



**Devki Limited v Barongo (Appeal E162 of 2024)
[2025] KEELRC 2632 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2632 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E162 OF 2024
NJ ABUODHA, J
SEPTEMBER 26, 2025**

BETWEEN

DEVKI LIMITED APPELLANT

AND

OKELO ONYIEGO BARONGO RESPONDENT

(Being an appeal from the Judgment and decree of Hon. W. Ngumi (SPM), Gatundu delivered on 18th March, 2024 in Gatundu CMCC No. 153 of 2017 Okele Onyiego Barongo vs. Devki Steel Limited)

JUDGMENT

1. Through the Memorandum of Appeal dated 31st May, 2024 the Appellant appeals against the Judgement of Hon. W. Ngumi (SPM), Gatundu delivered on 18th March, 2024 in *Gatundu CMCC No. 153 of 2017*. The Appeal was based on the grounds among others that:
 - i. The learned trial Magistrate erred in law and in fact in her finding that the Appellant was fully liable for the accident.
 - ii. The learned trial Magistrate erred in law in and fact in awarding general damages for loss of amenities when the same was not pleaded, prayed for or evidence supplied to prove an award under the heading of loss of amenities.
 - iii. The learned trial Magistrate erred in law, and in fact, in awarding general damages for loss of amenities when there was no evidence present to prove that the Respondent had lost his ability to earn an income.
 - iv. The learned trial Magistrate erred in law in adopting a multiplier of 20 years without factoring in the vicissitudes of life .in her computation of general damages for loss of future earning capacity when the same was not pleaded.



- v. The trial magistrate erred in law and in fact in awarding manifestly excessive and undeserved general damages of Kshs. 1,500,000 for pain suffering and loss of amenities.
 - vi. The trial magistrate erred in law and in fact in awarding manifestly excessive and undeserved general damages of Kshs. 2,400,000 for loss of future earning capacity.
2. The Appellant therefore prayed that the appeal be allowed and the judgment of the trial court be set aside and the costs of the appeal be awarded to the appellant.
 3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's Advocate Mr. Njoroge submitted among others that the allegations by the appellant that he pleaded for special damages for future medical expenses was false. Counsel contended that it was trite law that courts have no power to grant a prayer not specifically pleaded in the plaint. In this regard counsel relied on the case of *Caltex Oil (Kenya) Ltd v Rono Limited* [2016] eKLR. In this case the respondent in the plaint dated 26th July, 2017 did not plead and pray for loss of amenities. This failure was critical as it denied the appellant a chance to demur in its defence.
5. On the issue of computation of damages, counsel submitted that it was trite law that the estimate of prospective loss must be based on facts as was held in the case of *Nathan Nyambu Maghanga v Benard M. Wanjala & Another* [2016] eKLR where the court held that lost and future earnings are specific damages that must be specifically pleaded and proved.
6. On the question of setting aside the trial court's judgment counsel relying on the case of *Kemfro Africa Ltd t/a Meru Express Service [1976] & Another v Lubia* [1985] KECA 137 (KLR) submitted that the court will not interfere with the trial court's award on quantum of damages unless the appellant demonstrates that the trial court in assessing damages took into account irrelevant factors, or left out relevant facts and that the amount awarded was inordinately low or high that it must have been an erroneous estimate. Counsel further submitted that the law on assessment of damages was stated in the case of *Kigaragari v Aya* Civil Appeal No. 85 of 1993 and reiterated in the case of *Kimotho & Othman v Vesters & Another* [2002] KLR1. The award should be within the limit set by decided cases and limit which can be afforded by Kenyans and further that inflation should be taken into account.
7. In conclusion counsel submitted that the appellant had demonstrated that the trial magistrate erred in law and fact in awarding general damages for loss of amenities when the same was not pleaded and that the award for general damages for pain and suffering was exaggerated. Consequently the appellant prayed that the appeal be allowed.

Respondent's Submissions

8. Counsel for the respondent Ms. Kasina on the other hand submitted that there was no evidence before the trial court that the respondent occasioned the accident. Counsel submitted that on the date of the hearing, the appellant did not appear despite the fact that they were served leading to the matter proceeding for hearing ex parte to conclusion. According to counsel, a party who fails to call any witnesses to testify or produce any evidence at the trial cannot fault the court on finding that they are liable since the testimony of the claimant remained uncontested. Ms. Kasina relied on the case of *Linus Ng'ang'a Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR where the court stated that:

“...although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence



render the plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim unsubstantiated..."

9. On the issue of pain and suffering, Counsel submitted that the trial Court awarded the respondent Kshs. 1,500,000/- as general damages for pain and suffering and loss of amenities. According to counsel, it was not in dispute that the respondent suffered severe injuries. The particulars of the injuries were supported by the treatment notes from Kamunga Medical Clinic and medical report from Dr. Cyprianus Okere. As per the medical report, it was clear that the respondent had sustained electric burns on both hands, loss of consciousness for some time and paresis of the left hand. The doctor classified the injuries as harm with a degree of permanent incapacity at 50%.
10. Ms. Kasina further submitted that before the trial for an award of Kshs. 2,500,000/- and relied on the cases of *Patrick Kithaka Kivuti v John Mwangi* [2018] eKLR, *Barchia Leonard Mbaabu & Another v Angeline Ngesa Rambim* [2019] eKLR. It was Ms. Kasina's contention that the injuries sustained by the plaintiff in the cited authorities were comparable to the injuries sustained by the respondent. Counsel further relied on the case of *Mutua Kaluku v Muthini Kiluto* [2018] eKLR where the court stated:

“...I am guided by the general principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amount of the award in previous cases in which the injuries appear to have been comparable and is adjusted in the light of the fall in the value of money since such awards were made...”
11. From the above cited authorities, counsel submitted that the trial magistrate did not err in awarding in awarding the respondent Kshs. 1,500,000/- as general damages. On the issue of loss of future earning capacity, counsel submitted that the principles to be applied were settled in the case of *Butler v Butler* [1984] KLR 225. It was not in doubt that the respondent sustained severe injuries that resulted in him being unable to perform his duties as he used to. Counsel further submitted that in the case of *Charles Musau Munguti v Doshi & Co. Ltd* Civil Appeal No. 373 of 2005 the Court held that once future medical expenses are pleaded and proved through a medical report, the court must make a pronouncement on the same.
12. In conclusion, counsel submitted that on the evidence before the court, the magistrate applied the correct principles of law and facts in awarding loss of future earning capacity

Determination.

13. The Court appreciates perfect rendition by both counsel on the applicable principles in assessing damages for personal injuries and the circumstances under which this court as an appellate court will interfere with the decisions of a trial court. The court thanks counsel for their industry. At the risk of overkill, the Court stated that the principles which guide it in an appeal from a trial court are now more or less well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

14. As noted in paragraph 13 above and as was held in the above cited case, this appeal revolves around the question whether the trial court erred in awarding the claimant damages for loss of future earnings and whether the quantum awarded by the trial court was excessive in the circumstances. The respondent has contended that the award was reasonable and consistent with previously decided cases on comparable injuries and further that the award on loss of future earnings though not directly pleaded in the plaint, was evidenced by the medical report by Dr. Cyprianus Okere. Counsel in this regard relied on the case of *Charles Musau Munguti v Doshi & Co. Ltd* Civil Appeal No. 373 of 2005 where the Court held that once future medical expenses are pleaded and proved through a medical report, the court must make a pronouncement on the same.
15. The trial Court (Hon. W. Ngumi) had the benefit of listening to evidence and observing the demeanour of witnesses and came to the decision, the subject of the present appeal. The Court acknowledges that an appeal to this court from a trial by the magistrate’s court is by way of retrial. However in exercising this jurisdiction, the court must guard against acting whimsically and replacing its view of the judgment it could have reached if it tried the matter in the first instance with the finding of the trial court. The decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it is clothed with jurisdiction to reevaluate the evidence and come up with its own findings.
16. The appellant while contesting the decision of the lower court on the assessment of the quantum, unlike the respondent, did not submit sufficient caselaw and ample evidence to support the assertion that the quantum of damages ought to have been assessed at Kshs. 150,000/-. The appellant further contested the award on loss of future earnings arguing that the same ought to have been awarded since the respondent never pleaded it. The Court however concedes the same may not have been directly pleaded but the respondent pleaded that he suffered severe injuries the particulars of which were supported by the medical report by Dr. Okere. Besides, it is noted that the appellant never attended the hearing to contest the allegations by the respondent. Going by the case of *Charles Musau Munguti v Doshi & Co. Ltd* Civil Appeal No. 373 of 2005 relied on by the respondent, once medical expenses are pleaded and proved through a medical report, the court must make a pronouncement on the same.
17. In conclusion the court finds the appeal without merit and hereby dismisses the same with costs.
18. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025

DELIVERED VIRTUALLY THIS 26TH DAY OF SEPTEMBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

