



**Royal Garment Industries EPZ Limited v Chai (Appeal 1 of 2017)
[2022] KEELRC 12951 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12951 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 1 OF 2017
MA ONYANGO, J
OCTOBER 14, 2022
FORMERLY NAIROBI ELRC APPEAL NO. 13 OF 2017**

BETWEEN

ROYAL GARMENT INDUSTRIES EPZ LIMITED APPELLANT

AND

DAVID CHIRIBA CHAI RESPONDENT

(Being an appeal arising from the judgment of Hon. A. G Kibiru, Chief Magistrate which was delivered on 30th August 2017 at Chief Magistrates Court at Machakos in CMCC 492 of 2015 – David Chiriba Chai v Royal Garment Industries EPZ Limited)

JUDGMENT

1. The appeal herein is against the decision of Hon. A. G Kibiru, Chief Magistrate delivered on August 30, 2017. In the judgment the Trial Court found the Appellant liable for injuries sustained by the Respondent in the course of employment and awarded him general damages of Kshs.800,000/-, loss of future earnings Kshs.2,192,040, special damages of Kshs.18,000/- and costs less 25% contributory negligence.
2. The Appellant dissatisfied with the decision filed the instant appeal on the following grounds:
 - i. The Learned Chief Magistrate erred in law and in fact in finding that the Respondent was injured while in course of employment with the Appellant
 - ii. The Learned Magistrate erred in law and in fact in awarding manifestly excessive and undeserved award under the heading of loss of future earnings of Kshs.2,192,040.00
 - iii. The Learned Magistrate erred in law and in fact in adopting a multiplier of 30 years.



- iv. The Learned Magistrate erred in law by failing to consider the Appellants submissions in arriving at her judgment pronounced on August 30, 2017.
 - v. The Learned Magistrate erred in law by failing to give concise statement of the case, a concise statement of evidence adduced by parties, the points of determination, the decision thereon and reasons for the judgment pronounced on August 30, 2017.
3. The Appellant prays for the following reliefs –
- i. That this Appeal be allowed,
 - ii. That the lower Court's finding under the heading of loss of future earnings be set aside,
 - iii. That the assessment of the general damages done by the lower Court be set aside and this Honourable Court be pleased to do its own assessment,
 - iv. That the Appellant be awarded costs of this Appeal,
 - v. Such other relief as this Honourable Court deems fit.
4. The Court gave directions on September 24, 2021 for the appeal to be disposed off by way of written submissions.

Appellant's Submissions

5. The Appellants in their submissions relied on the holding in *Abok James Odera t/a Odera & Associates v John Patrick Muchira t/a Machira & Co. Advocates* [2013] eKLR where the Court held that the primary role of a first appellate court is to re-evaluate, re-assess and re-analyse the evidence on the record and then determine whether the conclusions reached by the learned magistrates are to stand or not give reasons either way.
6. The Appellant referred to the principles to be observed by the Appellate court as observed in *Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Lubia & Another (No 2)* [1985] eKLR where the Court held that the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Trial Judge;
 - a. Whether the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that;
 - b. The amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
7. The Appellant submits that the Trial Court in its judgment failed to consider a relevant factor in assessing the damages it awarded hence the damages were inordinately high. The Appellant submits that the Learned Magistrate erred in law in awarding sums of money without considering recent judicial decisions.
8. The Appellant submits that the Respondent did not prove that as a result of the injuries sustained he was exposed to either losing his job in the future or that in case he had lost his job his chances of getting an alternative job in the labour market was slim. That there was no evidence presented to prove that the Respondent's chances of getting employment in the future were diminished as a result of the injuries he sustained in the accident.



9. The Appellant submits that the Trial Court erred in relying on the evidence of PW1 in assessing the degree of permanent incapacity yet during cross-examination the witness confirmed that he is a chest physician. That only an optician is suited to give an opinion on eye injury.
10. The Appellant submits that the Trial Court erred in using the Respondent's evidence and attached payslips that were contradictory and as a result arrived at an excessive award.
11. The Appellant submits that the Learned Magistrate failed to take into account the Appellant's submissions as the judgment was mainly based on the submissions of the Respondent. That the Court ought to have given reasons for disagreeing with the Appellants and agreeing with the

Respondents' submissions.

12. The Appellant further submits that the Trial Court failed to give a concise statement of evidence adduced by the parties, points of determination, the decision thereon and reasons for the judgment and therefore erred in law and in fact in its findings on both liability and quantum of damages.
13. The Appellant submits that the Trial Court judgment is one that ought to be disturbed by this Court as the trial Court failed to take into consideration relevant factors in awarding inordinately high damages.

Respondent's Submissions

14. The Respondent submits that the Appellant was responsible for the injuries he sustained and that the accident was caused by negligence on the part of the Appellant, his directors, manager's employees, servants and/or agents.
15. The Respondent submits that Section 107(1) of the *Evidence Act* Cap provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.
16. The Respondent submits that it called one witness who testified under oath and produced documents in support of the Respondents case. The Appellant on the other hand called two witnesses in their defence.
17. The Respondent submits that he was an employee of the Appellant and there is no evidence adduced in Court to prove that he was not performing his duties as assigned until 2011 when he started attending hospital with eye problems. The Respondent further submits that the Appellant did not adduce evidence to prove that the Respondent at the time of joining his employment had a disability or eye problem. That it is clear that the injuries were sustained in the course of his employment with the Appellant.
18. The Respondent submits that the Learned Magistrate did not err in finding that the Appellant breached his statutory duty by failure to provide the Respondent with safety apparels.
19. The Respondent relies on the decision in *Simba Posho Mills Limited v Fred Machira Onguti* Nakuru HCCA No. 65 of 2002 where Kimaru J. held:

“That the Appellant was under statutory obligation to provide the Respondent with a safe working environment which included not exposing him to tasks which could result in his sustaining injury. The liability imposed upon the Appellant is statutory. The breach of the statutory liability means that the Appellant was strictly liable for the injury of its employees sustained in the course of their employment.”



20. The Respondent submits that it is not in dispute that the Respondent suffered severe injury to his eyes with severe visual loss. That in his submissions the Respondent opined that Kshs.1,200,000/- would be reasonable and adequate compensation while the Appellant submitted that Kshs.600,000/- would be adequate compensation.
21. The Respondent submits that the learned magistrate in his decision considered the evidence placed before him and awarded Kshs.800,000/- as general damages relying on the holding in *Mutua Kaluku v Muthini Kiluto* [2018] eKLR.
22. The Respondent submits that the Appellant has not shown that the assessment by the Trial Court was too high to warrant interference and that there is no reason for the Court to interfere with the Trial Court's judgment.
23. The Respondent also submits that he sustained severe injuries that resulted in 90% visual loss. That as such he is unable to perform his duties hence the loss of future earning capacity.
24. The Respondent submits that DW1 Dr. Cyprianus Okere confirmed the injuries sustained and produced a medical report. The Respondent further produced payslips confirming that he earned a net salary of Kshs.18,270/- and relied in the holding in *Ndoro Kaka Kakondo v Salt Manufacturers (K) Limited* 2016 eKLR where Rika J. held that –

“Damages for loss of future earning capacity and or diminished earning capacity unlike damages for loss of earning capacity is a type of remedy based on the claimant's potential earning power..... He further stated that even if a person is unemployed at the time the injury occurs he would be entitled to pursue damages for loss of future earning capacity or diminishing earning capacity.”
25. The Respondent submits that in his submissions before the Trial Court he prayed for Kshs.7,673,400/- for loss of future earnings while the Appellant offered Kshs.100,000/-. The Learned Trial Magistrate observed the incapacity was 90% and the Respondent will not be able to work again and awarded Kshs2,192,040/-. That the learned magistrate did not err in making the award.
26. The Respondents urges the Court to dismiss the appeal as the same is not sustainable and uphold the Magistrate's decision.

Analysis and Determination

27. I have considered the record of appeal and the submissions by the parties. The issues arising for determination are the following:
 - i. Whether or not the Respondent was injured in the course of employment;
 - ii. Whether the Learned Trial Magistrate erred in adopting a multiplier of 30 and whether the award was manifestly excessive;
 - iii. Whether the Learned Trial Magistrate failed to consider the Appellant's submissions and whether the judgment of the Learned Trial Court failed to give a concise statement of the case, the evidence adduced, points of determination the decision and the reason for the judgment.
28. I will start with issue no. (iii). In the submissions the Appellant avers that it is obvious that the Trial Court did not take into account the Appellant's submissions and that the judgment is mainly based on the submissions of the Respondent. That the Trial Court ought to have given reason why it disagreed with the Appellant's submissions and agreed with the submissions of the Respondent. Further, that



the Trial Court misdirected itself by failing to give reasons for its judgment and proceeded on wrong principles.

29. The Appellant has not stated the specific submissions that the Trial Court failed to consider, or the wrong principles of law the Trial Court relied on.
30. I have perused the submissions of the Appellant in the record of appeal. I have also perused the judgment. At page 2 of the judgment the Learned Trial Magistrate has summarised the evidence adduced by the Appellant's witnesses. In the last two paragraphs on the same page the Magistrates states: -

“I have carefully considered the evidence tendered by both sides, and the respective written submissions. There is no dispute that Plaintiff was an employee of the Defendant and that he was on duty on the August 12, 2011. There is also no dispute that the Plaintiff was injured while at his place of work. DW1 and DW2 confirmed having heard about the plaintiff's injury.

The Plaintiff has blamed the Defendant for failing to supply him with protective devices. DW1 did not provide any evidence to show that Plaintiff was supplied with protective devices. The Defendant cannot therefore escape blame. However, the Plaintiff knew the dangerous environment he was working in being a boiler attendant. There is no evidence that he requested for the protective devices. He thus exposed himself to the eminent danger. He owed himself a duty of care and cannot therefore escape some level of liability. I apportion the Plaintiff 25% liability and the Defendant 75%.

31. It is evident from the above excerpt of the judgment that the Learned Trial Court considered the evidence of both the Appellant and Respondent before arriving at the determination of the suit.
32. There are no submissions filed in the record of appeal or in the Trial Court file before me and since the Appellant did not specify what was in the submissions that was not taken into account in the judgment, I find no proof of the same to support the averments of the Appellant. I therefore find no reason to fault the judgment on this ground.

ii. Whether or not the Respondent was injured in the course of employment

33. Although this was raised as ground of appeal no. (a) no mention is made of the same in the submissions. In the judgment the Trial Court found that there was no dispute on this issue as both DW1 and DW2 admitted that they had heard about the injury sustained by the Respondent herein. I therefore find that the Trial Court's finding on the issue was based on the evidence added in Court and I agree with the finding of the Trial Court.

ii. Whether the Trial Court erred in adopting a multiplier of 30 and whether the award was manifestly high

34. The Learned Trial Magistrate held as follows with regard to the multiplier:

“On loss of future earning, capacity the Plaintiff is said to have been employed by the Defendant. He was earning Kshs.18,267/- as per pay slip produced. He was 25 years. It is clear that with 90% incapacity Plaintiff will not be able to work again. Indeed the court noted that he needed assistance when he was walking to the witness box.



On the multiplier, the Plaintiff would have worked up to the official retirement age of 60 years. He therefore had 35 years to go. However, considering the preponderances of life, I find a multiplier of 30 years appropriate. I therefore make the following award.”

35. The Appellant does not deny that the Respondent’s salary was Kshs.18,267/-. This is derived from the Respondent’s payslips issued to him by the Appellant. The Trial Court used the factor of $\frac{1}{3}$ (one third) which the Appellant does not appear to disagree with.
36. On general damages, according to the judgment, the Appellant had relied on the case of *Menegai Oil Refineries Ltd v Peter Ochieng Bolo* [2015] eKLR where Kshs.600,000/- was awarded for similar injuries as the Respondents. The Respondent had relied on *Paul Gakunu Mwinga v Nakuru Industries Ltd* [2009] eKLR where the Court award Kshs.650,000/- for complete loss of sight in the left eye, which in my view was less severe taking into account that the Respondent loss 90% of sight in both eyes, which means that he is technically blind. I do not find the award of Kshs.800,000/- by the Trial Court to be manifestly excessive as to warrant interference by this Court.
37. From the totality of the foregoing, I find that the appeal has no merit and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 14TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

JUDGE

