



**Tile & Carpet Center Warehouse v Okello (Civil Appeal
74 of 2019) [2022] KECA 5 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 5 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 74 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

TILE & CARPET CENTER WAREHOUSE APPELLANT

AND

DAVID ODHIAMBO OKELLO RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Ndolo, J.) dated 9th April 2019 in Mombasa ELRCA No. 14 of 2017)

JUDGMENT

1. The respondent herein filed suit against the appellant in RMCC No. 375 of 2015, pleading that at all material times he was employed by the appellant. On or about 3rd October 2013 while he was on duty making a water tank, a machine cut his hand and finger thereby causing him severe injuries loss and damages.
2. The respondent averred that the accident was occasioned by the negligence on the part of the appellant in failing to provide safety work systems, protective gear and/or equipment. He therefore prayed for judgment against the appellant for general damages, special damages at Kshs.2,934/=, costs and incidentals to the suit, interest at court rates and any other relief.
3. In the course of proceedings, the parties entered a consent on 29th May 2017 that liability be apportioned at 30% on the part of the respondent and 70% on the appellant, and that two medical reports on the respondent be admitted as exhibits. The trial magistrate observed that the medical report by Dr Adede concluded that the respondent sustained 4% permanent disability due to amputation and defective right hand power grip while the report by Dr Noorani put the permanent disability at 2%. On quantum, the trial magistrate awarded general damages of Kshs.300,000/= for pain and suffering, and Kshs.900,000/= for loss of earning capacity; and special damages of Kshs. 2,000/=, less 30% contribution, leaving a balance of Kshs.841,000/=.



4. Dissatisfied with the judgment, the appellant filed an appeal ELRCA No. 14 of 2017 on the grounds that the trial magistrate erred by assessing damages that were manifestly excessive and incomparable with current awards for similar injuries; in failing to apply the principles applicable in assessment of damages under loss of earning capacity; in failing to take into account relevant factors in evaluating the evidence on record on quantum; and by awarding damages for loss of earning capacity which damages were neither pleaded nor prayed for.
5. In her judgment, the learned judge noted that assessment of damages is a discretionary exercise which should not be interfered with except in exceptional circumstances. On the damages for pain and suffering, the learned judge held that none of the doctors who produced the two medical reports was called for examination and the learned magistrate could only rely on their opinions as recorded. She found no reason for the taken by the magistrate to adopt the opinion of Dr Adede and not Dr Noorani, but did not find the award of Kshs.300,000/= for pain and suffering excessive.
6. Regarding loss of earning capacity, the learned judge held that there was no legal basis for the appellant's proposition that the trial magistrate erred in making an award under this head because it was not specifically pleaded, holding that loss of earning capacity is an integral part of general damages, citing *William J Butler v Maura Kathleen Butler* [1984] eKLR. She also held that the multiplier employed by the trial court was reasonable in the circumstances. The learned judge found no reason to interfere with the award and dismissed the appeal.
7. Still dissatisfied, the appellant filed the present appeal seeking to review and/or set aside the superior court's finding on quantum. The appeal is premised on the grounds that the learned judge erred in law as follows:
 - a) By assessing damages that were manifestly excessive and incomparable to the current judicial awards for analogous injuries.
 - b) In failing to appreciate and apply the principles applicable in assessment of damages for loss of earning capacity.
 - c) That the award for loss of earning capacity was so inordinately high as to represent an entirely erroneous estimate and must have acted on wrong principles of law.
 - d) In awarding damages that were not specifically pleaded, prayed for, or proven.

The appeal proceeded by way of written submissions.

8. Counsel for the appellant made reference to *William J Butler v Maura Kathleen Butler* [1984] eKLR for the principles to be considered in a claim for loss of earning capacity, where the court held that loss of earning capacity may, and should be included as an item within general damages but where it is not so included, it is not improper to award it under its own heading. Counsel also cited *Mumias Sugar Company Ltd v Francis Wanalo Kisumu CA No. 91 of 2003* for the proposition that loss of earning capacity can be a token, modest, or substantial award depending on the circumstances of each case; that there is no formula for assessing loss of capacity but the correct principles must be applied and the relevant factors taken into account to ascertain the real or approximate financial loss suffered by the plaintiff as a result of disability.
9. It was also submitted for the appellant that the permanent incapacity of 2% - 4% suffered by the respondent is too negligible to warrant an award for loss of earning capacity, as the incapacity would not negatively impact the respondent's ability to earn. Counsel clarified that the respondent's little finger was halfway amputated and not entirely amputated, hence incapacity was negligible. Counsel also submitted that the formula adopted by the trial court assumes that the respondent would not be



- able to earn at all for 15 years; and that if any award was to be made using the formula, it should have been subjected to the 2% incapacity.
10. Further, it was submitted that in assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. Counsel made reference to a number of cases to illustrate the awards made for injuries comparable to the present case: *Blowplast Ltd v Julius Ondari Mose* [2018] eKLR}} – where the court awarded general damages of Kshs.600,000/= and an award for loss of earning capacity of Kshs.400,000/=.
 11. The plaintiff in that case suffered amputation of the middle and index finger of the right hand and permanent incapacity assessed at 25%; *Diamond Transporter Limited & another v Joseph Kioko Mwikali* [2018] eKLR – where the High Court upheld an award of Kshs.350,000/= general damages, and no award made for loss of earning capacity whereby the appellant suffered a traumatic amputation of the left index finger; and *Pietro Canobbio v Joseph Amani Hinzano* [2016] eKLR where the High Court set aside an award of Kshs. 1,800,000/= for loss of earning capacity and instead awarded Kshs.750,000/= in general damages, even though the plaintiff had suffered 18% permanent incapacity due to loss of fingers.
 12. Counsel for the respondent submitted that the respondent's injuries are not in dispute as both medical reports concluded that the Plaintiff suffered a traumatic amputation of the little finger of his predominant right hand. That the disability was assessed at 2% and 4% by Dr Noorani and Dr Adede respectively, and Dr Adede's report also concluded that the respondent had a defective right hand power grip as a result of the amputation.
 13. Counsel submitted that from the memorandum of appeal and submissions filed by the appellant, the appellant seems to be challenging the award of loss of earning capacity and does not challenge the amount awarded as general damages. Counsel submitted that the appellant has not demonstrated how the principles in the Butler Case (supra) were misapplied by the superior court contending that the superior court actually appreciated the principles in the Butler decision.
 14. It was further submitted that when comparable awards are taken into account, the amount of Kshs.900,000/= awarded as loss of earning capacity is not manifestly high. Counsel relied on the case of *Elgeyo Saw Mills (K) Ltd v Alfred Kipchirchir Rotich* [2016] eKLR where the respondent suffered the amputation of his right thumb and the court awarded general damages of Kshs.300,000/= and Kshs.914,190/= as damages for loss of earning capacity. He contended that the 2018 decisions referred to by the appellant were not applicable as at the time when the trial court was making the award that it did.
 15. Regarding ground 4 which related to an award not pleaded or proven, counsel noted that the appellant had not submitted on the ground to enable the respondent understand the basis of the said ground.
 16. The mandate of this Court in a second appeal is to confine itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR. This Court in *Stephen Muriungi & another vs. Republic (1982-88) 1 KAR 360* cited with approval the case of *Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511* where it was held that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.



17. From the pleadings and submissions of the appellant, the central issue appears to be the appropriateness of the award under the head of loss of earning capacity. The appellant argues that the award was inordinately high and were not specifically pleaded, prayed for, or proven. Whether the learned judge erred in upholding the award for loss of earning capacity.
18. The principles guiding the award of damages by a court were set out in the case of *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where this Court held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question.”
19. Regarding when the court may interfere with an award of damages on appeal, in the case of *Jane Chelagat Bor vs. Andrew Otieno Oduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, this Court held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
20. Loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. See *CECILIA W. MWANGI & another v RUTH W. MWANGI* [1997] eKLR. In *S J v Francesco Di Nello & another* [2015] eKLR, this Court held that: Loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *FAIRLEY V JOHN THOMSON LTD* [1973] 2 LLOYD'S LAW REPORTS 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”
21. It follows therefore that the appellant's contention that the award should be set aside for not being specifically pleaded is not sustainable, as the respondent prayed for general damages. The remaining issue is whether the damages assessed for loss of earning capacity was inordinately excessive considering the extent of the injuries suffered by the respondent.
22. Based on the medical evidence, the trial court was convinced that the amputated finger would make the respondent not perform some of his duties. The specific impact of the respondent's injuries was stated as permanent partial disability due to amputation and defective right hand power grip. The extent of the disability/incapacity was stated as 4% in Dr Adede's report and 2% in Dr Noorani's report.
23. Given the finding that the permanent disability was fixed at 4% at most, the learned judge ought to have questioned the trial court's assessment of damages for loss of earning capacity on an assumption of complete loss of earning capacity, instead of diminished loss of earning capacity without sufficient proof to support this approach. No evidence was led to demonstrate the extent to which the



amputation and defective right hand power had diminished the respondent's ability to perform his duties, or indicating that the respondent was unable to find work in a similar role which offered similar pay due to the injuries suffered.

24. In *James Mukatui Mavia v M. A. Bayusuf & Sons Limited [2013] eKLR*, this Court held as follows on the method of assessing loss of earning capacity:

“The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life.”

25. The fact that the respondent's injuries had an impact on his earning capacity cannot be overlooked, especially considering the nature of the respondent's work. However, the evidence on record does not justify the trial court's assessment of damages for loss of earning capacity and this leads to the conclusion that the award was excessive. With regard to awards for comparable injuries, the only case among the three relied on by the appellant that directly deals with loss of earning capacity is *Blowplast Ltd v Julius Ondari Mose [2018] eKLR* where the court reduced an award of Kshs.1,000,000/= as damages for loss of earning capacity to Kshs.400,000/= where the respondent suffered an amputated distal phalanx, fracture of the right index finger, and loss of dexterity/grip of the right hand; and where disability was fixed at 25%. The respondent relied on the case of *Elgeyo Saw Mills (K) Ltd v Alfred Kipchirchir Rotich [2016] eKLR* where damages for loss of earning capacity assessed at Kshs.914,940/= was not interfered with by the court on appeal. In that case, the respondent's right thumb was amputated together with its metacarpal bone and disability fixed at 25% and 50% by two doctors. What distinguishes that case from the present one is that evidence was also led to the effect that the respondent could barely use his right hand except to eat.
26. In the present case, the only evidence of the impact of the injuries on the respondent's ability to work are the medical reports. The respondent suffered an amputation of the distal phalanx of the right little finger and a defective right hand power grip. The disability/incapacity was fixed at 4% and 2%. Based on this evidence, and without further evidence regarding the practical use of the respondent's right hand, it would be reasonable to assess the respondent's diminished earning capacity at not more than 20% of his original earning capacity. Therefore, accepting the trial court's multiplier of 15 years and an earning of Kshs.5,000/= per month, the suitable award for loss of earning capacity ought to be $Kshs.5,000 \times 20/100 \times 12 \times 15 \text{ years} = Kshs.180,000/=$.
27. The appellant has not challenged the other categories of damages and so they shall remain as assessed by the trial court because in our view, the awards were not excessive.
28. In the end this appeal is allowed by reducing the award of diminished earning capacity from Kshs.900,000/= to Kshs.180,000/=. The final figure shall therefore be Kshs.482,000/= less 30% leaving a balance of Kshs.337,000/=.
29. Each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU, FCIArb



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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

