



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bigot Flowers (Kenya) Ltd v Cheboswony (Employment and Labour Relations Appeal 10 of 2018) [2022] KEELRC 3772 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3772 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 10 OF 2018**

**DN NDERITU, J**

**MAY 10, 2022**

**BETWEEN**

**BIGOT FLOWERS (KENYA) LTD ..... APPELLANT**

**AND**

**BARNABAS KIPLIMO CHEBOSWONY ..... RESPONDENT**

*(Being an appeal from the Judgment/Decree of the Hon. Esther Boke, Senior Principal Magistrate, Naivasha Delivered on 4th September, 2013 in Naivasha PMCC No. 562 of 2011)*

**JUDGMENT**

**Introduction**

1. By way of plaint dated 2<sup>nd</sup> August, 2011 the Respondent herein filed Naivasha PMCC No. 562 of 2011 claiming the following:-
  - (a) Special damages aforesaid of Kshs.3,000/=.
  - (b) General damages for pain, suffering and loss of amenities
  - (c) Costs of the suit.
  - (d) Interest on (a), (b), and (c) above at court rate.
  - (e) Any other or further relief that this Honorable Court may deem just to grant.
2. The claim in that suit was based on injuries allegedly sustained by the Respondent in the course of his duties as an employee of the Appellant herein. The particulars of negligence and breach of statutory duty of care on the part of the Appellant were set out by the Respondent in paragraphs 4 and 5 of the said plaint. The particulars of injuries sustained by the Respondent were also set out in the plaint.



3. For clarity paragraphs 4 and 5 of the plaint pleaded as follows:

“(4) On or about the 24<sup>th</sup> April, 2010 the Plaintiff, whilst acting in the course of the Defendant’s employment, was assigned duties of maintenance in the green-house. While he was lawfully carrying out his duties which required that he climbs on top of the green- house, he was cut by a wire on both legs as he was climbing the said green-house. The Plaintiff avers that the said accident was caused by the negligence and/or breach of statutory duty of care on the part of the defendant by itself or by its servant and/or agent.

Particulars of Negligence

- (a) Failing to take any or any adequate precautions for the safety of the Plaintiff while he was engaged upon the said work.
  - (b) Failing to provide a safe place of work for the Plaintiff.
  - (c) Failing to provide the Plaintiff with protective clothes like heavy duty over rolls and gumboots.
  - (d) Exposing the Plaintiff to a risk of which the Defendant knew or ought to have known.
  - (e) Failing to devise and/or provide and maintain a safe and proper system of work and/or instruct the plaintiff to follow that system.
  - (f) The Plaintiff pleads the doctrine or res ipsa loquitur in the circumstances.
  - (g) Assigning duties to the Plaintiff without due care and attention.
- (5) By reason of the aforesaid the Plaintiff sustained severe personal injuries and has suffered loss and damage.

Particulars of Breach of Statutory Duty of Care

- a) Failing to employ sufficiently trained employee for the said work as required by Section 99(1), (2), and (3) of the [Occupational Safety and Health Act](#), 2007.
- (b) Failing to put the Plaintiff under supervision of a person who had adequate knowledge and experience of discharging the said work as required by Section 6 (1)(2) (b) of the [Occupational Safety and Health Act](#), 2007.
- (c) Failing to provide the Plaintiff with protective clothing and appliances as required by Section 101(1) of the [Occupational Safety and Health Act](#), 2007.
- (d) Failing to compensate the Plaintiff in accordance with the provisions of The [Workmen’s Compensation Act](#), Cap 236, Laws of Kenya.

Particulars of Injuries

- a) Degloving injury on both legs



#### Particulars of Damages

- a) Medical Legal Report - Kshs.3,000.00

And the plaintiff claims special and general damages for pain, suffering and loss of amenities.”

4. In a defence dated 14<sup>th</sup> November, 2011 the Appellant herein denied liability and attributed the alleged accident, if any or at all, to the negligence on the part of the Respondent and stated the particulars of the alleged negligence in paragraph 6 of the said defence as follows:-

“6. Without prejudice to the foregoing, the Defendant avers that if the alleged accident ever occurred which is denied, and if the Plaintiff sustained any injury or injuries from the same as alleged also denied, then the same occurred and/or was substantially contributed by the plaintiff’s own acts of negligence.”

#### Particulars of The Plaintiff’s Negligence

- (a) Failure to work with due care and attention.
- (b) Failure to adhere to proper work procedures as would be reasonably expected and/or as he had been trained to do.
- (c) Failure to use the protective apparel provided as would be reasonable to do.
- (d) Performing his work in unworkman like manner.
- (e) Failing to follow the laid down instructions by the defendant.
- (f) Exposing himself to a danger and/or injury which he knew or ought to have known in the circumstances.
- (g) Engaging himself in his own frolics while at work.
- (h) Being generally negligent.
- (i) *Res ipsa Loquitur.*”

5. Thereafter the said suit was set down for hearing and the learned trial magistrate (Hon. Esther Boke P.M.) delivered her judgment on 4<sup>th</sup> September, 2013 wherein the Respondent was awarded a sum of Kshs.220,000/= in general damages and Kshs.3,000/= in special damages. Liability was apportioned at 80% to 20% in favour of the Respondent. A decree was issued on 26<sup>th</sup> January, 2015.

6. The Appellant was dissatisfied with the above award and it has now filed this appeal *vide* a Memorandum of appeal dated 30<sup>th</sup> September, 2013 citing 10 grounds hereunder:-

- (1) That the learned trial magistrate erred in law and in fact and misdirected herself in finding the Defendant liable to the extent of 80% or at all in the absence of evidence to that effect.
- (2) That the learned trial magistrate erred in law and in fact in holding that Plaintiff produced a copy of a sick sheet in evidence and/or as an exhibit, a finding that is totally incorrect as the same as not produced in evidence at all.
- (3) That the learned trial magistrate erred in law and in fact in holding in favour of the plaintiff who failed to produce initial treatment notes in evidence.



- (4) That the learned trial magistrate erred in fact in holding that private hospitals do not give treatment note to patients despite absence of evidence by the Plaintiff in support of such an allegation.
- (5) That the learned magistrate erred in law in shifting the burden of proof to the defendant by holding that the defendant was required to tender evidence in support of the plaintiff's case yet the plaintiff did not issue Notice to produce to the defendant.
- (6) That the learned trial magistrate erred in fact in failing to analyze the evidence of DW1, the plaintiff's supervisor who rebutted the plaintiff's assertion that he (DW1) referred the plaintiff for further treatment.
- (7) That the learned trial magistrate erred in law and in fact in failing to consider evidence adduced by the medical doctor to the effect that the Plaintiff sustained soft tissue injuries and instead opined that the injuries sustained amounted to grievous harm.
- (8) That the learned trial magistrate erred in law by delivering judgment without Notice to parties.
- (9) That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.
- (10) That the learned trial magistrate erred in law and in fact in awarding general damages far in excess contrary to the evidence adduced in court.

It is proposed to ask this honourable court

- a) That the judgment/decree of the Honourable court dated 4<sup>th</sup> September, 2013 be reviewed and/or set aside.
  - b) That the Respondent do bear the costs of this appeal.
7. The Appellant prays that the judgment and decree of the lower court be reviewed and or set aside and for costs of this appeal.
8. The Respondent has filed a cross-appeal by way of a notice dated 4<sup>th</sup> November, 2013 based on the following three(3) grounds:-
- (1) That the learned magistrate erred in law and in fact by not factoring in the severity of the injuries sustained before making the said award and hence awarding a minimal sum which is not commensurate with the injuries sustained.
  - (2) That the learned magistrate erred in law and fact by proceeding to apportion liability despite the fact that the Appellant had not discharged their statutory duty of provision of protective apparels.
  - (3) That the learned magistrate erred on law and fact by proceeding to apportion liability despite the fact that the appellant had not discharged their statutory duty of training the Respondent before proceeding to allocate him duties.

It is proposed to ask the court for the following orders that:

- (a) The Appeal be dismissed and the Cross-appeal be allowed.



(b) The Judgment of the Lower court be set aside and the award be enhanced without apportionment of any liability.

9. The Respondent prays that the Appeal be dismissed with costs and that the cross-appeal be allowed. He prays that the judgment of the lower court be set aside and the award be enhanced without apportionment of any liability to the Respondent.

## **II. Proceedings in the Lower Court**

10. The Respondent's (plaintiff's) case in the lower court was that he was working for the Appellant (Defendant) at the maintenance department. He stated that he was employed on 24<sup>th</sup> April, 2010 and that on the same day he was injured.
11. The Respondent stated that he had been allocated duties of repairing a green-house but he was not issued with any protective gears. He stated that he slipped as he was attempting to reach the roof of the green-house and that he fell downwards and along the fall he was badly injured on both his legs.
12. The Respondent testified that he reported the accident and the injuries to his supervisor one Mr. Ariri who issued him with a sick-sheet and sent him to a first-aider one Mr. Jeremiah. He was later sent to the Appellant's clinic and he produced the sick-sheet as exhibit 4 during the hearing.
13. The Respondent further stated that from the Appellant's clinic he was referred to Ndonyo Health Care Clinic located in Naivasha Town. The Respondent complained during the hearing that he had not healed completely as he experienced pain when walking and that he had ugly scars on both legs.
14. The Respondent lamented that he was not provided with a ladder, gumboots, or any other necessary tools or protective gears and that is why he was injured. He blamed the Appellant for the accident.
15. In cross-examination the Respondent maintained that he climbed up the green-house on instructions from his supervisor.
16. The Respondent (PW2 in lower court) called one witness Dr.Obed Omuyoma (PW1) who stated that he examined the Respondent on 20<sup>th</sup> July, 2011. He described the injuries suffered by the Respondent as degloving injury on both the right and the left legs. He stated that the Respondent had ugly scars on the interior aspect of both shins. He classified the degree of injury as grievous harm. He produced his medical report as exhibit 1. He also produced a receipt for Kshs.3,000/= being his medical fees on the report as exhibit – 2.
17. On cross-examination PW1 testified that degloving injury means that muscles had peeled off from the bones. He stated that such injuries are not permanent as the same can recover fully. He stated that except for the ugly scars on both legs the Respondent had fully recovered at the time he examined him on 20<sup>th</sup> July, 2011, one year or so after the accident.
18. On the other hand the Appellant called one witness, James Ariri (DW1) during the trial in the lower court. He testified that the Respondent was an employee of the Appellant at the material time and that he was his supervisor.
19. However, DW1 denied that the Respondent was injured on 24<sup>th</sup> April, 2010 as alleged or at any other time or at all. He denied that he issued or filled the injury report form produced as an exhibit by the Respondent. He stated that the alleged form was not properly executed as it lacked details of the filler and signature, and the official rubber stamp of an authorized officer of the Appellant.



20. In cross-examination DW1 admitted that the Respondent was on duty on 24<sup>th</sup> April, 2010 but denied that the Respondent was injured as alleged.
21. It is on the basis of the foregoing evidence, in summary, along with the written submissions by Counsel for both parties that the trial lower court delivered the judgment alluded to above.

### **III. Duty and Role of This Court**

22. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence adduced in the trial court but bearing in mind that this court has not had the advantage of hearing the evidence first hand and particularly the chance of observing the demeanor of the witnesses as they testified or even asking questions to the witnesses for clarification. This is the principle set out in *Selle v Associated Motor Boat Co. Limited*, and other related decisions.
23. Further, in an appeal where the appellate court is requested to interfere with the discretionary award of the lower court, such as in this appeal, and more so an award of general damages, the appellate court has to exercise caution and may only interfere with the award where the trial court acted on wrong principles, took into account irrelevant matter(s), misdirected itself on the evidence adduced, or misapprehended the evidence and hence arriving at an award that is either inordinately too high or too low - See holdings in *Butt v Khan* [1982-88] IKAR1 and [\*Godfrey Wamalwa Wamba & Another v Kyalo Wambua\*](#) [2018] eKLR, among other decisions.
24. It is on the basis of the principles set out in the foregoing paragraphs that this court shall proceed in disposal of this appeal.

### **Iv. Issues for Determination.**

25. This appeal had originally been filed in the High Court at Nakuru as Civil Appeal No. 176 of 2013. However, the subject matter having arisen out of an employment relationship and or an injury at work, the same was correctly transferred to this court (ELRC) from High Court on 24<sup>th</sup> May, 2018 (Mulwa J) and allocated the reference as per the header in this judgment.
26. On 1<sup>st</sup> December, 2021 after a prolonged period of dormancy, this court directed that this appeal be disposed of by way of written submissions. Counsel for the Appellant filed written submissions on 15<sup>th</sup> December, 2021 and Counsel for the Respondent on 2<sup>nd</sup> February, 2022.
27. This court has carefully studied the entire record of appeal, including the cross-appeal, alongside the written submissions by Counsel for both parties, and identifies the following to be the issues for determination:-
  - (a) Was the Respondent injured at work as alleged and what was the extent of the injuries?
  - (b) Did the learned trial magistrate error in law and fact in finding the Appellant liable for the said accident?
  - (c) Did the learned Magistrate error in law and fact in apportioning contributory negligence at 80% to 20% in favour of the Respondent?
  - (d) Are there sound legal reasons to warrant this court to disturb the award by the trial lower court?
  - (e) Who meets the costs of this appeal?



28. The above five issues for determination tie together all the 10 grounds of appeal raised by the Appellant in the memorandum of appeal, and the three (3) grounds by the Respondent in the cross-appeal. This court shall now look into each of the issues above.

#### **V. Injuries to the respondent**

29. From the evidence on record, as summarized in an earlier part of this judgment, and as extracted from the proceedings in the lower court as per the record of appeal, the Respondent started working with the Appellant on 24<sup>th</sup> April, 2010. DW2, the supervisor, confirmed in his testimony that indeed the Respondent was at work on the said date. However, the Appellant through DW1 denied that the Respondent was injured through an accident at work as alleged.
30. On the other hand the Respondent produced as an exhibit Accident/Injury Report Form and a medical note from Ndonyo Health Care in support of his claim that he was injured at work on 24<sup>th</sup> April, 2010. Further, the Respondent called PW1, Dr. Obed Omuyoma, in support of his position that he sustained the said injuries at work.
31. Upon re-examining and re-evaluating the evidence adduced from both sides on record this court is unable to fault the conclusion arrived at by the trial lower court, that indeed the respondent suffered the injuries complained of as a result of an accident at his place of work with the respondent.
32. This court takes the view that the accident occurred in the manner described by the Respondent in his evidence and that the evidence of DW1 for the Respondent was untruthful and intended to mislead the trial court.
33. As to the nature of the injuries sustained the doctor, PW1, was very clear both in his oral and documentary evidence that the Respondent suffered degloving injury on both legs. He produced a medical report to that effect.
- Further, PW1 defined degloving injury as one where the muscle is peeled off the bone. He classified the injury as grievous harm and indicated that as at the time of the medical examination the Respondent complained of pain in both legs and that he had ugly scars on both legs.
34. It is the view and opinion of the court that with the above evidence on record grounds 2, 3, 4, 5, 6, and 7 in the memorandum of appeal are defeated. This court finds and holds that the Respondent was injured at work and the nature of the injuries is as per the evidence tendered by PW1, both orally and documentary in the trial court.

#### **VI. Liability**

35. Evidence on record as per the Respondent, PW2, is that he was allocated duty to repair the roofing of a green-house. The accident occurred on his first day at work on 24<sup>th</sup> April, 2010. He testified that he climbed up on the instructions from his supervisor. He stated in his testimony that he was not taken through any training on how to carry out the job and that he was not provided with protective gear or equipment such as gumboots, climbing ladder, gloves, or others. He testified that as he was executing his allocated duties he slipped and fell down as a result of which he sustained the injuries complained of.
36. It is on the basis of the foregoing that the Respondent pleaded the particulars of negligence on the part of the Appellant as per the plaint as reproduced elsewhere in this judgment.
37. On the other hand the Appellant pleaded negligence on the part of the Respondent in paragraph 6 of the defence.



38. This court has carefully considered the evidence tendered by both sides in respect of this issue. It is not contested that the Respondent was not trained on how to execute the duties allocated to him on the material day which happened to be his first day at work. The Appellant did not avail any manuals or procedures detailing how such duties should be executed that were provided to the Respondent. There is no evidence on how the Respondent was negligent and or how he exposed himself to danger or failed to follow instructions as alleged in the defence.
39. In apportioning the contributory negligence in the manner that it did the trial court had this to say at page 80 of the record of appeal:-
- “However the plaintiff cannot blame defendant wholly because he was also under duty to take care of himself while performing his duty. I will hold plaintiffs 20% liable and defendant 80%.”
40. This court has carefully gone through the evidence on record again and again to establish if there is any evidence of the negligence on the part of the Respondent. However, no such evidence is available on record and as such this court holds that the Appellant was 100% to blame for the accident and the injuries suffered by the Respondent.
41. The foregoing finding answers to grounds 1 and 9 of the memorandum of appeal, and grounds 2 and 3 of the grounds in the Cross-appeal. It also answers to issues (b) and (c) of the issues for determination.

## VII. Quantum of General Damages

42. For the injuries suffered, pain and suffering, the trial court awarded the Respondent a sum of Kshs.220,000/= less 20% contributory negligence.
43. Counsel for the Appellant has submitted that the award was too high in the circumstances and that the same offended established principles of fairness, reasonableness, moderation, and similar awards for similar injuries based on stare decisis. Counsel cited several decisions on this issue including *Cecilia W. Mwangi & Another v Ruth Mwangi* (CA 251 of 1996). This court agrees with Counsel for the Appellant that an award for general damages ought to be fair, reasonable, moderate, and based on decided cases for uniformity.
44. Counsel for the Appellant has proposed an award of Kshs.30,000/= based on the authorities that were relied on by the Appellant in the lower court. This court has noted that the Appellant relied on two decided cases on this issue in the lower court, that of *Sokoro Saw Mills Ltd v Grace Nduta Ndunge* Nakuru HCCA No.99 of 2005 and *African Highland Produce Co. Ltd v Francis Masosi* HCCA BI, 22 of 2003, wherein awards of Kshs.30,000/= and Kshs.40,000/= were made respectively.
45. Although the Appellant did not include copies of the two decisions in the record of appeal, the injuries in the two decisions were soft tissue injuries and analogous wound, respectively, which are distinguishable from the injuries suffered by the Respondent in this appeal.
46. On the other hand, Counsel for the Respondent submitted that the award of Kshs.220,000/= by the trial court was fair and reasonable in view of the injuries suffered by the Respondent.
47. This court has carefully gone through the judgment of the lower court and the reasons given by the learned magistrate in making the award of Kshs.220,000/= at page 84 of the record of appeal. The trial court cited the case of *Micah Lekeuwan v Julius Amakange Yosi* [2002] and the award of Kshs.150,000/= made therein and took into consideration the effect of inflation as a factor.



48. In *Simon Njoroge Ngotho v Masari Distributors Limited* [2021] eKLR, the plaintiff suffered degloving injuries on both legs. Although injuries in this case were more serious than those suffered by the Respondent in this appeal, a sum of Kshs.1,000,000/= was awarded in general damages. This decision is also more recent [2021] compared to Respondent's [2013]. The court in that case (B. Thurania Jaden J, as she then was) also made reference to *H. Young Construction Company Ltd v Richard Kyule Ndolo* [2014] eKLR and *Jackson Wanyoike v Kenya Bus Ltd & Another* [2003]eKLR, wherein general damages for similar injuries were assessed at Kshs.250,000/= and Kshs.300,000/=, respectively.
49. While precedents are a good source of law, there are no two cases that can be exactly the same. Each case has its own uniqueness and injuries cannot be exactly the same in two different accidents involving two different persons.
50. In the circumstances and in view of all foregoing, this court finds no good reason to interfere with the award of Kshs.220,000/= made by the trial lower court and the same is hereby upheld.

### **VIII. Costs**

51. The appeal by the Appellant has not succeeded to any extent. On the other hand the cross-appeal by the Respondent has partly succeeded in setting aside the contributory negligence as this court holds the Appellant 100% liable for the accident.
52. In the circumstances, the costs of this appeal are awarded to the Respondent. There is no order for costs in respect of the cross-appeal as the same was in the nature of opposition to the appeal.

### **IX. Disposal**

53. In disposal of this appeal and the cross-appeal this court orders as follows:-
- (a) The award by the lower court in the sum of Kshs.220,000/= for general damages is upheld.
  - (b) The Appellant is held 100% liable for the accident and injuries suffered by the Respondent.
  - (c) The Respondent is awarded costs of this appeal and of the trial in the lower court.
  - (d) The award by the lower court, which has been upheld by this court, subject to (b) above, shall earn interest at court rates from the date of the judgment of the lower court till payment in full.

**DATED,SIGNED,AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF MAY, 2022.**

.....

**DAVID NDERITU**

**JUDGE**

