of;

Miss Daye holding brief for Cheloti for Appellant

Miss Ambako for Respondent

Court Assistant - Lesinge