



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CIVIL APPEAL NUMBER 11 OF 2015**

**BETWEEN**

**WONDERNUTS [K] LIMITED ..... APPELLANT**

**VERSUS**

**MAPENZI KAMBI MWAKALAMA .....  
RESPONDENT**

**[An Appeal from the Judgment of the Learned Principal Magistrate Mrs. A.M. Obura delivered on  
the 19<sup>th</sup> December 2011, in Kilifi Senior Resident Magistrate's Court Civil Suit Number 490 of  
2010]**

**BETWEEN**

**MAPENZI KAMBI MWAKALAMA ..... PLAINTIFF**

**VERSUS**

**WONDERNUTS [K] LIMITED .....DEFENDANT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*E.W.Njeru Advocates for the Appellant*

*J.A, Abuodha & Company Advocates for the Respondent*

**JUDGMENT**

1. The Respondent filed Civil Claim Number 490 of 2010 in the Senior Resident Magistrate's Court at Kilifi. She sought damages from the Appellant, her Employer, alleging she sustained injuries arising from an accident which occurred in the course of her employment. In a Judgment dated 19th December 2011, the Trial Court ruled in favour of the Respondent awarding her general damages at Kshs. 100,000, special damages at Kshs. 1,000, costs and interest. Liability was apportioned entirely against the Appellant.

2. Dissatisfied, the Appellant filed Civil Appeal Number 7 of 2012 at the High Court in Mombasa, setting

out the following Grounds of Appeal:

- a. The Learned Magistrate erred in law and fact in finding that the Respondent proved her case despite the contradictions in her evidence, the Plaintiff and the Doctor's Report.
- b. The Learned Magistrate erred in law and fact in awarding the Respondent damages without any prove of negligence.
- c. The Learned Magistrate erred in exercising her discretion wrongly by awarding excessive damages despite medical evidence showing minor soft tissue injuries.
- d. The Learned Magistrate erred in law and fact in failing to find the Respondent had the duty to take care of her safety and that she contributed to the accident by her negligence.
- e. The Learned Magistrate erred in law and fact in disregarding the Appellant's submissions on the law.

The Appellant prays the Court to uphold these Grounds, set aside the Judgment and allow the Appeal with costs to the Appellant.

3. The Appeal was transferred by the High Court to the Employment and Labour Relations Court on the 19<sup>th</sup> February 2015 according to the letter of the Deputy Registrar High Court dated 27<sup>th</sup> February 2015. The High Court record is not clear, as the handwritten transcripts indicate the file was transferred to the High Court in Malindi. Nonetheless the current Court took cognizance of the Appeal, registering it as Appeal Number 11 of 2015.

4. The Parties agreed to have the Appeal determined on the strength their Submissions which were confirmed to be on the record, at the last mention in Court on the 8<sup>th</sup> September 2015.

#### Appellant's Submissions

5. The Appellant submits the evidence given by the Respondent at the Trial was scanty. She stated she was injured while carrying a machine on the instructions of the Respondent. The machine fell on her feet injuring her because it was greasy, and she had not been provided with gloves. She did not show how the gloves would have prevented the injuries.

6. She stated the machine fell on her on her way back to the office, while on cross-examination, her evidence was that it fell on her as she stretched to pick a pipe range. The two versions indicated she was unsure on the occurrence and was inattentive while performing her duty. This destroyed her credibility. She did not show what she did to avoid the accident. She did not take reasonable precaution to avoid the accident. She should have been found to bear 100% or otherwise substantial liability. The finding by the Trial Court that the work system was unsafe was erroneous.

7. The Trial Court erred by awarding excessive damages. The Doctor saw the Respondent 1½ years after the accident and concluded the injuries had healed well, with no residual disability. The grant of Kshs. 100,000 as general damages was excessive. The Trial Court did not base its award on any decided cases. It did not fully analyze the Judicial Authorities availed to it, and would have arrived at a different decision had it done so. The Appellant urges the Court to adopt the same Judicial Authorities of ***Timsales Limited v. Daniel Karanja Bise [2010] e-KLR; Statpack Industries v. James Mbithi Munyao [2005] e-KLR; and Timsales Limited v. Stephen Gachie [2005] e-KLR***, and allow the Appeal.

#### Respondent's Submissions

8. The Respondent submits that she gave satisfactory evidence before the Trial Court on the occurrence of the accident; the negligence of her Employer; the injuries sustained; and the Trial Court found the Employer 100% liable, and correctly awarded general damages at Kshs. 100,000. The Respondent proved her case on the balance of probabilities. There was no contradiction in the Respondent's evidence, on the occurrence of the accident. She testified she was instructed to carry the machine from the workshop to the factory within the Appellant's premises. In the process, the machine fell on her legs and injured her. She did not say in her particulars of negligence that there were no protective gloves issued to her, or that this

default was the cause of the accident; she stated the machine was heavy, and therefore slipped and fell on her legs. She did not contradict herself in her evidence.

9. Liability was properly assigned to the Appellant at 100%. The Respondent testified Employees were not issued gloves and boots. These would have assisted in firming the grip on the machine she was made to carry. The Respondent faulted the Appellant for not availing to her a helper to carry the heavy machine. The Appellant had proposed the Court awards the Respondent general damages at Kshs. 50,000, while the Respondent herself proposed Kshs. 180,000. The Trial Court struck a middle-ground by an award of Kshs. 100,000. The Respondent prays the Court to dismiss the Appeal, with costs to the Respondent.

*The court Finds:-*

10. The Trial Court found and this is not disputed, that the Respondent was employed by the Appellant as a Casual Worker. She was assigned the role of crushing cashew-nuts. The machine she was using developed mechanical problems. She was asked to take it to the workshop for repair. It weighed 5kgs. The machine was repaired. While ferrying it back to her workstation, it slipped off her fingers and fell on her feet. She was not supplied with gloves and boots. The work she was performing (i.e. taking the machine for repair) was not her normal work.

11. There was medical evidence which was accepted by the Trial Court, indicating the Claimant suffered 2 cm cut wound over the right and left Achilles tendons. These were characterized as soft tissue injuries, which have fully healed.

12. There was no discernible contradiction in the evidence of the Respondent before the Trial Court on the occurrence of the accident. Her statement on cross-examination that the machine fell while she stretched her hand to pick the pipe range, does not seem to this Court, to contradict her statement that the machine fell on her way back after it was repaired. The fundamental issue was that she was made to carry the machine to the workshop for repair so as to continue with production; she carried the machine because the *fundi* refused to carry it; the machine had sharp blades at the front and the back; and was greasy, making it hard to grip. The Respondent gave satisfactory evidence showing the accident occurred as concluded by the Trial Court, and there was no contradiction which would create doubt in the mind of the Court, on the occurrence of the accident.

13. The Employer has a common law duty as well as a statutory duty to ensure the safety of its Employees. Where an Employer has engaged Casual Employee, it is the responsibility of the Employer, to ensure the Employee is informed and educated about safe and healthy work environment. The principle in ***Statpack Industries v. James Mbithi Munyao*** [citation above] that the Employer's common law duty to take all reasonable steps to ensure Employee's safety should not mean the Employer baby-sits or constantly watches the Employee, must be placed in its proper context in situations where the Employee is engaged on casual terms. The law places an obligation on the Employer to ensure such Employees are properly trained, instructed and supervised while operating machines and other tools of their trade. The nature of casual engagement does not give Employers adequate opportunity to educate their Casual Employees on workplace health and safety. There must be a higher degree of care imposed on the Employers in casual arrangements, than would be necessary in cases of regular Employees. Casual Employees must constantly be watched.

14. The Trial Court concluded correctly that the Appellant had failed to provide the Respondent with a safe working environment. She was compelled to ferry her work machine to and fro the workshop. It was not even her role to attend to the machine when broken down. She was not provided with other means of transport, and the *fundi* offered no assistance. She handled the machine with bare hands. She was not wearing protective gloves or boots. If she had been provided with these, and was not wearing them at the time the accident occurred, there would appear to have been failure in the supervisory role of the Employer over the Casual Employee. It is insufficient for the Employer to argue he/she has provided protective gear to the Employee; the Employer must keep close supervision on the Employee to ensure such gear is adorned, particularly in cases of Casual Employees who do not have the protection of regular

employment contracts. DW1 testified he was the Respondent's Supervisor; he was present when the accident occurred; the Respondent was provided with gloves; she refused to wear the gloves; and DW1 allowed her to work without the gloves because she refused to wear them. The Supervisor acted negligently, if his evidence that he allowed the Respondent to work without gloves, is to be believed. He should simply have ordered her to cease working and consider disciplinary measures against her thereafter. The Trial Court was not convinced on the truthfulness of DW1's evidence, stating DW1 offered no evidence that the Respondent was at fault. The Court termed DW1's evidence on the gloves, as a mere 'claim.' The ground that the Trial Court awarded damages without proof of negligence has no merit.

15. There was nothing done by the Respondent, or which she omitted to do, which would have justified apportionment of liability to her. She was compelled to perform a task which was not hers. She was not provided with a safe working environment. 100% liability on the Employer was just and proportionate.

16. In the Court of Appeal decision in *Kemfro Africa Limited t/a Meru Express Service & Another v. A.M. Lubia & Another [1982-1988] 1 KAR 777*, the Court ruled the Appellate Court can interfere with the award of damages by the Trial Court if:

- a. The Trial Court in assessing damages took into account an irrelevant factor, or left out a relevant one.
- b. The amount is so inordinately low or so inordinately high, that it must be wholly erroneous estimate of the damage.

17. The Appellant has not demonstrated the presence of any of these two grounds in the decision of the Trial Court, to justify the setting aside of the Trial Court's decision. There were decided cases cited by the Parties in their submissions, which must have guided the assessment of damages: in *Nairobi H.C.C.C Number 1026 of 1991 between Salima Abdi v. Vincent Achieng Ogutu*, the Plaintiff sustained soft injuries with no residual incapacity and was awarded Kshs. 75,000 in general damages; and in *Nairobi H.C.C.C Number 3295 of 1987 between Joel Edwards Odhiambo v. Wilson Mboya Opee & Another*, a general damages award of Kshs. 70,000 was made for soft tissue injuries. The Trial Court complied with the rule in *Court of Appeal Civil Appeal Number 251 of 1996 between Cecilia Mwangi v. Ruth Mwangi* that, awards of damages must be within the limits set by decided cases. These cases though, were decided some years before the case of *Mapenzi*, and the money value cannot have remained the same. The Appellant submitted Kshs. 50,000 would have sufficed, while the Respondent sought Kshs. 180,000. The sum of Kshs. 100,000 awarded to her, was sufficient, fair, proportionate seen against her injuries.

18. There was no judicial obligation imposed on the Trial Court to analyze every Judicial Authority relied on by the Parties in their argumentation. The duty of the Court was to read those authorities and apply the relevant principles to the facts in dispute, while exercising its judicial mind intelligently, aware that the law does not stay the same. There was no persuasion that the Judgment of the Trial Court departed from any of the relevant principles developed in the availed Judicial Authorities. ***The Appeal has no merit and is dismissed with costs to the Respondent.***

Dated and delivered at Mombasa this 4<sup>th</sup> day of December 2015

James Rika

Judge