



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**APPEAL NO. 36 OF 2017**  
**(ORIGINALLY NAKURU HIGH COURT CIVIL APPEAL NO. 72 OF 2013)**

**SUPER BARGAINS GLASS & HARDWARE**

**(NKU) LIMITED**

**APPELLANT**

**V**

**VICTOR NAMBISIA AMWOGA      RESPONDENT**

**(being an Appeal from the Judgment of the Resident Magistrate Honourable R. Aganyo in Nakuru  
CMCC No. 631 of 2012 – Victor Nambisia Amwoga v Super Bargains Glass & Hardware (Nku)  
Limited delivered on 10<sup>th</sup> May, 2013)**

**JUDGMENT**

1. In a judgment delivered on 16 May 2013, the trial Court awarded the Respondent general damages of Kshs 280,000/- (after factoring 30% contributory negligence agreed by the parties), lost earnings/diminished earning capacity of Kshs 240,000/- and special damages of Kshs 5,000/-.
2. The Appellant was dissatisfied with the award and on 10 August 2016 it filed a Memorandum of Appeal contending
  1. That the Learned Magistrate erred in law and in fact in awarding loss of earning capacity without supporting evidence on record.
  2. That the Learned Magistrate erred in law and in fact in making the award for loss of earning capacity when the same was not prayed for in the Plaintiff.
  3. That the Learned Magistrate erred in law and in fact by proceeding on wrong principles and/or misapprehending the evidence on record thus awarding an erroneous estimate of damages both under the head of general damages for pain and suffering and loss of earning capacity.
3. On 13 April 2017, the parties made oral submissions before the High Court and the Court reserved judgment to 6 July 2017.
4. However, in a ruling delivered on 31 May 2017, the High Court declined jurisdiction on the ground that the cause of action arose within an employment relationship and ordered the Appeal to be transferred to this Court.

5. When the Appeal was mentioned before this Court on 2 October 2017, the Court directed the parties to file and exchange submissions and in this regard, the Appellant filed its submissions on 23 October 2017 (the Respondent had filed his submissions on 23 January 2017).

6. The Court has given due consideration to the record/material placed before it.

### **Role of this Court on first Appeal**

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court will keep that interdict and the back of its mind while re-evaluating and analysing the evidence presented before the trial Court.

### **Whether Respondent pleaded for loss of earning capacity**

9. In the Plea filed before the trial Court, the Respondent pleaded thus

7. Further and consequent to the matters aforesaid the Plaintiff was in June, 2012 unlawfully summarily dismissed from work by the Defendant on grounds that he could not carry heavy items at the defendant's hardware shop using his partially incapacitated left hand. The Plaintiff has thus as a direct result of the accident herein lost his employment and/or has suffered diminished earning capacity. The Plaintiff remains unemployed to date and is unable to perform duties as a turn boy and hardware shop attendant, whereby he was earning Kshs 10,000 per month.

10. The Appellant's contention that the Respondent did not plead a head of claim for diminished earning capacity is therefore baseless and ground 2 of the appeal has no merit.

### **Evidence to support award of damages for loss of earning capacity**

11. In *Butler v Butler* (1984) KLR 225, an authority cited by the Appellant, the Court of Appeal stated and held that

A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.

12. The question therefore begs whether the Respondent presented evidence to bring himself within the principles as outlined in the *Butler* case.

13. While testifying, the Respondent stated that after the injury he was off work for about 1 month and that he could not do the work he was doing prior to the injury because his hand had not healed by time of hearing.

14. He also stated that he was not able to earn as much money as he used to earn before the injury and that the Appellant had as well put him on light duties.

15. The Respondent further produced a medical report by Dr. Wellington K. Kiamba which opined that due to the injuries, the Respondent could not lift heavy objects because of a markedly reduced function of the hand. The doctor assessed temporary disability of 2 months and permanent disability of 20%.

16. In the Court's view, the medical report presented before the trial Court and the Respondent's testimony that he was not working at the time of hearing because of the condition of the hand constituted sufficient evidence that his chances in the labour market had been reduced significantly.

## **Assessment of damages based on wrong principles**

17. The *Butler* case, cited by the Appellant set out some of the factors to be considered in assessing damages for loss of earning capacity as age, qualifications and disability of the Claimant.

18. The Respondent testified that he used to earn Kshs 10,000/- before the injuries and that he was 22 years old at the time of the accident. He had worked for about 2 years before joining the Appellant.

19. The trial Court considered the Respondent's wage of Kshs 10,000/-, the 20% permanent disability as assessed by the doctor and a multiplier of 10.

20. In my view, the trial Court did not apply the wrong principles as contended by the Appellant.

21. Before concluding, the Court wishes to note that the Appellant had in the oral submissions before the High Court indicated that it was not challenging the award of general damages for pain and suffering.

## **Conclusion and Orders**

22. The upshot of the foregoing is that the Court finds no merit in the Appeal herein and orders that it be dismissed with costs to the Respondent.

23. Considering that stay pending appeal had been granted on condition the decretal sum was deposited into a bank account in the names of the parties' advocates, the Court orders that such monies be released to the Respondent's advocate on record.

**Delivered, dated and signed in Nakuru on this 1<sup>st</sup> day of December 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant E.M. Juma & Ombui, Advocates

For Respondent Githiru & Co. Advocates

Court Assistants Nixon/Martin