**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CORAM; R. MWONGO, J.**

**CIVIL APPEAL NO. 38 OF 2017**

**CHINA ZHONGXING CONSTRUCTION COMPANY LTD.....APPELLANT**

**VERSUS**

**ANN AKURU SOPHIA.....RESPONDENT**

*(Being an appeal from the judgment and/or decree of Hon E Kimilu, PM in Naivasha*

*CMCC Civil Suit No. 104 of 2013, delivered on 5th September, 2017.)*

**JUDGMENT**

**Background**

1. This appeal emanates from an accident that occurred at Enashapai Hotel on 8th July 2013. Briefly, the facts are that the respondent was working for the hotel as a cleaner. On the material day, whilst the hotel was under construction by the appellant, electricians working on site had live wires on the floor. As the plaintiff cleaned, the bucket full of water she was using came into contact with the wires and she was electrocuted. She sued the appellant.

2. There was a full hearing in the trial court with two witnesses for the plaintiff, and one witness for the defence. The trial court found the defendant 100% liable and on that basis made an award in favour of the Respondent as follows:

> "General damages 1,200,000/=
>
> Special demages 7,470/=
>
> Total 1,207,470/=

**The law**

3. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's 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 the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

4. The Court of Appeal for East Africa took the same position in ***Peters v Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:

***It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.***

***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."***

5. From these cases, the appropriate standard of review to be established can be stated in three complementary principles:

i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. Thus, this court can only interfere with an award of damages if, as stated by Law J.A. in the case of ***Butt v Khan (1977) KAR 1***, the aggrieved party satisfies one of two conditions:

1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

**Liability**

7. The appellant's submission is that despite the plaintiff being aware she needed to exercise caution and had a duty to have regard to her own safety, she recklessly insisted on carrying out her duties in the room before the wires had been cleared out. They allege that this was despite the defence evidence that she disobeyed instructions to carry out the works only after the electricians had finished; evidence they say the trial court did not attach any weight to.

8. They argue that the authority relied on by the court, viz, **Samson Emuru v Ol Suswa Farm Ltd [2006] eKLR** does not prescribe for a total exoneration of the employee, but merely places a higher duty on the employer to provide a safe work environment. The appellant cites **Statpack Industries v James Mbithi Munyao Nbi HCCC No 152 of 2003** where the court stated:

***"…an employer's duty at common law is to take all reasonable steps to ensure the employee's safety but he cannot babysit an enmpoyee. It is not expected to watch over the employee constantly"***

9. I have perused the evidence and the judgment of the trial court, and note that the trial magistrate duly considered the evidence of the defendant's witness. She noted that the power source emanated from one floor whilst the plaintiff was working on another floor.

10. The plaintiff testified that:

***"They (defendants) had live wires in the room on the ground. A live wire came into contact with a bucket full of water. I did not know wire was live…"***

In cross examination, she stated that she did not know the wires were live; that she knew she needed to be cautious; that she was in the same room with the electricians; and that there were no safety officers on the ground.

11. On his part, DW1, the defendant's safety officer stated that the plaintiff was given instructions to clean after welding was through; that she disobeyed the instruction; that the workers had been trained in safety. In cross examination, DW1 stated that:

***"… other workers had been assigned welding work on the first floor. She (plaintiff) was electrocuted while at ground floor ….***

***…..She was electrocuted while in ground floor….***

***Plaintiff and welders were working on two different floors….***

***She poured water on the ground floor…"***

12. I have also considered DW1's witness statement where he stated that: the plaintiff was under instructions to let the welders pass before she began cleaning; and that she instead poured water on the floor and started cleaning. Very tellingly DW1, also stated:

***"It is then (after the water was poured) that one of the wires which had come in touch with the water poured on the floor by the plaintiff sparked some electric current from the first floor on to the ground floor causing the plaintiff to suffer electric shock"***

13. This is a surprising admission by DW1 of the cause of the accident. He admits that it was a wire that came in touch with the water that sparked the consequent electric shock. By this admission, it is clear, in my view, that there must have been an exposed live wire on the ground floor from which electric current leaked into the water. Common sense suggests that unexposed electric wires would be unlikely leak electric current in the manner suggested by the evidence, as leakage occurs upon exposure.

14. I therefore have no hesitation in determining that the fact that a wire leaked current is what led to electric shock. In the circumstances, I cannot see the basis for apportioning liability on the respondent. From the evidence, that all that plaintiff did was pour water on the floor, and that the appellant or its agents moved around the wet floor with exposed live wires. Even if she disobeyed and started cleaning the ground floor early, there was no warning that exposed live cables would be used where she was working. No responsibility can thus be laid on the plaintiff. No doubt the appellant and its agents were fully responsible for this failure to prevent electric current from leaking through live electric wires into the water on the ground floor when they were welding on the first floor.

15. Accordingly, I see no reason to depart from the finding of 100% liability on the part of the defendant/ applicant, and so hold.

**Quantum of Damages**

16. The appellant submits that the award of Kshs 1,200,000/= was excessive; that the trial court disregarded authorities for more comparable injuries; and that there was no factual basis for the court to suggest that the ***"plaintiff may never fully recover"***, which influenced the trial court to come to the wrong figure.

17. The trial magistrate noted that the plaintiff suffered 40% permanent disability, with injuries classified grievous harm. Noted the reduced function of the plaintiffs upper and lower limbs, and inability to lift heavy objects. She rejected two of the appellant's authorities which were for 2005 and 2007 with awards of 106,750/= and 120,000/=. She also rejected the plaintiff's authorities: **Charles Kimani Nganga v KPLC [2006] eKLR** where the plaintiff was awarded Kshs 2,500,000/= for injuries which are far more serious than those suffered by the plaintiff., and **John Machoka v KPLC Ltd [2005]eKLR** where Kshs 800,000/= was awarded and where loss of libido, severe depression, and the loss of his wife who thereby left the plaintiff were all noted.

18. I have seen the medical report by Dr Kiamba. The plaintiff was admitted in hospital from 8/7/2013 up to 24/7/2013: sixteen days. The injuries are stated as electric shock and electric burns; weakness in both left upper and lower limbs was suffered; and the function of both lower limbs was reduced. He awarded 40% permanent disability and classified the degree of injury as grievous harm. None of the parties availed authorities for truly comparable injuries.

19. The authorities presented by the appellant on appeal offer no useful assistance and include **Statpack Industries v James Mbithi Munyao [2005]eKLR** where an award of Kshs 100,000/= was made for a left arm injured when it got caught in a machine whilst it was being switched on.

20. It has not been demonstrated that the trial court's award was so excessive as to require intervention by this court, nor has it been shown that the award was arrived at by application of wrong principles. Accordingly, I see no basis to interfere with the award of the trial court.

21. The appeal is therefore dismissed with costs of the appeal to be borne by the appellant.

22. Orders accordingly

**Dated and Delivered at Naivasha this 30th Day of January, 2020**

**_____**

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mr. Muchele holding brief for Mburu for the Appellants

2. Ms Kithinji for the Respondent

3. Court Clerk - Quinter Ogutu