REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 155 OF 2018

EPCO BUILDERS LIMITED.....APPELLANT

-VERSUS-

NICHOLAS KIOKO MWANGANGI.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.W. Mburu (Mr.)

(Principal Magistrate) delivered on 22nd September, 2017 in Milimani CMCC no. 2350 of 2014)

JUDGEMENT

1. Nicholas Kioko Mwangangi who is the respondent in this instance lodged a suit against the appellant vide the plaint dated 30th April, 2014 and sought for general and special damages in the sum of Kshs.2,000/ plus costs of the suit and interest on the same for negligence and/or breach of contractual/statutory duty of care.

2. The respondent pleaded in his plaint that he was at all material times an employee of the appellant working as a general worker and that sometime on or about the 6th day of June, 2013 while offloading timber from a lorry to the store in the lawful course of his employment, the respondent sustained injuries when one of the timber columns hit him on the right shoulder.

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 with summons and filed its statement of defence on 10th June, 2014 to deny the respondent's claim.

5. At the hearing of the suit, the respondent testified while the appellant closed its case without calling any witnesses.

6. Upon considering the material placed before the court and the written submissions filed by the parties, the trial court entered judgment in favour of the respondent and against the appellant in the following manner:

a) Liability	100%
b) General damages	Kshs.140,000/
c) Special damages	Kshs.2,000/
Total	Kshs.142,000/

7. Being dissatisfied with the judgment by the trial court, the appellant lodged this appeal against the respondent vide the memorandum of appeal dated 21st March, 2018 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in holding the appellant liable in negligence in the ratio of 100% to the respondent and awarding damages of Kshs.142,000/ to the respondent.

ii. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the appellant's defence raised serious triable issues and that the respondent's suit should have been dismissed as opposed to awarding the general damages.

iii. THAT the learned trial magistrate erred in law and fact by finding that the respondent had proved his case against the appellant on a balance of probabilities.

iv. THAT the learned trial magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the appellant.

v. THAT the learned trial magistrate erred in law and fact in failing to take into consideration that the amount of Kshs.60,000/ would have been applicable in damages as submitted by the appellant.

vi. the learned trial magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the appellant.

8. At this court's invitation, the parties filed written submissions on the appeal. The appellant filed its submissions dated 15th November, 2019 and argued that the respondent testified before the trial court that his colleague did not hold the timber properly, thereby leading to the injuries he sustained, though he did not bring any evidence to show contributory negligence on the part of such colleague.

9. The appellant submits that the respondent did not prove his case for negligence against it and cited the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** in which the court laid out the elements arising out of the tort of negligence which ought to be proved by a plaintiff, as follows:

"On question of proof, and burden thereof, it is stated in CHARLESWORTH & PERCY ON NEGLIGENCE, 9TH edition at P.387:-

"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

10. The appellant argues that the trial court ought to have considered its written submissions on liability and the evidence of the respondent during cross-examination; had it done so, it would have dismissed the respondent's suit.

11. On quantum, the appellant faulted the trial court for awarding a manifestly excessive award on general damages and for applying wrong principles on the assessment of damages.

12. The appellant is of the view that the sum of Kshs.60,000/ which was proposed before the trial court constituted a more suitable award in line with comparable awards made for similar injuries.

13. In reply, the respondent through his submissions stood in support of the decision by the trial court and submits that he had adduced evidence before the trial court to demonstrate that he was at all material times an employee of the appellant and that he was injured at work, which evidence was never challenged by the appellant at the trial. The respondent referred this court to the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR** where the court rendered itself thus:

"The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged."

14. The respondent is of the view that in the absence of any evidence to the contrary, he had proved his case to the required standard and the trial court arrived at a correct finding on liability.

15. It is the submission of the respondent that in the absence of any witness testimony, the statement of defence filed by the appellant raises mere denials.

16. The respondent further stood in support of the award made by the trial court on general damages stating that it was a proper exercise of discretion and constituted a reasonable.

17. I have considered the rival submissions and authorities cited on appeal. This being a first appeal, I am enjoined to re-evaluate the evidence placed before the trial court. It is noted that the appeal lies purely against both the findings on liability and quantum. I will therefore address the six (6) grounds of appeal under the aforementioned heads.

18. On liability, the respondent testified before the trial court that he worked for the appellant at all material times as a casual worker before leaving in 2013 and that he had been issued with a job card which he produced as evidence.

19. The respondent further testified that on the material date, he was instructed by the appellant's foreman named Mutua, to offload timber from a lorry and that he was carrying the timber log with one (1) other person when it fell on him and injured him.

20. The respondent blamed the appellant for his injuries by stating that the timber logs ought to have been offloaded using a forklift and four (4) persons as opposed to two (2). The respondent also stated that he was not provided with an overall.

21. In cross-examination, it was the evidence of the respondent that at the material time, his colleague had failed to hold the timber properly, though he did not blame him but blamed the insufficiency of manpower to carry the timber.

22. It was also the evidence of the respondent that he had requested for extra manpower but that his requests were ignored, and that that was his first time ever to be assigned with the duty of offloading the timber.

23. In re-examination, the respondent testified that he had produced evidence to prove his employment with the appellant.

24. Upon considering the evidence, the learned trial magistrate found that the respondent had proved that he sustained his injuries while working for the appellant.

25. The learned trial magistrate further found that in failing to provide the respondent with the necessary protective apparel/gear/clothing as required under the provisions of Section 10(1) of the Occupational safety and Health Act No. 15 of 2007, the appellant had breached its statutory duty of care owed to the respondent.

26. The learned trial magistrate went ahead to reason that the appellant had equally failed to ensure a safe working environment, in contravention of the provisions of Section 6(2) of the Occupational safety and Health Act No. 15 of 2007 which require every employer to provide and maintain a safe work environment so as to ensure the welfare of its employees is protected while at work.

27. It was the reasoning of the learned trial magistrate that while the appellant had pleaded contributory negligence in its defence, it did not adduce any evidence to support such averment, thereby arriving at a finding of 100% liability against the appellant.

28. The law on negligence sets out the elements which ought to be proved for a claim of negligence and/or breach of statutory duty of care to stand. In addition to the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** cited by the appellant and which I made reference to earlier in this judgment, I also wish to refer to the **Halsbury's Laws Of England, 4th Edition at paragraph 662 on page 476** which reads as follows:

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

29. Upon re-examining the evidence tendered before the trial court, I note that the respondent had produced a gate pass and casual labour cards as P. Exh 5(a) and 5(b) respectively to support his assertion that he was at all material times an employee of the appellant, employed on a casual basis. This evidence was not controverted by the appellant at the trial and therefore remains unchallenged.

30. I further note that the evidence adduced by the respondent leads me to the conclusion that he suffered his injuries while in the course of his employment duties with the appellant. The appellant did not bring any evidence to contradict this position.

31. On the subject of negligence, upon re-examining the oral evidence of the respondent, I am satisfied that he proved that his injuries were the result of negligence and/or breach of statutory duty of care by the appellant, since the appellant did not bring any evidence or call any witnesses to show that it had either not assigned the respondent with the duty of offloading and carrying the timber logs on the material date as averred, or that it had provided the respondent with the necessary manpower to undertake the task or otherwise ensured a safe working environment for the respondent. To my mind, in the absence of any evidence to the contrary, I agree with the finding of the learned trial magistrate that the respondent had proved his claim against the appellant on a balance of probabilities.

32. On the issue of contributory negligence which was raised by the appellant, upon studying the pleadings and re-examining the material evidence, I find that the appellant did not at all bring any evidence to lead the trial court to find the respondent partly to blame for his injuries. I am satisfied that the learned trial magistrate arrived at a correct finding on this issue.

33. Furthermore and in answer to the appellant's argument on appeal that the learned trial magistrate did not consider its statement of defence and its written submissions, from my perusal of the record, I established that save for filing its statement of defence, the appellant did not rely on any evidence or witness testimony.

34. The legal position is that in the absence of evidence, the pleadings of a party remain mere allegations/statements. Such position was reaffirmed by the court in the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR** cited hereinabove by the respondent and additionally, in the case of **National Housing Corporation v Francis Muga [2019] eKLR** in the manner hereunder:

> ***"The Appellant very correctly submitted that the Respondent having failed to adduce evidence, in support of his defence, his defence remained mere allegations. This was clearly stated in the case MARY NJERI MURIGI V PETER MACHARIA & ANOTHER [2016] eKLR where the judge stated:***
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> ***"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the***

claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail…" Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged…" "

35. The law is equally well settled that submissions do not constitute evidence and hence a party cannot be heard to argue its case or present its evidence through its submissions. This was succinctly stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** when it held that:

"Submissions cannot take the place of evidence…Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

36. From the foregoing, I support the decision of the learned trial magistrate that the respondent's case remains uncontroverted.

37. On quantum, it is clear that the award being challenged on appeal is that on general damages.

38. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** quoted by the respondent in his submissions:

a) ***Where an irrelevant factor was taken into account.***

b) ***Where a relevant factor was disregarded.***

c) ***Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

39. The above was echoed by the court in the case of **Butt v Khan (1977) 1 KAR** which both parties cited before this court.

40. At the trial, the respondent stated that following his injuries, he was given first aid and taken to Jerusalem Hospital for further treatment. The respondent adduced medical evidence to that effect.

41. At the submission stage, the respondent proposed a sum of Kshs.300,000/ and cited the case of **Daniel Lengete Nkurne v Constantino Thomas-NRB HCCC 4084 OF 1983** involving blunt injury to the head, chest, right knee and bruises and where an award of Kshs.100,000/ was made in 1997, and the case of **Abednego Kyalo v Eliud Kioko & Another-Machakos HCCC 42 OF 1995** where Kshs. 100,000/- was awarded for multiple soft tissue injuries bruises over the head, left shoulder, nose, upper lip, below the chin and left knee. The appellant suggested an award in the sum of Kshs.70,000/ and relied on the case of **Maize Milling Co. Limited v Rashid Namwiba Hassan [2017] eKLR** where the High Court sitting on appeal substituted an award of Kshs.100,000/ with one of Kshs.70,000/ for a cut wound on the right finger and severe pain, and an award of Kshs.75,000/ made in the case of **Eldoret Steel Mills Limited v Moenga Obino Josephat [2014] eKLR** for burns suffered on the left forearm.

42. Upon considering the injuries sustained and submissions by the respective parties, the learned trial magistrate settled for an award of Kshs.140,000/.

43. Upon re-evaluating the evidence tendered before the trial court, I note that the injuries indicated in the medical report prepared by Dr. Cyprianus Okoth Okere dated 25th April, 2014 and produced as P. Exh 3 confirms the injuries pleaded in the plaint, being bruise on the right shoulder. The report classified the injury as harm.

44. Upon looking at the authorities cited by the parties, I find that while those of the respondent constitute comparable injuries, they were decided many years ago. I also find that the authorities cited by the appellant concern different injuries from those sustained herein.

45. The learned trial magistrate did not cite any authorities which guided his award. Suffice it to say that I considered the case of **Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next of friend) VAA [2019] eKLR** in which the court awarded a sum of Kshs.180,000/ on appeal for moderate injuries including bruises on the left shoulder, face and left leg. I also considered the case of **Benson Muchira & another v MWN [2019] eKLR** where the court awarded a similar sum of Kshs.180,000/ to two (2) plaintiffs with injuries in the nature of bruises on the right and left shoulder joints respectively, and bruises/tenderness on the knees, among other moderate injuries.

46. From the foregoing, I am of the view that whereas the learned trial magistrate did not cite any authorities, he arrived at a reasonable award, upon considering the comparable awards I have cited hereinabove. I therefore do not find the award on general damages to be so inordinately high as to entitle disturbance.

47. Consequently, the appeal is found to be without merit, it is hereby dismissed with costs to the respondent.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent