



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 24 OF 2018

TEITA ESTATE LIMITED.....APPELLANT

-VS-

WELLINGTON MWAPWAKA MWAKUJA.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable

E. G. Nderitu, Senior Principal Magistrate, in SPMCC No. 181 of 2015 – Voi:

Wellington Mwapwaka Mwakuja v Teita Estate Limited delivered on 5th November 2018).

JUDGMENT

Background

1. The Appellant Teita Estate Limited was the Defendant in Voi SPM Court Civil Case No. 181 of 2015 where Wellington Mwapwaka Mwakuja sued praying for special damages of Kshs. 3000, general damages for pain and suffering and loss of amenities for loss of earning capacity and a diminished earning capacity as pleaded in paragraph 9 for loss of consortium and costs of the suit.

2. The suit arose out of injuries the Plaintiff/Respondent suffered on 22nd December 2014 when he slipped and fell on the wet floor which was caused by rain water flowing into the brush room through a damaged section of the roof. The particulars of injuries were that he suffered diffuse disc bulges on the lumbar spine, loss of lumbar lordosis due to muscle spasms, facetar arthropathy on L4/5 and L5/S. He also suffered loss of libido/erectile dysfunction.

3. The trial magistrate considered the evidence of the Plaintiff and defence witness and concluded that the Defendant was 100% liable for the injuries suffered by the Plaintiff/Respondent and awarded him a sum of Kshs. 800,000 for pain and suffering and loss of amenities. He was also awarded Kshs. 856,320 being damages for cost earning capacity. For special damages, the Plaintiff was awarded Kshs. 31,885.

4. The Appellant was aggrieved by the finding of the trial magistrate and filed memorandum of appeal dated 12th November 2018 on the grounds: -

- 1) That the learned Senior Principal Magistrate erred in law and fact in holding the Appellant 100% liable in negligence despite the evidence adduced before the court.
- 2) That the learned Senior Principal Magistrate erred in failing to take into consideration the evidence of the defence witness and the Plaintiff himself while arriving at his decision.
- 3) That the learned Senior Principal Magistrate erred wholly in disregarding the Appellant's counsel's submissions and the authorities submitted and proceeded to rely on his own views not backed by law.
- 4) That the learned Senior Principal Magistrate erred in awarding Kshs. 1,656,320 by way of general damages for pain, suffering and loss of amenities for the injuries sustained by the Plaintiff/Respondent which in the circumstances is inordinately high that it must be a wholly erroneous estimate of the loss and damage sustained by the Plaintiff/Respondent.
- 5) That the learned Senior Principal Magistrate erred in failing to analyse and synthesize the evidence before him and arrived at a completely erroneous and excessive finding.

5. The Appellant prayed that the appeal be allowed with costs and judgment of the Senior Principal Magistrate on liability and quantum be set aside and in any event reassess the proportion of liability issued and the amount of general damages awarded be removed and/or reduced taking into account the evidence adduced and the injuries sustained by the Plaintiff/Respondent. The Appeal was canvassed by way of written submissions.

6. This appeal was canvassed by way of written submissions. The Appellant's submissions dated 9th July 2020 were filed on 10th July 2020 and the Respondent's submissions dated 31st August 2021 were filed on 9th September 2021.

Appellant's Submissions

7. The Appellant's submissions were that DW1's evidence controverted the Plaintiff's assertions that no gumboots were provided. It was further submitted that the employer cannot be said to be liable in all circumstances regardless of the injury in question. That pursuant to Section 13 (1) (a) of the Occupational Safety and Health Act, the Respondent as an employee was also required to take reasonable precaution to ensure his safety at the work place while performing his duty and thereby bears liability.

8. The Appellant submitted that they had provided a safe working environment and continues to do so and that they had commenced repair of the leaking roof.

9. While submitting that comparable injuries attract comparable awards, the Appellants relied on the holding in *Jabane v Olenja*, Civil Appeal No. 2 of 1986 and said that the award of general damages in this case was inordinately high and that it must be a wholly erroneous estimate of the loss and damages sustained by the Plaintiff/Respondent.

10. It was argued that the court ought to have relied on Dr. Muthuri's opinion because he was a consultant orthopedic and trauma surgeon as opposed to Dr. Ndegwa's report was that of a general doctor.

11. The Appellants proposed that the Respondent be awarded Kshs. 500,000 as general damages less contributory negligence. On special damages, the Appellant pleaded that only 29,300 was proved and not 31,855 that was awarded.

Respondent's Submissions

12. The Respondents on their part submitted that the Appellant owed the Respondent various duties of care which included safe and clear working environment, provide proper working gear and warnings on the dangers at the workplace.

13. The Respondent argued further that he slid on the wet floor and hit the floor with his back as a result of rains which leaked through the worn out roof at the Appellant's premises and this was a clear breach of care on the Appellant as they did not provide a safe working environment as was held in the case of *Sokoro saw mills Ltd v Grace Nduta Nguji*, Nakuru High Court Civil Case No. 99 of 2003.

14. It was argued that the Respondent proved that the working environment was unsafe due to the slippery floor and dim due to sisal dust. That the Respondent proved negligence on the part of the Appellant as there were no signs to alert employees of the wet and slippery floor and that the fall would have been avoided as the Appellant provided gumboots with a grip.

15. The Respondent submitted that his evidence was not shaken and the Appellant corroborated the breaches he complained about.

16. The Respondent stated that the Appellant breached duty of care as a result of which he sustained severe injuries which left him with 50% disability and led to his retirement on medical grounds.

17. It was argued that the trial magistrate took into consideration severity of the injuries sustained while awarding Kshs. 800,000 for pain and suffering and that the award was not inordinately high because of an injustice on the Appellant but it was lower than what the Appellant expected for the injuries sustained.

18. The Respondent submitted that the award be sustained as it had not been shown that the trial court's assessment was erroneous or that the same was based on wrong principles.

Analysis and Determination

19. This is a first appeal and in the circumstances this Court has a duty to analyze and re-evaluate the evidence adduced in the superior court and to reconsider it to find out if it warranted the decision reached. As was stated in *Selle & Another v. Associated Motor Boat Co. Ltd.* [1968] 123 at p 126:-

“...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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.”

20. After considering the grounds of appeal, Records of the trial court and submissions, the issue for determination is whether the appeal has merits.

21. The evidence of the Respondent and the Appellant are in concurrence that the Respondent was an employee of the Appellant and that while carrying out his duties on 22nd December 2014, he slipped and fell on the wet floor of the Appellant's premises. The cause of wetness was the leaking roof of the Appellant's premises which DW1 admitted was under repair. Following these injuries, the Appellant referred the Respondent for treatment at Moi Voi Hospital as well as Metropolitan Diagnostics and MRI Centre Ltd where MRI and films were taken and his injuries were established.

22. Following the injuries suffered by the Respondent, he was allowed off duty for 69 days and he was officially retired on medical grounds on 27th August 2015. These undisputed facts make this court find that the trial magistrate properly found that the Respondent did not do anything to contribute to the accident as it was the responsibility of the Appellant to fix the leaking roof, provide protective gear and put signage within their premises as warnings where there was danger to caution the employees to trade carefully. DW1 who testified on behalf of the Appellant gave non-committal evidence and did not prove having complied with statutory duty of the Appellant. The finding that the Appellant was 100% liable is therefore upheld.

23. On quantum of damages whether inordinately high, the Respondent suffered 50% disability and as a result, he was retired on medical grounds. The Appellant did not dispute this fact. The Respondent could not have retired on medical grounds if he suffered only 8% disability. The award of general damages was in my view conservative save that the same can only be revised in the event that it was inordinately low or high or that the same was arrived at using wrong principles of law. I do find that the trial magistrate based her assessment of damages on the evidence before her and comparable awards.

24. In conclusion, this appeal does not have merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 17TH DAY OF FEBRUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Olwande Advocate for Respondent – No appearance

Mr. Wafula Advocate for Appellant – No appearance

Court: Notice of judgment to be conveyed by registry to advocates

HON. LADY JUSTICE A. ONG'INJO

JUDGE