



**Butali Sugar Mills v Chibembe (Civil Appeal 22 of 2021)
[2022] KEELRC 13039 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13039 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CIVIL APPEAL 22 OF 2021**

JW KELI, J

OCTOBER 27, 2022

(FORMERLY KSM APPEAL NO. 380 OF 2018)

BETWEEN

BUTALI SUGAR MILLS APPELLANT

AND

NATHAN BUSOLO CHIBEMBE RESPONDENT

JUDGMENT

1. The respondent /appellant being aggrieved by the decision of Hon O’ngondo in Civil Suit No CMC Kakamega Civil suit No 309 of 2021 delivered on February 23, 2015 filed the instant appeal dated March 18, 2015 against the judgement on quantum.
2. The trial court entered judgement and delivered for the plaintiff as follows:-
 - a. Liability 100% in favour of the plaintiff against defendant
 - b. General damages Kshs 245,000(two hundred forty five thousand Kenya shillings).
 - c. Special damages pleaded and proved Kshs 7,000/-
 - d. The plaintiff shall also have costs and interests from date of judgement.
3. Aggrieved by the award on quantum only the appellant filed the instant appeal on the November 6, 2017 through the law firm of LG Menezes & Company Advocates and listed the following grounds:-
 1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.



2. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant in respect of the damages awardable.
 3. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant relating to the damages awardable.
 4. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable.
 5. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis a-vis the respondent's claim.
4. The court on the July 4, 2022 gave directions that the appeal would be canvassed by way of written submissions. The parties complied and filed their written submissions together with authorities. The appellants written submissions are dated July 30, 2018. The respondents written submission drawn by Abok Odhiambo & Company Advocates are dated July 6, 2022 and filed in court on the July 7, 2022.

Determination.

5. The appellant submitted that the issues for court determination in the appeal are as follows:-
 - a. Whether the respondent was bound by their pleadings .
 - b. Whether the trial magistrate based his award on the pleaded injuries.
 - c. Whether the magistrate understood the nature of injuries pleaded by the respondent.
6. The respondent identified the following as issues for court determination in the appeal:-
 - a. Whether the trial magistrate court erred in law in fact in assessing damages in favour of the respondent.
 - b. Whether the trial magistrate failed to take into account the appellant's submissions and evidence in rendering judgment in favour of the respondent.
 - c. Whether the trial magistrate court took into account irrelevant factors/issues in reaching a determination on award of damages.
7. The court having considered the issues identified by the parties and having examined the grounds of appeal by appellant is of the considered opinion that the issue for conclusive determination of the appeal would be :-

Whether the trial magistrate court erred in law and fact in assessing damages in favour of the respondent and if so whether the appeal is merited.

8. The court is duly guided that this being a first appeal, it is settled law that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach its own conclusion bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
9. The appellant submits that generally the appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. That it must be shown the judge proceeded on a wrong principle of law or misapprehended the evidence in some material respect



and so arrived at a figure which was either inordinately high or low as was held in *Ndirangu Dennis -vs- Ann Wangari Ndirangu & another* (2018) Kiambu HCCA No 54 of 2016 where the plaintiff having been granted sum of Kes 300,000/- for soft injuries to the lower right leg and to back the High Court evaluated the award to Kes 100,000/-.

Whether the trial magistrate court erred in law and facts in assessing damages in favour of the respondent and if so whether appeal is merited.

10. The appellant submits that their submissions captured at page 64 of the record of appeal deal with issue of quantum based on documents produced by the plaintiff before the court being treatment notes and medical report by Dr Andai. That the plaintiff suffered soft tissue injuries as indicated in the medical report of Dr Andai. That the injuries described in the treatment card discharge card, and P3 form and even the plaint as injury was a sprain left ankle joint which according to the doctor would not lead to any disability and generally would heal without any complications.
11. That an award of Kes 50,000/-, based on authority of *Gilbert Odhiambo Amount -vs- Nzoia Sugar Co Ltd* would suffice as the injuries suffered were largely for similar severity with the ones suffered by the claimant in the trial court and not Kes 245,000/- awarded by trial magistrate which they submit is high and unjustified.
12. To buttress its submissions the appellant relies on the decision in *Ndirangu Dennis -vs- Ann Wangari Ndirangu & another* (2018) Kiambu HCCA No 54 of 2016 where the court held that general damages are at large and the court does its best in reaching award that reflects the nature and grant of injuries . That in assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards.
13. The respondent submits that the trial court did not error in their law and fact in the manner in which it awarded damages for the respondent's injuries since the trial court properly found that the respondent's injury was sustained directly from the appellant's negligence in addressing the respondent's concerns regarding his safety at the appellant's work place.
14. The respondent submits the trial court judgment considered the appellant's submission and cited case of *Gilbert Odhiambo Omar -vs- Nzoia Sugar Company Ltd* 2013 (at page 126 of record) which proposed award of Kes 50,000/- but the cited authority was not found at Kenya Law reports website.

Decision of the Court.

15. The court having summarized the position of the parties proceed to analyze the evidence before trial court. the only issue is on quantum .
16. The plaint dated June 29, 2012 gave the particulars of the plaintiff's injuries under paragraph 5 (a) as "sprained left ankle joint" (page 4 of record). The medical report produced by the plaintiff by Dr Charles Andai (page 17) indicates same injury. The opinion of the doctor under the report reads as follows: "Nathan Busolo Chibemba suffered moderate soft tissue injuries, in the mishaps during the mishap ie a sprained left ankle joint. The injuries are still in the process of healing at the moment complete recovery with no resultant incapacitation is expected in one year from now".
17. Dr Andai indicated that in preparing the medical report he considered the treatment notes at Malaba District Hospital for sprained left ankle joint and Neema Medical Clinic (page 17).
18. The trial court found that as per Dr Andai's report the plaintiff suffered single injury at left ankle (page 126-127).



19. The trial court stated at(page 126) that the defendant cited the case of *Gilbert Odhiambo Omar -vs- Nzoia Sugar Co Ltd* 2013 and proposed award of Kes 50,000/. The court then wrote “ However, no copy was filed and citation was not correct. I did not find the case at the Kenya Law website. I have passed case law cited by the plaintiff in 2008 -2009. The authority all referred to multiple injuries, while per Dr Andai report the plaintiff suffered single injury at the left ankle”.
20. The court then stated:- “ Taking into account the nature of injuries and affliction at the given decision in cited authorities , I award Kes 245,000.00 general damages for injuries”.
21. The court on the question whether the court considered case as pleaded finds that the trial court was aware that the plaintiff suffered injury of left ankle as stated in the judgment consistent with the pleading under paragraph 5 (a) of the plaint.
22. On whether the court erred in law and facts. The court finds that the trial court in the judgment did not disclose the decisions relied on as authorities to award general damages of Kes 245,000/- (page 127) having passed decisions of 2008-2009 cited by plaintiff .
23. On whether the submission of the defendant were considered. The defendant’s submission are reflected at page 63 and 64 of the record of appeal . The appeal only contests the quantum . On quantum the defendants submission filed on February 9, 2015 relied on only one case *Gilbert Odhiambo Owour -vs- Nzoia Sugar Company Limited* (2013 eKLR) to buttress its submission that award of kshs 50,000/- was adequate for similar injury of left ankle joint categorized as soft tissue injury. In the judgment the trial court stated the defendant relied on case of *Gilbert Odhiambo Omar -v- Nzoia Sugar Company Limited* (2013) and that the court could not find the same at Kenya Law Reports website.
24. The court to satisfy itself of the truth on authority cited by the defendant further looked into the trial court file for the original pleadings. In the original submissions filed on February 9, 2015, the submission of the respondent relied on the decision of *Gilbert Odhiambo Owour -vs- Nzoia Sugar Company Limited* (2013) eKLR. The court finds and determines the trial court relied on extraneous material and failed to consider the correct authority on quantum relief on by the appellant to support its position that award of Kes 50,000/- was adequate for the injuries suffered by the plaintiff.
25. The court then finds it has to re-evaluate the quantum award in view of the errors cited above of non-disclosure of authorities relied on to reach award of Kes 245,000/- by trial court having by passed authorities cited by the plaintiff and having failed to look into authority cited by the appellant on quantum.

The Plaintiff’s submissions at the trial court.

26. The plaintiff opined award of Kes 300,000/- as general damages was justified and relied on the decision of *Joseph Wahome Muturi -vs- Municipal Council* in Nyeri HC at Nyeri Court of Appeal No 2 of 2006 where court held that “an award of Kes 120,000/- was suddenly too low. Had the appellant merely suffered soft tissue injuries, I would have no quarrel with that”. The plaintiff further relied on *Securex Agencies (k) Limited -vs- Benard Ochieng Olute* HC Nairobi Civil Appeal No 20 of 2004 where the evidence was that no permanent disability the plaintiff did not suffer had no fracture and no residual effect the court reduced quantum awarded by trial court from Kes 400,000/- to Kes 250,000/-.

Respondent’s submissions at trial court

27. The respondent submitted that for the left ankle joint injury having been categorized as soft injury, Kshs 50,000/- was sufficient compensation and relied on the decision in *Gilbert Odhiambo Owour -*



vs- Nzoia Sugar Company Ltd (2013) eKLR where they stated a similar award was awarded for more or less similar injuries.

Decision of the court.

28. The court found that the trial court erred in assessment of the general damages for failure to consider authorities relied on by the parties and failing to disclose the authorities. It relied on to award Kes 245,000/-. The appellant submitted that its authority in *Gilbert Odhiambo Owour -vs- Nzoia Sugar Company Limited* was relevant. The said authority emanated from appeal in High Court Bungoma Civil Appeal 46 of 2010 and a hard copy was produced under the respondent's appeal submissions.
29. The court in that case (*Gilbert Odhiambo Owour*) found the injuries were that the appellant had suffered swollen and tender left foot and ankle and was in severe pain. On examination by the doctor the appellant had complained of pains in the injured region with limited movement of the left ankle joint. The doctor found there was tenderness in the left ankle and foot and limited movement in the left ankle joint . The doctors opinion was that the injury sustained was severe but he was continuing to heal and the pains were going to subside with the use of analgesics. The court found award of Kshs 20,000/- low and increased the award to Kshs 50,000/-. In that case the appellant also required physiotherapy.
30. The respondent cited the decision of Makueni Courts Limited (*supra*) under which the decision of *Butt-vs- Khan* (1977) I KAR is cited to buttress the law on role of the appellate court. The court in Butt case held that:- "An appellate court will not disturb an award of 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 is either inordinately high or low".
31. Applying the foregoing principles of appellate court role at first appeal and having evaluated the evidence , the court finds and determines that the proposal of Kes 300,000/- by the plaintiff to have been too high considering authority cited of *Joseph Wahome Muturi -vs- Municipal Council* in Nyeri HC Appeal No 2 of 2006 which found award of Kes 120,000/- too low was on the basis that the injuries suffered by the Appellant were not soft tissue injuries. In that case the appellant suffered compound fracture of the middle finger and required surgery. In the instant appeal, there was single injury and no surgery required compared to the authority of *Securex Agencies (K) Limited -vs- Bernard Ochieng Olute* (2009) where the claimant suffered gun shot wound on thigh and pelvis and was admitted at KNH for 8 days and complained of numbness of lower limbs, weak urinary stream and pain on erection. The court finds that injuries in *Securex Agencies(K)* case were not comparable injuries but were severe where the award was reduced from Kes 400,000/- to Kes 250,000/-.
32. The court then considered the decision relied on by the appellant which the court wrongly quoted its parties hence reaching wrong finding that the authority was not available online. In *Gilbert Odhiambo Owour -vs- Nzoia Sugar Company Ltd* the injury was to left ankle joint with finding of doctor that the injury was severe and the award for general damages was increased from Kshs 20,000/- to Kshs 50,000/-.
33. The court finds and determines the decision in *Gilbert Odhiambo Owour -vs- Nzoia Sugar Company Ltd* (2012) eKLR to be similar in nature of injuries but more severe as the court found that the employee (plaintiff) required physiotherapy . In the instant case the opinion of Dr Andai (page 17) was that the respondent suffered soft tissue injuries. No further treatment was recommended.
34. The foregoing leads to finding and conclusion of the court that the decision in *Joseph Wahome Muturi* case was irrelevant . The court in that case having found that the injuries suffered by the appellant were more than soft tissue injuries.



35. The court warns itself as held by Justice Joel Ngugi in *Ndirangu Dennis – vs- Ann Wangari Ndirangu & another* (2018) eKLR that it can only interfere with an award of damages if the aggrieved party satisfied one of two conditions:-
- "i. That the trial court took into account irrelevant factors or left out relevant factors when assessing damages or
 - ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages .”
36. In the instant appeal the court observed that the trial court failed to consider authorities cited by both parties having passed those by the plaintiff on basis of not being not recent (2008 -2009) and having failed to look into the authority cited by appellant on quantum. The trial court further failed to disclose in the judgment the authority relied on in arriving at the general damages of Kes 245,000/- as is the established practice of courts to consider precedent in assessing general damages hence arriving at an arbitrary award.
37. Taking into consideration the medical report of Dr Andai that the respondent’s injuries were in nature of moderate soft tissue injures and complete recovery was expected in a year and taking into account of almost similar injuries further stated as severe in decision of *Gilbert Odhiambo Owour -vs- Nzoia sugar Company Ltd* (2012) eKLR where the High Court on appeal enhanced award to Kes 50,000/- from Kes 20,000/- and given the policy of court to compensate comparable injuries as far as possible (see *Ndirangu Dennis* case (*supra*) the court finds that the award of Kes 245,000/- was obviously manifestly excessive.
38. In it is the view of the court then an award of Kes 50,000/- was adequate compensation to the respondent to compensate the injuries suffered in this case.

Conclusion and Disposition

39. In conclusion the appeal is found merited and is allowed and the court sets aside the assessment of general damages by the trial court. In it’s place the court substitutes an assessment of quantum for general damages for Kes 50,000/- (fifty thousand Kenya shillings).
40. The amount awarded in special damages is not challenged and hence not affected. Costs and interest as awarded by trial court upheld.
41. The court, for equitable reasons declines to award costs on this appeal. Each party to bear own costs in the appeal.
42. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 27TH DAY OF OCTOBER, 2022.

J. W. KELI,

JUDGE

In the Presence of:-

Court Assistant : Brenda Wesonga

Appellant : Oriwa

Respondent: Absent



Court: Stay of execution granted for 30 days.

J. W. KELI,

JUDGE

27.10.2022

