REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 284 OF 2018

SHIVAM ENTERPRISES...APPELLANT

VERSUS

WILSON NAKAYA AMAKABANE..RESPONDENT

(Being an appeal from the judgment and decree of Honourable E.K. Usui (Ms.) (Senior Principal Magistrate) delivered on 6th June, 2018 in MILIMANI CMCC no. 2471 of 2014)

JUDGEMENT

1. Wilson Nakaya Amakabane who is the respondent in this instance lodged a suit against the appellant vide the plaint dated 11 th March, 2014 and sought for general and special damages in the sum of Kshs.15,930/ together with costs of the suit and interest on the same.

2. The respondent pleaded in his plaint that he was at all material times an employee of the appellant and that sometime on or about the 24 th day of January, 2014 while working at the appellant's worksite at St. Scholastica Academy in the lawful course of his employment, a wooden flat form he was working from broke and fell down, causing him to sustain injuries which are particularized in the plaint.

3. The respondent attributed his injuries to negligence and/or breach of the appellant's contractual and/or statutory duty of care by setting out their particulars in paragraph 6 of the plaint.

4. The appellant entered appearance on being served withsummons and filed her statement of defence to deny the plaintiff's claim.

5. At the hearing of the suit, the respondent testified while the appellant summoned one (1) witness for the defence case.

6. At end of trial, the learned Senior Principal Magistrate entered judgment in favour of the respondent and against the appellant as follows:

Liability	**100%**
a) General damages	**Kshs.400,000/=**
b) Special damages	**Kshs. 2,000/=**
Total	**Kshs.402,000/=**

7. Being aggrieved by the trial court's finding on both liability and quantum, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 25th June, 2018 and amended on 6th July, 2018 setting out the following grounds:

i. THAT the learned trial magistrate erred in law and in fact in finding that the respondent was an employee of the appellant.

ii. THAT the learned trial magistrate erred in law and in fact in finding that the appellant's liability was 100%.

iii. THAT the learned trial magistrate erred in law and in fact in finding that the appellant was solely responsible for the respondent's accident and injury.

iv. THAT the learned trial magistrate erred in law and in fact by awarding general damages of Kshs.400,000/= to the respondent.

> ***v. THAT the learned trial magistrate erred in law and in fact by failing to consider all the evidence adduced and submissions made by the appellant.***

8. This court gave directions that the appeal be canvassed by written submissions. In its submissions on liability, the appellant argued that the trial court erred in finding that the respondent was its employee at all material times in the absence of any supporting evidence.

9. The appellant also argued that the respondent was never its employee and further argued that the evidence of its employees was tendered at the trial for consideration by the trial court.

10. It is the submission of the appellant that in any event that the respondent did not adduce any evidence to link the injuries sustained to negligence on its part.

11. On quantum, it is the submission of the appellant that the trial court acted on wrong principles of law and misapprehended the facts presented before it. The appellant therefore urged this court to set aside the award given to the respondent.

12. To buttress its point, the appellant cites the case of **Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR** where the court held thus:

> ***"On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler v Butler (1984) KLR 225."***

13. In reply, the respondent submits that the trial court arrived at a proper decision on both liability and quantum. More particularly, the respondent submits that he had brought reasonable evidence to show that he was employed by the appellant at all material times and that he was working at the site in question on the material date.

14. The respondent argues that in the absence of any contradictory evidence, the trial court acted correctly in finding the appellant fully liable for the injuries he sustained.

15. In respect to quantum, the respondent urged this court to uphold the award made by the trial court upon finding that there was no error of principle in arriving at the same.

16. I have considered the rival submissions and authorities cited on appeal. This being a first appeal, I am required to re-evaluate the evidence placed before the trial court.

17. It is noted that the appeal is against both liability and Quantum. The appellant has specifically challenged the award made under the head of general damages for pain, suffering and loss of amenities.

18. On liability, the respondent in his oral evidence before the trialcourt adopted his signed witness statement and testified that on the material day, he was assigned the duty of painting the site by the supervisor named Nathan. The respondent testified that he worked as a casual labourer and that he was not issued with a pay slip but was paid in cash.

19. The respondent stated in his evidence that he and a co-worker named Michael Kioko fell from the third floor while painting on the material date and that he therefore blamed the appellant for the injuries sustained.

20. The respondent further stated that he had previously requested Nathan to provide him and his colleague with suspension belts but this was not done.

21. In cross-examination, the respondent gave evidence that he was employed at the site and that the building in question does not belong to the appellant but that the appellant only supplied the paint.

22. The respondent further gave evidence that he found a wooden ladder at the site and used it, though he did not know who had provided it. That this is the ladder that gave way, leading to his fall and injuries.

23. In re-examination, the respondent stated that he worked for the appellant and that a Mr. Shivan who is the owner of the appellant company visited the site on occasion to check on the progress of the work done.

24. Yogesh Patel who was DW1 stated that the appellant manufactures and sells paints to customers, including St. Scholastica Academy.

25. The witness stated that he does not know anyone by the name Nathan and that the respondent was never an employee of the appellant. The witness further stated that the appellant does not employ persons on casual basis; rather, its employees are either on contractual or permanent basis.

26. The above was reiterated in cross-examination save to add that the appellant would ordinarily sub-contract some of its employees, which employees would not be included in the payroll.

27. The learned trial magistrate in arriving at her decision reasoned that the evidence tendered by the respondent was credible since the defence witness had stated that there is a company that hired workers on its behalf and that it was in charge of the paint work. The learned trial magistrate was therefore satisfied that the respondent had proved that he was among the persons employed to undertake the paint work at the site.

28. Upon re-evaluating the evidence tendered before the trial court, I note as the learned trial magistrate did, that the evidence tendered by the respondent regarding his employment was more plausible than that tendered by the appellant.

29. While I note that the respondent did not call any additional witnesses, I am convinced that he brought credible evidence to show that he was working at the site on the material date under the instruction of the appellant, whether directly or through a sub-contract.

30. It is also apparent from the evidence adduced that the respondent was injured while in the course of his employment and while performing his employment duties and there is nothing to show that the respondent was provided with the necessary protective gear.

31. Going by the evidence set out hereinabove, I am satisfied that the learned trial magistrate arrived at a proper finding that the respondent had proved his case on a balance of probabilities.

32. Nonetheless, upon re-evaluating the evidence tendered before the trial court, I established that the respondent had performed similar jobs before and therefore ought to have been aware of the risks involved while using a fragile ladder especially given that he was working from the third floor of the site according to his testimony.

33. Notwithstanding the oral testimony of the respondent that he had requested for a suspension belt from Nathan on the material date, the respondent also made mention in his testimony that he opted to use a ladder he had picked on site and which ladder turned out to be fragile.

34. In my view, in so doing he voluntarily assumed any risks that would befall him in the course of his employment duties. I draw reference from the provisions 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.

35. For the foregoing reasons, I am of the view that the learned trial magistrate ought to have apportioned liability. To this extent, I find that there is reason to interfere with the finding on liability by apportioning the same in the ratio of 90:10 in favour of the respondent.

36. On quantum, 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 **Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR** cited in the appellant's submissions.

37. As earlier noted, the appellant is challenging the award for the reasons that the learned trial magistrate applied wrong legal principles.

38. The pleadings and medical evidence tendered show that the respondent sustained soft tissue injuries on his left ankle and foot, with degree of permanent incapacity being assessed at 10%.

39. Upon my perusal of the record, I note that while the respondent suggested a sum of Kshs.400,000/= under the head of general damages, the appellant did not make any suggestions at the submission stage.

40. In her judgment, the learned trial magistrate found the authorities cited by the respondent to constitute comparable awards and therefore awarded the sum of Kshs.400,000/= proposed.

41. Upon my consideration of the impugned judgment, I have not come across anything to indicate that the learned trial magistrate applied wrong principles of law in arriving at the award made so as to warrant interference with the same.

42. The upshot is that the appeal succeeds to the extent of the finding on liability. Consequently, the trial court's finding on liability at 100% is hereby set aside and is substituted with an apportionment in the ratio of 90:10.

43. For the avoidance of doubt, the judgment on appeal is as follows:

Liability	**90%:10% in favour of the respondent**
a) General damages	**Kshs. 400,000/=**
b) Special damages	**Kshs. 2,000/=**
Total	**Kshs. 402,000/=**
Less 10% contribution	**(Kshs.40,200)**
Net Total	**Kshs.361,800/=**

c) The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

d) Parties to bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

…………………..

J. K. SERGON

JUDGE

In the presence of:

………………………………. FOR THE APPELLANT

………………………………. FOR THE RESPONDENT