



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.2 OF 2020**

**JUMAA NYAMAWI BAGALA.....APPELLANT**

**VERSUS**

**DOSHI & COMPANY (HARDWARE) LTD.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Hon. A. S. Lesootia, Principal Magistrate delivered on 16/12/2019 in Mombasa CMCC No.1831 of 2017)***

**JUDGMENT**

1. The Appellant **JUMAA NYAMAWI BAGALA** was the Plaintiff in **Mombasa CMCC Civil Suit No.1831 of 2017**. He sued the Respondent, **Doshi & Company (Hardware) Ltd** for not taking all the necessary precautions to ensure safety and not expose the Appellant to risk of damage and injury as its employee.
2. The particulars are that on or about **2<sup>nd</sup> February, 2015**, the Appellant as the Respondent's employee, in the course of his duties as a Machine attendant at **Miritini Factory**, received instructions to tighten a bolt around a levelling Machine and while doing so, the spanner slid which in turn caused the machine to slide and his right hand was caught in between the machine, a result whereof he was occasioned severe physical injuries.
3. The particulars of negligence were pleaded as *permitting the Appellant to work in a dangerous environment, failing to take any adequate precaution for the safety of the Appellant while he was inside the Company premises, exposing the Appellant to a risk of damage or injury which the Defendant knew or ought to have known, permitting the Appellant to work in circumstances which were inherently dangerous, hazardous and failing to provide a system of work.*
4. The Appellant is alleged to have suffered crush injury to the right upper limb with: Fracture of the humerus arm bone; Segmental fractures of the right radius and ulna forearm bones; nerve and muscle degloving tissue loss injury; and paralysis (neropraxia) of the right upper limb. (radio brachial palsy). The Appellant blamed the occurrence of the accident on the negligence/breach of contract of the Respondent's terms of employment and sought to be awarded general damages, special damages of KShs.2,000/= together with costs of the suit and interest.
5. In its **Statement of Defence** dated **20<sup>th</sup> November, 2017**, the Defendant/Respondent denied the claim in toto and admitted that it had the duty to take all reasonable precautions for the safety of the safety of the Plaintiff/Appellant. It averred that the Appellant also had a duty to take all necessary precautions for his own safety whilst he engaged upon the said work. The particulars of the negligence as attributed to the Plaintiff/Appellant were pleaded at paragraph 5 of the said Statement of Defence.
6. At the hearing, the Appellant called 2 witness while the Respondent, despite filing witness statements, did not call any witness to testify. The Plaintiff/Appellant testified as PW1 and stated that between **2013-2017**, he was employed at the Defendant's Company vide a **Contract** signed on the **2<sup>nd</sup> February, 2015** and was paid KShs.674/= per day. He stated he was involved in an accident while repairing a machine that had a loose bolt. He stated that as he was tightening the bolt with a spanner which slipped and the machine tripped, hence pulling his hand into the roller.
7. PW1 stated that he received treatment at Pandya hospital for one and half months whereby four metal implants were inserted in his right hand and he received skin surgery. He stated that he was also treated at the Coast General Hospital and Bomu Hospital where the metal implants were removed.
8. It was also PW1's testimony that he was examined by **Dr. Ajoni Adede** and issued with a receipt for KShs.2,000/=. He stated that he had not recovered since his right hand was not functioning. He testified that he is not the one who caused the accident. He asked the court to grant him costs of the suit and damages for injury sustained.

9. PW2 was **Dr. Ajoni Adede**, who examined the Plaintiff and prepared a report on **17<sup>th</sup> October, 2017**, in which he indicated his findings. He stated that he was paid Kshs.2,000/- to prepare the report. His findings were that the Plaintiff suffered a fracture and 3 main general injuries, giving the disability as assessed at 45%.

10. The Defendant did not call any witnesses and neither did it inform the court to adopt its witness statements as its evidence and as part of the trial court's records. The suit was thus, undefended.

11. This Court takes judicial notice that on the **13<sup>th</sup> November, 2018** from the trial court's proceedings, Hon. Lesooita A. S (SPM) downed his tools citing that the court lacked jurisdiction to handle Work Injury Benefit Claims (WIBA).

12. However, on **16<sup>th</sup> December, 2019**, the trial court proceeded to write a **Judgment** in **Mombasa CMCC Civil Suit No.1831 of 2017** awarding the Appellant; general damages of Kshs.600,000/=, special damages of Kshs.2,000/= and he was apportioned 15% liability of Kshs.90,300/=.

### **The Appeal**

13. Being dissatisfied with the Hon. Lesooita A. S (PM), the Appellant filed the

Appeal herein to challenge liability and the quantum of damages as assessed by the trial Magistrate. The Appeal raised the following grounds:-

**1. THAT the Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's evidence on the issue of liability and quantum.**

**2. THAT the learned trial magistrate erred in law and in fact by appropriating liability in the ratio of 85% : 15% with the Appellant bearing 15% despite there being no evidence to convert the Appellant's oral and documentary evidence.**

**3. THAT the learned trial magistrate erred in law and in fact by awarding and inordinately low quantum of Kshs.600,000/= as general damages.**

**4. THAT the learned trial magistrate erred in law and in fact in finding that the prayer for loss of earning capacity ought to have been specifically pleaded whereas the same can be awarded under the head of general damages which had been pleaded.**

**5. THAT the learned trial magistrate erred in law and in fact in failing to award the appellant loss of future earning capacity despite the same having been pleaded and proved.**

**6. THAT the learned trial magistrate erred in law and in fact by failing to substantially and adequately consider the Appellant's submission and further submissions.**

14. The Appellant prayed that his Appeal be allowed, the Judgment delivered by the learned Trial Magistrate on liability of the Appellant be set aside and this Court finds the Respondent 100% liable for the accident, that quantum be set aside and this Honourable Court be pleased to re-assess quantum of damages.

15. On **2<sup>nd</sup> November, 2020**, this Court gave that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The parties elected to rely on their said submissions as filed in their entirety.

### **Analysis and determination**

16. This being the first appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witness nor heard the evidence when parties were testifying to see their demeanour. (See the case of **Peters -vs- Sunday Post Ltd [1958] EA 424**).

17. I have carefully considered the pleadings and submissions filed herein. In this Appeal, the Respondent's in their submission have raised a question on the jurisdiction of this Court, which question I believe this Court should endeavour to determine first.

18. A perusal of the **Plaint** as filed before the trial court shows that the Appellant was injured in his normal duties as an employee for the Respondent. Clearly what this brings out is a relationship of employer-employee or between the Appellant and Respondent herein. Therefore, such a claim in law is provided for under the **Work Injury Benefit Act No.13 of 2007**.

19. The preamble of the **Work Injury Benefit Act No.13 of 2007** provides:

**"...An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes..."**

20. The **Constitution of Kenya** under **Article 162 (2)(a)** establishes the **Employment and Labour Relations Court** whose jurisdiction is provided for under **Section 12** of the **Employment & Labour Relations Court No.12 of 2011** that provides: -

[12] *Jurisdiction of the court*

(1) *the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including; -*

- a) disputes relating to or arising out of employment between an employer and an employee;*
- b) disputes between an employer and a trade union;*
- c) disputes between an employers' organization and a trade union's organization;*
- d) disputes between trade unions;*
- e) disputes between employer organizations;*
- f) disputes between an employers' organization and a trade union;*
- g) disputes between a trade union and a member thereof;*
- h) disputes between an employer's organization or a federation and a member thereof;*
- i) disputes concerning the registration and election of trade union officials; and*
- j) disputes relating to the registration and enforcement of collective agreements.*

21. Further, the **Employment Act No.11 of 2007** at **Section 87** provides as follows: -

[87] *Complaint and jurisdiction in cases of dispute between employers and employees*

1) *Subject to the provisions of this Act whenever –*

- (a) an employer or employee neglects or refuses to fulfill a contract of service; or*
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or*
- (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.*

2) *No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).*

3) *This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.*

22. The dispute herein is clearly that of the Appellant having injured himself at his place of work. There being an employer and employee relationship between the Appellant and Respondent, this matter squarely falls under the jurisdiction of the **Employment and Labour Relations Court** as per the provisions of **Section 12** and **87** of the **Employment Act No 11 of 2007**.

23. It is now trite that jurisdiction is everything and the same can be raised at any time even on Appeal as was stated by the Court of Appeal in the case of **Kenya Ports Authority –vs- Modern Holdings [E.A] Limited [2017] eKLR**: -

**We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:**

**“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself**

**- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”**

24. This being a work injury dispute that arose out of an employer and employee relationship, the same is one that falls under the jurisdiction of the **Employment and Labour Relations Court**.

25. In view of the above finding, this Court lacks jurisdiction to determine the Appeal herein as it falls under the jurisdiction of the **Employment and Labour Relations Court**, and direct that the same be transferred to the said court for hearing and determination.

It is so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF APRIL, 2021.**

**D. O. CHEPKWONY**

**JUDGE**