



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R.MWONGO, J.

CIVIL APPEAL NO. 1 OF 2018

MARULA ESTATES LIMITED.....APPELLANT

VERSUS

PETER JUMA.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 2 OF 2018

MARULA ESTATES LIMITED.....APPELLANT

VERSUS

JACKSON LOKITARE.....RESPONDENT

(Being appeals from the Judgments of Hon D. Nyambu, CM in Naivasha

Chief Magistrate Civil Cases Nos. 202 and 204 of 2013,

both delivered on 22nd November, 2014.)

JUDGMENT

Background

1. These appeals emanate from a shooting incident that occurred at Muhu Farm in Marula Estates Ltd on 10th October, 2013. Briefly, on that day at around 9.30am, three security officers of the appellant, one of whom was armed with a gun, shot and injured three persons, namely, John Saratone Leisadala Peter Juma Abekiyo, and Jackson Lokitare. The three injured persons reported the matter to the police.
2. Thereafter, the three injured persons each filed a suit in the lower court seeking damages against Marula Farms Ltd. These suits were CMCC No 201 filed by John Saratone Leisadala, CMCC No 202 filed by Peter Juma Abekiyo and CMCC No 204 filed by Jackson Lokitare.
3. In exercise of this court's duty to take into its cognisance of the public record of court proceedings and judgments and its jurisdiction pursuant to Article 165 of the Constitution, this court perused the lower court files in each case. In respect of CMCC201/2014, such perusal was intended to ensure that the court obtains a clear picture of the incident complained of in light of the fact that the appellants asserted that it led to consolidation of the suits whilst the respondent submitted that it was treated a test suit. In each case, the plaintiff's counsel was Wanga Amboko and Co Advocates, materially represented by Ms Amboko. The respondents counsel was Jones & Jones Advocates, materially represented by Mr Mburu.
4. From perusal of the proceedings in the files, it is clear that when CMCC No 201 of John Saratone Leisadala came up for hearing before Hon P. Gesora on 27th November, 2014 the coram was stated and the following transpired:

“Plaintiff represented by Ms Amboko

Defendant represented by Mr Mburu

Mr Mburu: There are 2 other cases which arise from the same cause of action. We pray that the one of them be tried as a test suit or (sic, for ?) the other CMCC 202/14 and CMCC 204/14 Ms Amboko: I elect that this matter be tried as a test suit. Application allowed” (Underlining added for emphasis).

5. Thus, by agreement of the parties, adopted by the court by way of a court recorded order, CMCC No 201 proceeded as a test suit. By his judgment dated 14th March, 2016, Hon P Gesora determined, inter alia, as follows:

“ I find and hold that the defendant is wholly liable for the acts of its servants /agents and/ or employees....

...I find and hold that an award of Kshs 300,000/= is an adequate recompense on account of injuries, pain and suffering. Special damages of 5,380/= are also awarded....”

6. Whilst the test suit was in progress, and until after its conclusion, CMCC Nos 202 and 204 did not proceed as they were all before Hon P Gesora, and the parties’ counsel were the same. There was apparently a common understanding to pend the said proceedings until conclusion of the test suit.

7. After the determination of the test suit, Marula Estates Ltd through their counsel filed an appeal against the said decision, but then withdrew the same by a notice dated 2nd August, 2016. The Notice of Withdrawal was filed in court on 4th August, 2016, before the memorandum of appeal had been served upon the respondent. Thus the journey of CMCC No 201 of 2014 came to an end. As no appeal was heard, the determination of the trial court on the test suit remains extant.

8. Once the test suit had concluded, the other two suits – CMCC Nos 202 and 203 –proceeded as separate suits, and were each tried before the trial magistrate, Hon D Nyambu. In CMCC No 202, the plaintiff/respondent Peter Juma gave evidence as PW1, and then closed his case. The defendant did not offer any evidence and closed their case. Similarly, in CMCC No 204, the plaintiff Jackson Lokitare gave evidence as PW1 and closed his case. The defendant did not avail any witnesses. In each case the trial magistrate rendered judgment on 22nd November 2017.

9. It is the judgments in the two latter suits CMCC 202 and 204 that are the subject of this consolidated appeal filed, respectively, as HCCA No 1 and HCCA No 2 of 2018.

10. The grounds of appeal in HCCA No 1 of 2018 and HCCA No 2 of 2018 are a replica of each other save for the reference to the amount of damages awarded in each case. The grounds of appeal are that:

- 1. The Learned Trial Magistrate erred in fact and in law by failing to give concise statements of points of determination and reasons for the judgment pronounced on 22nd November, 2017.*
- 2. The Learned Trial Magistrate erred in fact and in law in holding disregarding that the burden of proof lay on the Respondent to prove negligence and in particular negligence pleaded in the Complaint which the Respondent failed to prove in this case.*
- 3. The Learned Trial Magistrate erred in fact and in law in imputing negligence and liability on the part of the Defendant by relying on evidence presented in another suit, Naivasha Civil Suit Number 201 of 2014 which was consolidated with civil suit number 202 of 2014 (the Present Appeal) and Civil Suit number 204 of 2014.*
- 4. The Learned Trial Magistrate erred in law and in fact by treating civil suit 201 of 2014 as a test suit case whereas the same was consolidated with civil suit number 202 of 2014 and civil suit number 204 of 2014.*
- 5. The Learned Trial Magistrate erred in law and in fact in disregarding the authorities adduced by the Defendant to prove damages and awarded damages of Kshs 350,000.00 [Shs 300,000.00 in HCCA No 2 of 2018] which was excessive in the circumstances.*
- 6. The damages awarded by the Learned Trial Magistrate are excessive, unrealistic and unreasonable considering the injuries suffered by the Plaintiff.*

11. The injuries sustained by the respondent Peter Juma, in CMCC No 202 and appealed against in HCCA No 1, were according to Dr. Omuyoma as follows:

- a) Severe soft tissue injuries of the head.
- b) Severe soft tissue injuries of the right temporal region of the scalp.
- c) Severe soft tissue injuries of the chest.
- d) Severe soft tissue injuries of the abdomen.
- e) Severe soft tissue injuries of the left hand.

f) Bullet wound on the left of shoulder joint.

g) Blunt injuries to both hip joints.

12. For these injuries, the trial magistrate entered judgment for the respondent as follows:

a) General damages - Kshs. 350,000/=

b) Special damages - Kshs. 5,530/=

Kshs **355,530/=**

13. In CMCC No 204, the injuries sustained by the respondent Jackson Lokitare, and appealed against in HCCA No 2, were as follows:

a) Bullet wounds at the occipital region of the head;

b) Soft tissue injuries of the left hand;

c) Soft tissue injuries of both knees;

d) Blunt injuries to both hip joints.

14. For these injuries, the trial magistrate entered judgment for the respondent as follows:

a) General damages - Kshs. 300,000/=

b) Special damages - Kshs. 5,590/=

Kshs **305,590/=**

15. In each of the cases, the trial magistrate referred to and adopted the liability as found in the test suit at 100% against the defendant.

16. From the written submission of the parties, the following issues arise for determination by this court:

a. Whether the trial courts' judgments contained a concise statement of the case, points of determination, decision and reasons as required under the Civil Procedure Rules

b. Whether negligence and liability was proved as against the appellants

c. Whether the trial magistrate erred in treating CMCC No 201 of 2014 as a test suit

d. Whether the damages awarded were excessive in the circumstances.

Compliance of trial courts' judgments with the CPR in the two cases

17. The appellant argues that the trial magistrate's judgment did not "*contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision*" which are requirements of **Order 21 Rule 4** of the **Civil Procedure Rules**.

18. On their part, the respondents submitted that the trial magistrate divided her judgment into two categories: negligence and quantum, and proceeded to make awards on each aspect.

19. I have perused the judgments in each case. The trial magistrate referred to and adopted the negligence finding in the trial suit. She then said that what remains for determination is the quantum, and proceeded to determine the quantum of damages. In so doing, she referred to the parties' submissions before her and the authorities they cited. On general damages, the trial magistrate commented on the appropriateness of the authorities relative to the injuries in the suits, although she did not find them relevant to the actual quantum of damages. She then made her determination on her best approximation. On special damages she stated that they had been proved.

20. My perusal of the proceedings shows that the sole witness for the plaintiff adduced testimony and provided unchallenged exhibits. I do not see that there is any more the trial magistrate could do. Accordingly, I find she complied with the Civil Procedure Rules on the proper content of the judgments. This ground therefore fails.

Proof of Negligence and whether the trial court was entitled to treat the CMCC No 201 as a 'test suit'

21. I have combined issue numbers b) and c) above for determination as they are inextricably linked.

22. The appellant in essence asserts that the trial magistrate was not entitled to treat CMCC No 201 as a test suit; that the three cases were for consolidation for hearing only; that the plaintiffs in each case were under duty to prove on balance the particulars pleaded in their plaints; that there can be no liability without fault; and that the trial court was wrong in apportioning 100% liability as against the appellant.

23. The respondent submitted that the parties agreed that CMCC No 201 would be treated as a test suit and are thus bound by their consent and that the matters were not consolidated.

24. As this is a first appeal it is my duty to consider the evidence adduced in the lower court being cautious to note that this court has not had an opportunity to hear the witnesses and see their demeanour for itself. Thereafter, this court can make its own evaluation and assessment of the evidence and reach its own conclusions.

25. I have already in the introduction herein, pointed out that in CMCC 201/2014, the parties consented that that suit would be a trial suit. There is no doubt about that. The parties' counsel made reference to the suits in question: CMCC 202 and 204, and the court adopted the consent. I note that the consent was not, however, recorded in the proceedings of the two suits, viz, CMCC 202 and 204, but this has not been argued by the appellant as the rationale for rejecting CMCC 201 as a test suit. Instead, the appellant's argument is, as stated in paragraph 9 of their submissions that:

***“8.....the learned trial magistrate erred...by relying on the evidence presented in Naivasha Civil Suit Number 201 of 2014 which was consolidated with the present Appeals and as such erred in treatin the said suit as a test suit.*”**

9.CMCC Number 201 of 2014 was not a test suit but the three cases were consolidation (sic) for hearing only”

26. Having carefully perused the proceedings in all three suits in the lower court, there is no evidence or indication at all that the cases were consolidated. The only evidence that relates the three suits is: first, that the three suits emanated from the same facts; second, that the defendant was the same party; third, that the counsel for the parties in all the suits were the same; and finally, that once the consent was reached in respect of CMCC 201 being tried as a test suit, the other two suits did not proceed

27. Further, I have perused the plaints in each of the three suits, and note that paragraphs 1-6, establishing the cause of action and complaint, the particulars of negligence, and particulars of breach of legal are word for word replicated in each case except for the plaintiff's names.

28. Accordingly, I find and hold as a matter of fact that the consent reached in CMCC 201/2014 was for the suit be considered as a test suit of the mentioned suits, and not for the consolidation of the said suits.

Whether damages awarded by the trial court were excessive

29. The appellant challenges the awards of general damage of 350,000/= and 300,000/= in CMCC 202 and 204 respectively, as excessive and unrealistic as the injuries were soft tissue. The injuries suffered by Paul Juma in CMCC 202 and Jackson Lokitare in CMCC204 have already been described above.

30. The appellant submits that no authorities were cited by the trial court for guidance; that the report by doctor Omuyoma opined that the degree of harm suffered in both cases was merely harm. In their submissions on the appeals, they cite five authorities:

- **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR mv accident**

- **Channan Agricultural Contractors Ltd v Fred Barasa Mutayi [2013] eKLR**

- **George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyale [2016] eKLR**

- **Dickson Ndungu Kirembe & another v Theresa Atieno & 4 others [2014] eKLR**

- **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd [2015] eKLR COA**

Each of these authorities deal with soft tissue injuries in which the awards given ranged between 100,000/= to 150,000/=:

31. In their response, the respondents argue that the trial magistrate recognized the parties' failure to cite apt authorities on quantum. They argue that the failure of parties to cite relevant authorities on quantum cannot be taken to amount to an application of wrong principles, as the proper authorities were never cited by the parties. Thus the trial court relied only on the authorities cited which was not an error in law.

32. Having perused the proceedings, filings and judgments n the lower court and in the appeal, I find that the trial court was hampered in comparing like for like injuries and the damages awarded. In CMCC No 20/20142, the trial magistrate said:

“Both parties did not present relevant authorities in support of quantum”

Having no other material to go by, the trial magistrate thus found that an award of Kshs 350,000/= ***“would adequately compensate the plaintiff for pain suffering and loss of amenities ...”***

33. In CMCC 204/2014 the trial magistrate after reviewing the authorities availed said:

“Both authorities relate to injuries which cannot compare with the ones for the present plaintiff”

34. Clearly the magistrate was left in a situation whereby unless she went the extra mile to acquire appropriate authorities for the injuries, she could not be in apposition to establish the correct quantum of damages. Both parties did not assist the trial magistrate in her endeavour. In addition, the plaintiff did not bring those authorities to the trial court for consideration.

35. Having looked critically at the five fresh authorities cited on appeal, I note that they relate to motor vehicle accident cases. I am not satisfied that the award of damages in relation to shooting accidents involving employees should follow the exact pattern of motor vehicle accidents. In this regard, I see no reason to interfere with the awards made by the trial court.

Disposition

36. In light of all the foregoing, both appeals fail in their entirety and are dismissed with costs to the respondent.

37. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of January, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Mukonyi holding brief for Maiyo for the Appellants
2. Mr. Mugisha holding brief for Amboko for the Respondents
3. Court Clerk - Quinter Ogutu