REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 41 OF 2018

NINI LIMITED.....APPELLANT

VERSUS

SAMUEL MBUGUA NJOROGE.....RESPONDENT

(Being an appeal from the judgment of Hon E Boke SRM delivered on 26th June, 2013 in PMCC No 75 of 2007)

JUDGMENT

Background

1. The brief background of this case is that the respondent was at work in the appellant's rose flower farm on 9th July, 2006. He stepped on a poorly constructed or weak wooden foot bridge which broke and he fell into a trench, suffering injuries to his hip joint. The plaintiff/respondent sued in the lower court and after a trial, he was awarded damages. The trial court found that the plaintiff contributed 20% liability for the accident and made an award as follows:

General damages	Kshs	60,000.00
Special damages	Kshs	2,000.00
Less 20% liability		

2. Dissatisfied, the appellant has appealed against both liability and quantum. As regards liability, the key arguments of the appellant are: That the trial court erred in finding that the plaintiff's case was proved, and that there was no evidence that the plaintiff was at work or suffered any injuries on the material day; and that the court did not consider the defendant's submissions. As regards quantum, it was argued that the assessment of damages was not in accord with the medical report and that the awarded amount of damages was excessive.

3. This court's role is to conduct a fresh and exhaustive scrutiny and come to its own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand as was stated ***Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123.***

Liability

4. The respondent testified as PW1. His brief testimony was that he worked for the appellant. On the material day he was transporting flowers from the garbage, and injured himself after stepping on an old wooden bridge that collapsed. He went to the company dispensary and was given Panadol. On the same day he went to Naivasha Hospital where he was treated.

5. In cross examination he was shown the muster roll for the day which showed his name marked with "O" indicating he was absent. He said sometimes they worked on Sundays if the workload was heavy, and confirmed he was at work that Sunday. He admitted that there was no record of his injury on the material date in his Clinic card kept at the employer's dispensary. He attributed this to the fact that the card is kept and filled in by the employer. He also admitted that that

6. Samuel Nyabuto, a clinical officer at Naivasha Hospital testified as PW3. He said he worked in the outpatient department, and produced the treatment card of the plaintf for the treatment on 9th July 2006. The card showed the plaintiff reported having fallen in a manhole of that date and injured his right hip joint which was tender. He wasput on oral analgesics and oral antibiotics. Dr Omuyoma, PW2, produced a medical report dated 17th November, 2006. It confirmed plaintiff's injury was pain in the right hip joint

7. DW1, Mark Omondi was the plaintiff's group's supervisor at work. He testified that on the material day there was no work for the group as it was a Sunday. He produced DExb 1, the company's muster roll which shows that on that Sunday and on other Sundays none of the employees work. He said that he never received a report of any injury.

8. In cross examination, he admitted that he had not produced any document to show that the plaintiff was on contract for two months, and had only produced the muster roll for July 2006. He also stated both in cross examination and re-examinatio that he was on duty on the material day, but could not provide a record of his presence:

> ***"I was on duty on that day. I have not produced any record to prove that I was on duty. It is not possible that it is plaintiff who was on duty but not me"***

9. DW2 was Virginia Waithera, the Company's Clinic nurse. She joined the defendant company in 2008, and says she found many records filled up in the ordinary course of business. She produced D Exhibits 2 and 3, the plaintiff's Dispensary clinic card and Clinic Accident register, which are kept by the Clinic Clinician. The card does not show that the plaintiff attended the clinic, and neither does the attendance register show that he attended.

10. My assessment of the overall evidence is that, on balance, there is no reason to doubt that the plaintiff was at work on the material day. After all, his supervisor DW1 unequivocally asserted that he himself had attended at work on that specific day, and yet whilst there is no documentary evidence to prove his attendance, he is to be held to his word. The supervisor gave no explanation as what he had gone to do at work on the material day, and it can only be reasonably concluded that he attended work to supervise the employees. It is disingenuous for the defence to approbate and reprobate: stating that there is no evidence in their records that the plaintiff was at work, yet alleging that the supervisor was at work but providing no evidence from the records they alone make and maintain to prove that fact. Alternatively, it can be surmised that the records kept or brought to court by the defendants were either incomplete and or inaccurate, and thus not credible.

11. Accordingly, I see no basis for impugning the finding of the trial magistrate that the plaintiff was at work on the material day.

12. As for the injuries alleged by the plaintiff, there is medical evidence of injuries he alleged he sustained. On the other hand, the defence did not successfully rebut the evidence of the injuries. In the defendant's pleadings, they had three alternative positions: First, they denied that the plaintiff was their employee – the employment was proved through their records; Second they stated that that if there was an accident- which they denied – it was caused wholly or substantially by the plaintiff, or the plaintiff voluntarily accepted such risk. Thirdly, that they provided adequate safety devices, supervision and training

13. As stated, there was no credible counter to the medical evidence availed by the plaintiff concerning the injuries he suffered. The trial magistrate plausibly found that the evidence availed showed that the plaintiff was treated at Naivasha hospital on 9/7/2006 because it was a weekend and the defendant's clinic was closed.

14. Further the trial magistrate found that the plaintiff got injured on a faulty wooden bridge, but that since it was day-time, and he saw the bridge, he was in apposition to see the weakness. As such, the trial magistrate naturally found that the plaintiff should shoulder 20% of the blame.

15. I see no reason to fault the trial court, and the plaintiff has not availed any. I thus uphold the finding on liability.

Damages

16. The plaintiff sought damages of 400,000/- citing two authorities in which the injuries were far more severe, and the trial magistrate correctly disregarded them with due comments.

17. The defence proposed damages of 25,000/- on the strength of **Elias Munyoki v Said Juma Atiti & Another HCCC No 53 of 1990 Mombasa**. The trial court acknowledged that in that case, decided twenty-three years prior, the injuries were more serious as there were soft tissue injuries to the neck, left side of face, left arm and shoulder, and lacerations and abrasions. She awarded 60,000/-.

18. In their submissions on appeal, the appellants attached, without comment, the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018]eKLR**. There, Sewe, J awarded 1,000,000/- for fractures of both legs and dislocation of the hip bone as well as soft tissue injuries to the upper lip and lower limb. In my view the aforesaid authority is not relevant to the present case in terms of injuries suffered.

19. Nothing has therefore been placed before me by the appellant to suggest that the award by the trial magistrate was manifestly excessive. The appellant thus failed to specify any decisions with comparable injuries to those suffered by the plaintiff indicate that he was appropriately guided. Nevertheless, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. This was appropriately stated in **H. West & Son Ltd vs. Shephard [1964] AC 326**, in the following words:

> ***"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."***

20. I am also mindful of the words of De Lestang VP (as he then was) in **Mbogo v Shah & Another (1968) EA 93** where he appropriately observed at page 94, that:

> ***" I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion and as a result there has been misjustice."***

21. Finally, I have come across the case of **Bildad Onditi & Another v Rashid M. Rateng [2013] eKLR** where an award of Kshs 350,000 was made for posterior dislocation of the right hip joint. Though that injury is far more severe than the injury of the plaintiff, it nevertheless gives an inkling of an award for serious injury to the hip.

22. Ultimately, nothing has been placed before me that shows that the award of 60,000/- was inordinately excessive. Accordingly, as stated in the **Mbogo case** there is no basis for interfering with the award of the trial court.

Disposition

23. Ultimately, and for all the forgoing reasons, the appeal is hereby dismissed on all its grounds, with costs to the respondent.

Administrative directions

24. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

25. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

26. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 25th Day of June, 2020

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RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Chengecha for the Appellant

2. Mr Njoroge for the Respondent

3. Court Clerk - Quinter Ogutu