



REPUBLIC OF KENYA



**Kassam & Bros. Company Limited v Maina (Civil Appeal 91 of 2018)
[2023] KEHC 1204 (KLR) (Civ) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 91 OF 2018

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

KASSAM & BROS. COMPANY LIMITED APPELLANT

AND

BENSON MURAGURI MAINA RESPONDENT

(Being an appeal from the judgment and decree of Honourable E. Wanjala (Ms.) (Senior Resident Magistrate) delivered on 7th February, 2018 in Milimani CMCC no. 7255 of 2013)

JUDGMENT

1. Benson Muraguri Maina who is the respondent in this instance lodged a suit against the appellant vide the plaint dated 19th November, 2013 and sought for general and special damages plus costs of the suit and interest on the same for negligence and/or breach of contractual/statutory duty of care.
2. The respondent pleaded in the plaint that he was at all material times an employee of the appellant and that it was an implied term of the employment contract that the appellant would provide a safe work environment to the respondent and would not expose the respondent to any danger or risk while in the course of his employment.
3. The respondent pleaded in the plaint that between February 2010 and June 2013 while he was in the course of his employment he was exposed to fumes which he inhaled overtime, resulting in injuries and health complications, the particulars of which are set out in the plaint.
4. The respondent attributed his injuries to negligence and/or breach of the appellant's contractual and/or statutory duty of care, the particulars of which are also set out in the plaint.
5. The appellant entered appearance on being served with summons and filed its statement of defence dated 26th February, 2014 to deny the respondent's claim.



6. At the hearing of the suit, the respondent testified, while the appellant closed its case without calling any witnesses.
7. Upon close of written submissions, the trial court entered judgment in favour of the respondent and against the appellant in the following manner:
 Liability 50%:50%
 - a. General damages Kshs.250,000/=
 - b. Special damages Kshs. 2,000/=
 Total Kshs.252,000/=
 Less 50% contribution Kshs.125,000/=
 Gross Total Kshs.125,000/ =
8. Being dissatisfied with the judgment by the trial court, the appellant lodged this appeal against the respondent vide the memorandum of appeal dated 20th February, 2018 and put forward the following grounds of appeal:
 - i. THAT the learned trial magistrate erred in law and in fact by finding the appellant 50% liable for the accident.
 - ii. THAT the learned trial magistrate erred in law and fact by failing to take into account the submission on the issues of liability.
 - iii. THAT the learned trial magistrate erred in law and fact by failing to take into account the submission of the appellant in the lower court on the issue of quantum.
 - iv. THAT the learned trial magistrate erred in law and fact by awarding general damages that are inordinately high and manifestly excessive so as to amount to an erroneous estimate in the circumstances.
 - v. THAT the learned trial magistrate erred in law and fact by making a decision on quantum and liability that was against the weight of evidence.
 - vi. THAT the learned trial magistrate erred in law and fact by taking into account irrelevant factors in awarding general damages.
9. This court gave directions for the parties to file written submissions on the appeal. However, at the time of writing this judgment, only the submissions by the respondent had been availed for this court's reference.
10. The respondent on his part contends that he tendered sufficient evidence to prove his claim against the appellant, and which evidence was not challenged by way of any contrary evidence.
11. The respondent further contends that the trial court acted correctly in apportioning liability equally between the parties, in the presence of proof that the appellant was equally to blame for not ensuring that the working environment of the respondent was safe enough.
12. On quantum, it is the argument by the respondent that there is no reason to interfere with the assessment made on general damages for pain, suffering and loss of amenities, citing the case of Insight Management Consultants Limited v Dickson Gwaro Manduku [2022] eKLR where the court awarded the sum of Kshs.250,000/= on appeal, on account of respiratory injuries. The respondent has



also cited the case of *Capwell Industries Limited v Nerbert Njue Njuki* [2016] eKLR in which a sum of Kshs.251,000/= was awarded under the head of general damages for similar injuries.

13. Consequently, the respondent is of the view that the trial court considered all the evidence and material placed before it and arrived at a fair finding. The respondent therefore urges that the appeal must fail.
14. I have considered the submissions and authorities on record in respect to the appeal. This being a first appeal, I am enjoined to re-evaluate the evidence placed before the trial court. It is apparent that the appeal lies essentially against the findings on liability, specifically the apportionment of liability; and on quantum, specifically the award made under the head of general damages. I will therefore address the six (6) grounds of appeal under the two (2) limbs.
15. On liability, it was the testimony by the respondent before the trial court that he worked in a small room in the appellant's premises, where he would burn mortar with a pressure stove and that smoke would be emitted in an enclosed room without ventilation.
16. It was also the testimony by the respondent that they were not provided with the necessary protective gear or milk to mitigate the effects of the emissions.
17. In cross-examination, the respondent testified that he worked for the appellant from the year 2009 until 2013 and that though he felt unwell after some time, he continued to work in the same environment.
18. The respondent testified that he requested the supervisor to improve the working conditions, to no avail. He also testified that he used to smoke cigarettes previously.
19. During re-examination, the respondent restated that despite developing breathing difficulties, he continued to work in the same department in order to safeguard his job.
20. In her judgment, the learned trial magistrate reasoned that the respondent had brought sufficient evidence to show that he was at all material times an employee of the appellant; that he had sustained the injuries while in the lawful course of his employment and that he had further demonstrated that he was not provided with the requisite protective gear.
21. The learned trial magistrate also reasoned that since the respondent had admitted to having smoked about four (4) cigarettes per day, this factor also likely contributed to the deterioration of his health.
22. It is for the above reasons that the learned trial magistrate decided to apportion blame equally between the appellant and the respondent.
23. The law on negligence sets out the elements which ought to be proved for a claim of negligence and/or breach of statutory duty of care to stand. For this purpose, I make reference to Halsbury's Laws of England, 4th Edition at paragraph 662 on page 476 which reads as follows:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”
24. Upon my re-examination of the material and evidence tendered before the trial court, it is not in issue that the respondent was at all material times an employee of the appellant.
25. Upon my further re-examination of the material and evidence tendered at the trial, I agree with the reasoning by the learned trial magistrate that it is more plausible than not that the respondent sustained



- his injuries during the course of his employment with the appellant and while performing his ordinary duties.
26. The appellant on its part did not bring any credible evidence to contradict this position or to show that it had provided the respondent with the requisite protective gear to assist in the performance of his duties as well as to ensure his safety.
 27. Consequently and on the subject of negligence, I am satisfied that the respondent had proved on a balance of probabilities that his injuries were the result of negligence and/or breach of statutory duty of care by the appellant. I therefore concur with the finding of the learned trial magistrate that the respondent had proved his claim against the appellant to the required threshold.
 28. On the subject of apportionment of liability, upon my study of the record, I concur with the reasoning by the learned trial magistrate that the respondent had performed the same employment duties for a number of years and therefore ought to have been aware of the risks involved with the nature of work undertaken.
 29. Furthermore, whereas the respondent testified that he was not provided with any protective gear while working, he also made mention of his prior smoking habits, which in my view, likely exacerbated his condition and exposure to breathing complications.
 30. I am therefore satisfied that the respondent voluntarily assumed any risks that would befall him in the course of his employment and I draw reference from the provision of Section 13(1) of the *Occupational Safety and Health Act* No. 15 of 2007 which place the responsibility upon an employee to ensure his or her safety while at the workplace.
 31. In the premises, I am of the view that the learned trial magistrate acted correctly in apportioning liability in the manner he did. I see no reason to interfere with the finding on liability.
 32. On quantum, it is trite law that this court can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out by the court in the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*.
 33. As earlier noted, the appellant is challenging the award on general damages for pain, suffering and loss of amenities on the basis that the same is inordinately high and is based on irrelevant factors.
 34. On his part, the respondent suggested an award in the sum of Kshs.300,000/= and cited inter alia, the case of *Super Foam Limited v Dominic Njuguna Gaitho [2016] eKLR* in which the court awarded the sum of Kshs.150,000/= to a plaintiff with respiratory-related complications in the nature of pneumonitis and rhinitis, acute broncho spasm, coughing, sneezing and shortness of breath. The appellant by way of its submissions suggested the sum of Kshs.50,000/= as constituting a suitable award, with reference to the case of *Sokoro Saw Mills v Grace Nduta [2004] eKLR* where the court entered an award in the sum of Kshs.30,000/= for similar injuries.
 35. The learned trial magistrate awarded the sum of Kshs.250,000/= but did not cite any supporting authorities.
 36. The pleadings and medical evidence tendered show that the respondent sustained pulmonary tuberculosis coupled with shortness of breath, cough and difficulties in breathing. In the two (2) medical reports dated 30th October, 2013 and 27th April, 2015 prepared by Doctors GK Mwaura and PM Wambugu respectively, healing of the respondent's injuries was termed as being fair.



- 37. Upon considering the authorities cited by the parties, I find that while those cited by the respondent involve relatable injuries, they were decided a few years ago. I also find the above-cited authority of Sokoro Saw Mills (supra) by the appellant to entail injuries of a less severe extent in comparison to those sustained here.
- 38. Upon considering the case of Primarosa Flowers Limited v Diana Mwendu Kimani [2019] eKLR in which the court awarded the sum of Kshs.200,000/= under the same head at the instance of severe respiratory infections; and the recent case of Insight Management Consultants Limited v Dickson Gwaro Manduku [2022] eKLR cited in the submissions by the respondent on appeal and where the court awarded the sum of Kshs.250,000/= at the instance of respiratory complications, I am satisfied that the award made by the learned trial magistrate is reasonable in the circumstances and well within the range of comparable awards made. I therefore see no reason to interfere with the award made under the head of general damages.
- 39. On the issue of consideration of the submissions and authorities cited by the appellant before her, upon my perusal of the record and the impugned judgment, I did not come across anything to indicate that the learned trial magistrate overlooked or otherwise ignored the submissions and/or authorities relied upon by the appellant.
- 40. The upshot is that the appeal lacks merit. It is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....
J. K. SERGON
JUDGE

In the presence of:

..... for the Appellant
..... for the Respondent