



**Kamale Mulama v Agro Manufacturing Company Limited (Appeal  
43 of 2019) [2022] KEELRC 3969 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3969 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 43 OF 2019  
MA ONYANGO, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**EDWARD KAMALE MULAMA ..... APPELLANT**

**AND**

**AGRO MANUFACTURING COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal arising from the judgment of P. W. Wasike, Resident Magistrate at  
Milimani Commercial Courts, Nairobi delivered on the 12th day of October, 2021 in CMCC  
No. 2463 of 2009 – Edward Kamale Mulama v Agro Manufacturing Company Limited)*

**JUDGMENT**

1. The appeal herein is from the decision of the Learned Magistrate, Hon. P. M. Wasike (RM) Chief Magistrate's Court at Milimani Commercial Court Civil Case No. 2463 of 2009. The judgment was delivered on October 19, 2012. The grounds of appeal are as follows:
  - a. That the Honourable Learned Resident Magistrate erred in Law when he made an award of Kshs.80,000/ in general damages which award was inordinately low in the circumstances of this case.
  - b. That the Honourable Learned Resident Magistrate gravely erred when he failed to award Kshs.7,000/- for the doctor's attendance fees despite the same having been produced as evidence.
  - c. That the Learned Resident Magistrate erred in law when he apportioned liability at 80%:20% when there was no evidence on the part of the Respondent to controvert the Appellant's evidence.
2. The Appellant prayed that the appeal to be allowed with costs and Interest, the lower Court Judgment be set aside to the extent of general damages awarded and apportionment of liability.



3. He further urged this Court to re-assess the general damages for pain and suffering and award him the sum of Kshs.7,000/- being the doctor's costs for Court attendance.
4. The Court directed that the Appeal proceeds by way of written submissions.

### **Respondent's Submissions**

5. In its submissions the Respondent maintained that the appeal filed herein is devoid of merit and therefore urged this Court to dismiss it with costs to the Respondent.
6. On the apportionment of liability, the Respondent submitted that the Trial Magistrate was rightfully guided by the testimony of the Appellant during cross examination when he confirmed having placed himself at risk by choosing to work in an unsafe environment with metal rods. To buttress this argument the Respondent relied the case of *Garton Limited v Nancy Njeri Nyoike* [2016] eKLR where the High Court in upholding the lower court's judgment on apportionment of liability at 80:20 held that where a plaintiff had knowledge of the dangers that were attendant, she too had a duty to be vigilant while working and that the Trial Court did exercise its discretion rightfully.
7. The Respondent further relied on the findings in the cases of *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR, *Top Tank Company Limited v Amos Ondiek Wandaye* [2018] eKLR and *Kenya Nut Company Limited v Sarah Nanjala Wambogo* [2019] eKLR where the Courts held that an employee has a duty to ensure their safety while on duty.
8. The Respondent submits that the trial magistrate correctly applied the law in his apportionment of liability and that there is no basis to interfere with the same.
9. With regards to general damages, the Respondent submits that an appellate Court can only interfere with an award in damages, if the award is either inordinately high or low as to represent an entirely erroneous estimate as was held in the case of *Butt v Khan Civil Appeal No. 40 of 1997*.
10. It maintained that in this case, the Leaned Trial Magistrate exercised his discretion judicially and that the award was in the circumstances reasonable and proportional to the injuries suffered by the Appellant.
11. With regards to the claim for doctor's attendance, the Respondent submitted that the same was rightfully not awarded to the Appellant noting that the same was not pleaded in the plaint. For emphasis the Respondent relied on the Court findings in the cases of *Peter Kamau Gathoro v David Waweru Nganga* (2020) eKLR and *James Wambua Kimila v Sinohydro Corporation Limited & Another* (2020) eKLR where the Courts maintained that doctor's court attendance fees ought to be specifically pleaded and proved for the same be awarded.
12. There were no submissions on record filed on behalf of the Appellant herein in the Court's e-filing system despite Counsel informing the Court that the same had been filed. I shall therefore proceed with the Judgment with what is on record.

### **Analysis and Determination**

13. As a first appellate Court, this Court has a singular duty to re-evaluate the entire case and come up with its own findings in the matter as was held in the case of *Selle v Assorted Motor Boat Company 1968 EA* Company 1968 EA 123-126 where the Court stated as follows:

“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 appear earlier that he has clearly failed on some part 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."

14. The Appellant has appealed against the lower court's decision on both liability and quantum.
15. The legal principles that regulate the relationship between an employer and employee as regards the duty to provide a safe working environment is described in *Halsbury's Laws of England* 4<sup>th</sup> Edition, Vol. 16 paragraph 562, as follows:

"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."

[Emphasis added]

16. Further, the Court of Appeal in the case of *Mwanyule v Said t/a Jomvu Total Service Station* (2004) 1 KLR 47 held that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.
17. The Appellant in this respect testified that while carrying out his duties, metal rods fell on his toe thus causing him injury. He blamed the Respondent for the accident and on grounds that it did not provide him with protective gear to perform his tasks.
18. The Respondent on the other hand contended that the Appellant failed to prove negligence against it and that he was fully to blame for the accident for exposing himself to risk.
19. The correct position is therefore that the Respondent had a duty to provide a safe working environment to the Appellant herein, while the Appellant had a duty to take reasonable care and precaution while performing his duties to avoid any foreseeable injury.
20. As observed by the Trial Magistrate, the Appellant had proved breach of duty of care owed to him by the Respondent to provide a safe system of work and a safe work environment. The Trial Magistrate further correctly found that the Appellant exposed himself to an unsafe working environment for which he must bear some liability which was apportioned at 20%.
21. Having considered the evidence, the above authorities, it is my finding that the Learned Magistrate's assessment of liability was sound in law and therefore this Court lacks basis to interfere with the same.
22. With regard to general damages, the award is purely discretionary and an appellate court will only interfere with quantum where the court arrived at the quantum after taking into account irrelevant factors, or failing to take into account relevant factors on where the quantum is inordinately low or



high as to amount to an erroneous estimate of damages as was held in the case of *Butt Khan* (supra) where the Court observed as follows:

“An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the 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.”

23. The duty of the court herein is thus to consider whether the award of the lower court was inordinately low as to warrant interference by this court.
24. The Appellant argued that the Trial Magistrate erred in law and fact by failing to be guided by the principles of law in awarding general damages. He further maintained that the award was inordinately low considering the injuries he suffered.
25. The Respondent on the other hand submitted that the Trial Magistrate exercised his discretion judiciously and that the award was fair and commensurate to the injuries sustained.
26. I have considered the submissions filed in the lower Court and the authorities relied upon by the Appellant which the Trial Court found to be inapplicable to this suit, the evidence on record and the Respondent’s submissions in this appeal. I find that the Learned Trial Magistrate’s assessment of general damages was reasonable and proper.
27. With regard to doctor’s attendance costs of Kshs.7,000/-, I agree with the Trial Magistrate that the same cannot be awarded by the court being special damages that needed to be specifically pleaded and proved to be allowed by the trial court. The same was never pleaded.
28. In the end, it find that this appeal is devoid of merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**

