



**China Wu Yi Company Ltd v Okari (Appeal 47 of 2022)
[2022] KEELRC 12733 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12733 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 47 OF 2022
JK GAKERI, J
OCTOBER 4, 2022**

BETWEEN

CHINA WU YI COMPANY LTD APPELLANT

AND

RONALD MUSIGISI OKARI RESPONDENT

JUDGMENT

1. The Respondent, Ronald Musigisi Okari testified that he was an employee of the respondent. That on 23rd June, 2016 at around 7.30 pm while working near the University of Nairobi digging up, he hit an underground cable which produced sparks which injured his left hand and face. That the Manager gave him Kshs.1,000/= for medication. It was his testimony that he was attended to at St. Mary's Hospital. The respondent blamed the Appellant for failure to provide protective gear. The respondent filed a claim at the Chief Magistrates Court, Nairobi seeking compensation.
2. In a judgement delivered 10th April, 2018, Hon. G.A. Mmasi (Mrs) SPM awarded Kshs.400,000/= as general damages for pain and suffering and Kshs.2,000/= as special damages plus costs of the suit and interest at court rate.
3. This is the judgement the Appellant has appealed against.
4. In its Memorandum of Appeal dated 25th February, 2019, the Appellant raises the following grounds of appeal;
 - i. The trial magistrate erred in law and fact in failing to consider the evidence by the appellant as far as the aspect of liability is concerned.
 - ii. The trial magistrate erred in law and fact by failing to call into question the authenticity of the documents availed by the plaintiff.



- iii. The trial magistrate erred in law and fact by failing to apportion liability yet the plaintiff failed to prove/demonstrate whether he had protective clothing on the day of the accident.
 - iv. The trial magistrate erred in law and fact by holding the appellant wholly liable in a clear case where the plaintiff failed to prove his case to the required standard.
 - v. The trial magistrate erred in law and fact awarding damages that are excessively high in view of the injuries sustained.
5. The role of the first appellate court is to re-evaluate and reconsider the evidence on record taking into account the fact that it did not see or hear the witnesses first hand.
6. In *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123, the Court of Appeal established the duty of a first appellate court as follow;
- “An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. 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 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 if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities . . . or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
7. The Appellant identifies five (5) grounds of appeal which in my view fall into two (2) categories.
- Quantum of damages.
- a. Liability and
 - b. Cogency of the evidence adduced by the respondent.
8. In her judgement delivered on 10th April, 2018, the Learned trial Magistrate observed that;
- “In the instant case, the defendant did not ensure that the environment was safe before allowing the workers the Plaintiff included to dig that ground. The defendant breached its duty of care hence exposed the plaintiff to danger.
- Secondly, the defendant did not supply the plaintiff with any protective gears to wit, hand gloves and safety boots. The same if issued to him would have minimized the extent of injuries sustained on the plaintiff. In a nutshell in regard to liability, the defendant is wholly to blame for the injuries sustained by the plaintiff and the company is 100% liable.”
9. The respondent submits that the evidence adduced at trial was clear that he was not given protective gear and had no contribution to the injuries.
10. Reliance is made on sections 107 and 108 of the *Evidence Act* on the burden of proof as well as the decisions in *Embu Public Road Services Ltd v Riimi* (1968) EA 22, *Mumias Sugar Company Ltd v Charles Namatiti* CA 151/87 and *Boniface Muthama v Carton Manufactures Ltd* to underscore the employers duty to provide a safe working environment and the duty of care imposed on the employer.
11. The trial court found that the appellant failed to ensure that the working environment was safe and exposed the respondent to danger.



12. The court further found that although the respondent was a cleaner, on 23rd July, 2016, he had been assigned the duty of “marking the road but not digging.”
13. From the record, there is no evidence to demonstrate that the respondent was marking the road on 23rd July, 2016.
14. In his evidence-in-chief, the respondent stated that he did security work but on the material day, he was assigned cleaning duties but he and others were taken to assist with digging the road when he was injured.
15. The respondent did not explain whether he requested for protective clothing or demanded the same bearing in mind he was in security and cleaning and not digging of the road.
16. Be that as it may, it is the duty of the employer to provide a safe working environment and not expose an employee to injury as held in numerous decisions. Weighing the evidence on record, the court is persuaded that the trial court based its decision on liability on the evidence before it by holding the appellant 100% liable. There is no persuasive case for the court’s interference.
17. On quantum of damages, the respondent relies on several decisions including *Butt v Khan* (1982-1988) KAR 1 on when court may interfere with an award, *Lim Pho v Candem & Islington Aarea Health Authority* (1979) 1 ALLER 332, *Mary Wairimu Njuguna v Kenya Power & Lighting Co. Ltd* (2018) eKLR as well as *Eunice Onyango v East African Growers Ltd* (2017) eKLR.
18. In the last two cases, the court awarded Kshs.500,000/= for electric shock, electric burns on the right hand and electrocution respectively.
19. The court is urged that the award of Kshs.400,000/= was fair compensation for the injuries.
20. In the instant case, the respondent’s medical report from St. Mary’s Hospital where he was treated show that he had superficial burns to the face and dorsum of the left hand less than 1% and no incapacity at all. All other systems were normal. The Medical Director found no electrocution or electric shock.
21. The respondent was not hospitalized nor were the burns dressed and by 27th July, 2016, the burns were drying up.
22. It is unclear on what principles the trial court arrived at the sum of Kshs.400,000/= as a general damages for pain and suffering.
23. In *Butt v Khan* (Supra), the Court of Appeal articulated the circumstances in which an appellate court may interfere with an award of damages as follows;

“ An Appellate court will not disturb an award of damages unless it is inordinately high or low as to represent and 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.”
24. For comparative jurisprudence the court has considered the following decisions.
25. In *Eastern Produce Kakuzi Ltd v Edwin Wasike* (2013) eKLR, the court awarded Kshs.100,000/= for chemical burns to both legs and toes.
26. In *Devki Steel Mills Ltd v Joseph Mulwa* (2004) eKLR, the plaintiff was electrocuted and suffered burns on the head, right hand, thumb, elbow, right foot and stomach. He was awarded Kshs.150,000/=



27. In *Kanyenyaini Tea Factory Co. Ltd v Stanley Mubia Gichure* (2008) eKLR, where the plaintiff slid and fell into a pit that had fire and got extensive superficial burns, he was awarded Kshs.100,000/= in general damages.
28. Finally, in *Eldoret Steel Mills Ltd v Maurice Ochieng* (2019) eKLR, where the respondent had 1% superficial burns and the trial court award Kshs.230,000/= as general damages, the appellate court reduced the same to Kshs.150,000/=.
29. It is apparent that the respondent herein went shopping for another medical report from a private practitioner 2 days after obtaining a report from St. Mary's Hospital as opposed to further treatment which appears curious.
30. The court is persuaded that the best report is the one given by the hospital where the respondent was treated.
31. Notably, the 2nd report relies on scars as opposed to the actual injuries or treatment and was prepared about 6 days after the injuries which had dried up leaving scars. In a similar vein, the doctor did not subject the respondent to a wholistic examination of other systems. The report is too specific for reliance in such a case.
32. The findings of the trial court that the 2nd medical report characterized the injuries as severe at 6%, ignored the earlier report which characterized them as less than 1%. The court is satisfied that the burns were merely superficial and not severe to warrant the award made.
33. It is evident that the trial court did not take into account the earlier medical report prepared by the St. Mary's Hospital where the respondent was treated. The report addresses the respondent in a wholistic manner and is more comprehensive and more reliable.
34. The foregoing establishes a sustainable basis for interference with the award made by the court.
35. As regards the cogency of the evidence led by the respondent at trial, there are several inconsistencies.
36. In his evidence-in-chief, the respondent stated that the manager gave him Kshs.1,000/= for medication. On cross-examination, he testified that he paid Kshs.1,500/= at the St. Mary's Hospital.
37. Secondly, in his written statement, the respondent states that he went to the hospital in the company of a friend on the night of 23rd July, 2016. On cross-examination, the respondent indicated that he was taken to hospital by a labourer and not one of his colleagues.
38. Thirdly, the Medical Report dated 27th July, 2016 states that the respondent was attended to at St. Mary's Hospital on 25th July, 2016. The respondent did not deny that he was treated on that date.
39. Intriguingly, the Report by Dr. Cyprianus Okoth Okere dated 29th July, 2016, makes no reference to the date of treatment at St. Mary's Hospital.
40. On the whole, the court finds the evidence in this case lacking in cogency.
41. For the foregoing reasons, the appeal is successful to the extent that the quantum of general damages is reduced from Kshs.400,000/= to Kshs.100,000/=.
42. For the avoidance of doubt, the sum awarded as special damages is upheld.
43. Parties to bear own costs.
44. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st April 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.

DR. JACOB GAKERI

JUDGE

