



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 14 OF 2017

TILE AND CARPET CENTRE WAREHOUSE.....APPELLANT

VS

DAVID ODHIAMBO OKELLO.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. E. Mutunga, SRM

delivered on 14th September 2017 in Mombasa RMCC No 373 of 2015)

JUDGMENT

1. The Appellant's appeal as documented by a Memorandum of Appeal dated 29th September 2017 seeks to overturn the judgment of **Hon. E. Mutunga, SRM**, delivered on 14th September 2017 in Mombasa RMCC No 373 of 2015.
2. The Appellant raises the following grounds of appeal:
 - a. That the learned Trial Magistrate erred and misdirected himself in law by assessing damages that were manifestly excessive and incomparable with current judicial awards for analogous injuries;
 - b. That the learned Trial Magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages under loss of earning capacity;
 - c. That the learned Trial Magistrate erred in law and in fact in failing to take into account relevant factors in evaluating the evidence on record on quantum;
 - d. That the learned Trial Magistrate erred and misdirected himself in law by awarding damages for loss of earning capacity which damages were neither pleaded nor prayed for.
3. The parties did not give *viva voce* evidence but the facts of the case are not in dispute. They are that on 3rd October 2013, the Respondent who was an employee of the Appellant assigned the duty of making water tanks, was injured by a machine. As a result, he suffered traumatic amputation of the right little finger, cut on the right ring finger and bruise on the left arm.
4. Pursuant to a consent recorded before the trial court on 29th May 2017, liability was apportioned at 30% for the Respondent and 70% for the Appellant. Medical reports by Dr. Ajoni Adede and Dr. Salim K. Noorani were admitted in evidence by consent.
5. According to Dr. Adede, the Respondent sustained 4% permanent partial disability due to amputation and defective right hand power grip. Dr. Noorani returned a 2% permanent incapacity.
6. The learned Trial Magistrate awarded the Respondent Kshs. 300,000 for pain and suffering and Kshs. 900,000 for loss of earning capacity. He further allowed special damages at Kshs. 2,000 plus costs and interest.
7. Reading from the grounds of appeal as contained in the Memorandum dated 29th September 2017, the Appellant's dissatisfaction is with regard to the level of quantum awarded by the trial court.
8. In the written submissions filed on behalf of the Appellant, reference was made to the decisions in ***Sumaria & another v Allied Industrial***

Ltd (2007) 2KLR and *Selle & another v Associated Motor Boat Co. Ltd & others 9 (1968) EA, 123* where it was held that an appellate court should not interfere with findings and conclusions of the trial court unless they are evidently based on a misapprehension of evidence or wrong principles.

9. In opposing the appeal, the Respondent relied on two Court of Appeal decisions being *Mbogo v Shah [1968] EA 93* and *William J Butler v Maura Kathleen Butler [1984] eKLR* where it was held that an appellate court should not interfere with an assessment of damages by a trial court except in cases of clear misdirection or application of wrong principles thus arriving at a wrong or unjust decision.

10. I am further reminded of the well tested decision in *Butt v Khan (1982-1988) 1 KAR, 1* where it was held as follows:

“An appellate court will not disturb an award of damages unless it is so 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.”

11. This was echoed by the Court of Appeal in *Kemfro Africa Limited T/A Meru Express Services (1976) & another v Aziri Kamumudika Lubia & another[1985] eKLR* thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be that either that the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”

12. Similarly, the Court of Appeal in *Catholic Diocese of Kisumu v Tete [2004] eKLR* rendered itself as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if satisfied that the trial court applied wrong principles. As by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

13. It is therefore a well-established principle of law that assessment of damages is a discretionary exercise which should not be interfered with save in exceptional circumstances, which I have taken time to restate above.

14. The trial court was faced with two medical reports returning different degrees of permanent disability. None of the Doctors was called for examination, meaning that the Learned Magistrate could only rely on their opinions as recorded. This Court found no reason for the decision taken by the Magistrate to adopt the opinion of Dr. Adede and not Dr. Noorani.

That said, the Court did not find the award of Kshs. 300,000 for pain and suffering excessive.

15. Regarding loss of earning capacity, the Appellant states that the Learned Trial Magistrate erred in making an award under this head because it was not specifically pleaded. The Court found no legal basis for this proposition. I say so because loss of earning capacity is an integral part of general damages (see *William J Butler v Maura Kathleen Butler* (supra)).

16. It was therefore perfectly in order for the learned Trial Magistrate to make an award for loss of earning capacity as part of general damages. The multiplier of 25 years employed by the trial court was also reasonable in the circumstances.

17. Ultimately, this Court finds no reason to interfere with the award by the learned Trial Magistrate. The Appellant’s appeal therefore fails and is dismissed with costs to the Respondent in this Court and in the Court below.

18. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Wairagu for the Appellant

Mr. Kariuki for the Respondent