



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 67 OF 2018

(Formerly HCCA No. 552 of 2014)

Before Hon. Lady Justice Maureen Onyango

NISPAN CONSTRUCTION COMPANY LIMITED.APPELLANT

VERSUS

IMANUEL MUKERA TEMESI.....RESPONDENT

(Being an appeal from the judgment of Hon. Magistrate R. A. Oganyo (Mrs.) Senior Principal Magistrate, delivered on 3rd November 2014 at the Chief Magistrate's Court at Milimani Commercial Court in Civil Case No. 6655 of 2010)

JUDGMENT

The Appellant, Nipsan Construction Company Limited, filed a Memorandum of Appeal dated 8th December 2014 appealing against the Judgment of Hon. Oganyo (Mrs.) Senior Principal Magistrate, delivered on 10th November 2014 in Nairobi CMCC No. 6655 of 2010. The Respondent had sued the Appellant in respect of personal injuries that occurred on 25th February 2008 while working at the Appellant's plant in industrial area.

The grounds of appeal are that:

1. The Learned Magistrate erred in fact and in law in failing to give a reasonable Judgment.
2. The Learned Magistrate erred in fact and in law in ignoring the specialist evidence on the Plaintiff's degree of permanent incapacitation.
3. The Learned Magistrate erred in fact and in law in failing to follow the guiding legalisation found in Schedule 1 of the Work Injury Benefit Act Cap 7 of 2007.
4. The Learned Magistrate erred in fact and in law in awarding general damages of Kshs.400,000/= which was excessively high in the circumstances.
5. The Learned Magistrate erred in fact and in law in failing to consider that the Plaintiff had not lost total use of the thumb of his left hand.
6. The Learned Magistrate erred in fact and in law in failing to consider Schedule 1 Work Injury Benefit Act Cap 7 of 2007 and the Insurance (Motor Vehicle Third Party Risk) (Amendment) Act Number 50 of 2013 in assessing total body incapacitation for loss of utility of the thumb of the left hand.
7. The Learned Magistrate erred in fact and in law in holding that the left hand thumb interjects with the mechanics of the other four fingers and was incapacitating the left hand generally.
8. The Learned Magistrate erred in fact and in law in adopting a disability of 45% total body incapacitation while the same was inordinately high in the circumstances.
9. The Learned Magistrate erred in fact and in law in adopting a multiplier of 30 years which was inordinately high in the

circumstances.

10. The Learned Magistrate's computation of loss of earning capacity is erroneous in law.

11. The Learned Magistrate erred in fact and in law in failing to subject special damages to contribution.

12. The Learned Magistrate erred in fact and in law in failing to discount the award for loss of earning capacity to cater for accelerated payment.

By orders made on 12th October 2018 by Githua J. in **HCCA No. 552 of 2014**, the appeal was transferred from the High Court to the Employment and Labour Relations Court for hearing and final disposal after the court confirmed from the Record of Appeal filed on 16th March 2017 that the appeal emanates from a dispute between an Employer and Employee. The appeal came up for directions on 22nd May 2019 before this Court and upon request by Counsel for both sides, parties were granted leave to proceed by way of written submissions. The Appellant filed its submissions dated 7th June 2019 while the Respondent filed his submissions dated 28th June 2019.

Brief Facts

The respondent was an employee of the appellant. He was employed in April 2007 as a general worker. On 25th February 2008 he sustained serious injuries to his left thumb while working with a concrete mixer machine.

The respondent sustained a deep cut wound to the left thenar eminence. He also sustained a nerve injury to the same finger that caused weakness of the left hand. He was X-rayed and taken to theatre for an operation that included surgical toileting and dressing. He remained admitted in hospital for one full week.

When the matter came up in the lower court on 19th May 2014 the parties to the suit recorded a consent on liability in the ratio of 80:20 in favour of the respondent as against the appellant. The matter then proceeded for hearing where the respondent and doctor Wangata testified for the respondent while Dr. Waithaka Mwaura testified on behalf of the appellant.

Judgment was entered for the respondent as follows –

- 1) *Liability as agreed in the ratio of 80% to 20% in favour of the Plaintiff.*
- 2) *General damages for pain and suffering at Kshs.320,000 (three hundred and twenty thousand only) after apportionment of liability.*
- 3) *Damages for loss of earning capacity at Kshs.622,080 (six hundred and twenty two thousand, and eight only) After apportionment of liability.*
- 4) *Special damages at Kshs.1,000 (one thousand only)*
- 5) *Costs to include Kshs.6,000 charged by the Doctor*
- 6) *Interest at court rates to accrue from date of judgement till payment in full.”*

Dissatisfied by the judgment on extent of incapacity and quantum the appellant filed the present appeal.

Appellant's Submissions

The Appellant submits that as a first appellate court, this Court is obligated to re-evaluate the evidence within the laid down legal principles as was held in **Selle & another -v- Associated Motor Boat Co. Ltd & others (1968) EA 123** in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 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 if it appears either that he has clearly failed on some point 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 (Abdul Hammed Saif -vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

It further relies on the case of **Peters v Sunday Post Limited [1958] EA 424** where the Court of Appeal for East Africa had taken the same position as in the **Selle case** above and was guided by extracts from the opinion of Lordships in the House of Lords in **Watt vs. Thomas (1), [1947] A.C. 484**.

Under **Grounds 1, 2, 3, 5, 6, 7 and 8**, the Appellant submits that the trial court erred in failing to weigh the value of the expert evidence against the qualifications of the witnesses, in light of **Schedule 1 of the Work Injury Benefits Act (WIBA), 2007**. That Dr. Wangata (PW1)

testified and concluded that the Respondent had sustained an injury to the thenar eminence (nerve injury) with resultant weakness of the left hand (**page 26 of the Record of Appeal**). In Dr. Wangata's Medical Report (**Pexb1**), the Respondent is stated as being right handed and PW1 admitted that arthritis of the left hand could have been caused by other factors and that physiotherapy and surgery would have improved the Plaintiff's disability (**page 27 Record of Appeal**). That Dr. Waitaha Mwaura (DW1) stated that the Respondent had sustained a deep cut wound with resultant nerve injury and opined that with continued self-physiotherapy, the functions of the left hand would improve tremendously (**page 33 Record of Appeal**).

That the Respondent did indeed suffer a nerve injury at work but in determining the degree of permanent incapacity, the trial court should have made reference to the WIBA which under the 1st schedule assesses the degree of disablement for the loss of thumb, both phalanges at 25%. That for the said nerve injury which did not render the thumb lost but damaged, the Respondent was required to do physiotherapy in addition to attending clinics but he did not. That Dr. Wangata contended he assessed the Respondent's incapacitation similar to the loss of the left hand but the said doctor forgot to factor in that the fingers of the Respondent's left hand were intact and only the left thumb suffered any injury. That while Dr. Wangata admitted to not being an Occupational Health Specialist, Dr. Mwaura on the other hand is an Occupational Health Specialist with a Masters of Science in Occupational Medicine and as such, his assessment of functional incapacity at 14.5% is rational. That the finding by the trial court of a disability of 45% is not based on any known provision of law and which error is required to be corrected. It submits that the findings of the trial court ought to be set aside and a finding that the Respondent suffered permanent disability at 14.5% be returned.

Under *Ground 4*, the Appellant submits that in the circumstances, the award of Kshs.400,000/= for a nerve injury is excessive and that both PW1 and DW1 confirmed that the Respondent did not suffer any skeleton injuries. That the Respondent's injuries were soft tissue in nature but would take a longer time to heal than ordinary soft tissue injuries. That an award similar for soft tissues would have been fair. It relies on **Kiambu HCCA No. 54 of 2011 - Ndungu Dennis vs. Ann Wangari Ndirangu & Anor** and **Nairobi Civil Appeal No. 180 of 2005 - Simon Muchemi Atako & Anor vs. Gordon Osore** in support of this submission.

Under *Grounds 9 and 10*, it submits that the trial court erred in awarding Kshs.777,600/= for loss of earning capacity whilst the Respondent had pleaded for "reduced" earning capacity. That the trial court should have awarded a global sum for the loss of earning capacity noting the Respondent was right handed while he was injured on his left hand. That in adopting the approach of a multiplicand and multiplier, the trial court was not cognizant that the approach has been shunned by the court relying on the case of **William J Butler -v- Maura Kathleen Butler [1984] eKLR** where the Court of Appeal set out the now accepted mode of assessing damages for loss of earning capacity with Nyarangi Ag JA (as he then was) stating at page 6:

"There was no evidence before the trial judge, that the respondent had before been in salaried employment. There could therefore be no claim for 'loss of future earnings'. However, having been injured to the extent of not being able to find a suitable job, the respondent had lost her capacity to earn...The trial judge held, on the evidence available, that the respondent's visible occupation would have been to work as a secretary and that she could expect a net figure of Pounds 3,000 per annum. The trial judge was here doing his best, to assess in monetary terms, the loss of earning capacity. It was immaterial that the respondent had not been in salaried or similar employment. This type of claim could, as Kneller JA says, be a claim on its own and the figure need not be plucked from the air, because the plaintiff would be expected to furnish the material on which a reasonable figure could be based..."

That the Court of Appeal in **Mumias Sugar Company Ltd -v- Francis Wanalo [2007] eKLR** adopted the holding in **William Butler case above** and restated the rule in awarding damages for loss of earning capacity as follows:

"...Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

In the instant case, the loss of earning capacity was claimed as part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent in capacity was assessed at 15% by Dr. Juma and at 10% by Dr. Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained – mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial. It was minimal. The trial Judge in assessing the multiplicand of Shs.7,000/= per month took into account that the appellant was earning Shs.8,300/= p.m. during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/ multiplier basis. In this, the learned Judge erred in principle. Indeed, considering the method of computation and the degree of the respondent's disability the award of Shs.2,016,000/= was in reality, but in name only, an award for loss of future earnings. That award is in any case, grossly so high that it amounts to an erroneous estimate of the loss. However, it was appropriate in the circumstances of this case to make a fair award for loss of earning capacity. We think that an award of Shs.500,000/= would be adequate compensation for the diminution of respondent's chances of employment in the labour market..."

The Appellant further submits that the Respondent did not prove he was unable or had been unable to get any employment as a result of the injury suffered. That as shown at **page 29 of the Record of Appeal**, the Respondent's own admission was that he got manual jobs but felt the pay was insufficient proving he was able to get work but chose not to do it because of the amount paid for the work. That if the Court finds that the Respondent did suffer a loss of earning capacity, then a global sum of Kshs.100,000/= would suffice as compensation.

Under *Grounds 11 and 12*, it submits that as shown at **page 4 Record of Appeal**, the trial court erred in failing to subject the special damages

to the agreed apportionment of liability ratio. In addition, that the award for diminished and or of loss earning capacity should have been discounted to account for accelerated payment. The Appellant urges the court to allow the appeal, re-assess the damages and award costs to it.

Respondent's Submissions

The Respondent submits that when the matter was before the lower court on 19th May 2014, the parties to the suit recorded a partial consent on liability in the ratio of 80:20 in his favour as against the Appellant before the matter proceeded for hearing. That he told the trial court on cross examination that he had been admitted at Avenue Hospital to exercise the left hand so that he could regain strength but that despite the said exercises, the left hand failed to respond and/or become strong. That Dr. Wangata who was his witness after he had examined him confirmed in his testimony that the Respondent's left hand had become weak and that in a scale of one to five, the left hand had moved down to grade one and only had some slight muscle movements. That according to Dr. Wangata, the left hand is there physically but cannot perform any meaningful duties. That the only role of the left hand is for cosmetic purposes such that on paper the respondent has two hands but in actual sense only one hand is functional. That this rationale is what Dr. Wangata used in assessing the degree of permanent incapacity at 60% because the injury might have been to the left thumb but it impacted the whole of the left hand which became useless.

That the Appellant's witness, Dr. Waithaka Mwaura also noted at **page 33 of the Record of Appeal** that the Respondent's left hand muscles were wasted and could not voluntarily extend but had to be manipulated to stretch and that the tips were hyper sensitive to touch. That with this description, it is clear his left hand had no use and the injury suffered was equivalent to losing the whole hand. That Dr. Waithaka Mwaura contradicted his medical report when he said the Respondent would improve and heal with physiotherapy but the Respondent had applied this prescription without positive results. That his contradictions are further shown at **page 34 of the Record of Appeal** where he acknowledges that there is a consequent weakness of the hand and further admitted that a thumb would affect the hand's normal capacity. That Dr. Waithaka Mwaura based his opinion of 14% of degree of permanent incapacity on an injury to the thumb without taking into account that the said injury had extended to the whole of the left hand which had the muscles wasted and the wrist stiff. That the trial court arrived at a decision that the degree of permanent incapacity was something in between what his doctor had said and what the Appellant's doctor had said and also after having had the advantage of physically seeing him.

He submits that the 45% degree of permanent incapacity arrived at by the court was therefore fair to both parties and urges this court not to interfere with the same. In his view, the lower court assessing general damages at Kshs.400,000/= was commensurate with the injuries suffered and is not excessive to warrant this court's interference. That it is settled law that an appellate court will not interfere with an award of damages by the lower court unless it is satisfied that the lower court acted on wrong principals of law or made an award of damages which is inordinately high or low as to represent a wholly erroneous estimate of damages, as was stated in **Mugambi and Silas v Isaiah Gitiru, Civil Appeal No. 130 of 2002**.

It is submitted by the Respondent that the trial court seriously considered his injuries and that in assessing the damages, it did not take into account an irrelevant fact or leave out a relevant factor nor did it misapprehend the evidence. That the Appellant has not pointed out to this court the irrelevant factor the lower court took into account and/or relevant factor the court failed to take into account in arriving at the judgment. He relies on the case of **Meru HCC No. 17 of 1983: Lucy Ntibuka -v- Benarp Mutwiri** where the plaintiff sustained head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm (elbow) and the court assessed general damages at Kshs.500,000/= on 8th February 2007.

The Respondent submits that it is not in dispute that he used to earn Kshs.4,800/= per month, that he was 22 years old as at the time of the accident and that after the accident, he lost his employment and has not been in gainful employment since then. That the Appellant's submissions that he did not prove he was unable to get employment is false as he has stated at **page 29 of the Record of Appeal** that he went up to class six and cannot get white collar jobs and has to depend on his hands for manual work. Further, he cannot do work with one hand but whenever he gets work he is given light duty which does not pay much. That in any case, he was awarded for reduced earning capacity and not loss of earning capacity and that the reduced earning capacity is based on his age and the permanent incapacity of 45% arrived by the court. That the Kshs.622,080/= awarded to him is a minimal sum that should not be interfered by this court and that if the court were to award a global sum, he would propose a figure of Kshs.700,000/= for reduced earning capacity. He relies on the case of **Kiambu Civil Appeal No. 97 of 2016: C M (a minor suing through mother and next friend M N) vs. Joseph Mwangangi Maina** where the claimant was awarded Kshs.600,000/= for loss of future/diminished earning capacity for similar injuries.

The Respondent submits that the appeal by the Appellant lacks merit and should be dismissed with costs to the Respondent.

Analysis and Determination

In the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, the Court observed that a first appeal behoves the court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. The Court in the **OI Pejeta case** further cited the case of **Kenya Ports Authority -v- Kuston (Kenya) Limited (2009) 2 EA 212** where this Court espoused that mandate or duty as follows:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The issues for determination are whether the appeal is merited and if the appellant is entitled to the orders sought.

The discharge summary from Avenue Hospital at page 18 of the Record of Appeal states that the respondent suffered a crush injury to the left hand caused by a cement mixer. He was admitted in hospital on 25th February 2008 and discharged on 1st March 2008 to continue

treatment as an outpatient.

According to the medical report by Dr. Theophilus Wangata for the respondent, the respondent suffered the following injury –

“OPINION

Immanuel Mukera Temesi suffered crush injury on the left hand with nerve injury and weakness of the hand in this accident. This caused a lot of physical, psychological pain, blood loss and suffering. He suffered grievous harm.

He was hospitalized for a period of one week. The sweating and weakness of the hand is as a result of the nerve injury suffered during this accident. He remains with scars that are of cosmetic significance. He also has features of post traumatic osteoarthritis at the left wrist joint. This is a chronic joint condition that presents with pain, swelling and stiffness and requires the recurrent use of pain killers.

As a result of the injury, he is not able to perform any duties using the left hand. The extent of permanent and functional incapacity as a result of injuries sustained in this accident is estimate sixty percent (60%)”

However according to the medical report by Dr. Waithaka Mwaura for the appellant, the injury by the respondent was as follows –

“CONCLUSION

Immanuel suffered a deep cut on the left hand with resultant nerve injury and consequent weakness of the hand. This caused both physical and psychological pain, blood loss and suffering and he was hospitalized for five days. The injury has since healed but with residual scars and nerve injury. This is the reason the left thumb cannot extend of its own volition and also explains the hyper-sensitivity. With continued self-physiotherapy, the function of the left hand should improve tremendously as the nerve undergoes regeneration.

The degree of permanent and functional incapacity as a result of injuries sustained in this accident is assessed at fourteen decimal five percentage (14.5%) points.”

Dr. Wangata examined the respondent on 21st September 2010 while Dr. Waithaka examined him on 12th October 2011.

The First Schedule on Degree of Disablement in the Work Injury Benefits Act provides –

6. Loss of hand at wrist-----	60
7. Loss of four fingers and thumb on one hand-----	60
8. Loss of four fingers on one hand-----	40
9. Loss of thumb:-	
Both halanges-----	25
one phalanx-----	10
15. Ankylosis in optimum position:-	
shoulder-----	35
elbow-----	35
wrist-----	25

NOTE: In the case of a right-handed employee, an injury to the left arm or hand and, in the case of a left-handed employee, to the right arm or hand, may in the discretion of the Director be rated at ninety per centum of the above percentages.

Where there are two or more injuries the sum of the percentages for such injuries may be increased, at the discretion of the Director.

Going by the medical reports of both Dr. Wangata and Dr. Waithaka, the claimant did not suffer the exact injuries in the Schedule. He suffered a crush injury that led to wastage of the thenar muscle. Dr. Waithaka for the appellant states that the whole thumb cannot voluntarily extend, meaning that the claimant lost the use of the whole of the left thumb in addition to the thenar muscle.

In the judgment the court observed that when in court the respondent’s left thumb was numb and could not straighten.

From the foregoing, I find no error in the trial Magistrate assessing the injury at 45% taking into account the nature of the injury and resultant incapacity to the respondent. As observed by the learned Magistrate.

The appellant further argued that an assessment of Kshs.400,000 for nerve injury was excessive in the circumstances, as the respondent suffered soft tissue injury, albeit to the nerve, which would take longer to heal than ordinary soft tissue injury. The court however notes that at the time of hearing in June 2014 the respondent's injuries had not healed. This means that those were permanent injuries that were unlikely to heal, having not healed from February 2008 when he was injured a period of more than 6 years.

This being the case, I find no justification to interfere with the trial court's award as the appellant has not proved that the same was excessive, or that the trial court took into account irrelevant factors, or misapprehended the evidence and/or the relevant law.

For the foregoing reason I find no merit in the appeal and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE