



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 19 OF 2017

CLUB HERITAGE LIMITED.....APPELLANT

VERSUS

STEPHEN MUASYA WAMBUA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable E. Kimilu (PM) delivered on the 9th May, 2017 in Naivasha CMCC No 480 of 2013)

JUDGMENT

1. In the suit for damages in the lower court, the Trial Magistrate made an award as follows:

1. Liability 60:40% (in favour of Plaintiff)
2. General Damages Kshs 1,000,000.00
3. Less 40% contribution Kshs (400,000.00)
4. Add Special Damages Kshs 2,000.00

- Total Kshs 602,000.00

5. Costs and interest

2. Dissatisfied, the Appellant has appealed against the findings of the trial court on both liability and quantum of damages awarded. The appeal essentially challenges the trial court's handling of the evidence in not finding the Respondent wholly to blame for the accident; and in misdirecting herself in awarding general damages that are inordinately high.

3. This court's role is to re-evaluate the evidence presented and come to its own conclusions being cautious to note that it did not have the opportunity to hear the witnesses itself and see their demeanour.

Liability

4. The Plaintiff gave evidence as PW1, the only witness for his case. He said he was on a ladder painting the Defendant's premises on 5th September, 2010. As he worked, the ladder broke and fell down with him. He sustained injuries which he particularized in his plaint as follows:

- 1) *Fracture to the right fibula.*
- 2) *Soft tissue injuries of the right shoulder joint.*
- 3) *Traumatic injury to the right testis.*

4) *Soft tissue injury to the right [shoulder] joint.*

He was treated at Naivasha District Hospital and produced hospital outpatient and appointment cards. He was also treated at Kinangop Hospital and produced the outpatient card.

5. Further, he testified that he was examined by Dr. Omuyoma on 16th July 2013, three (3) years after the incident. His report was also produced and is on the record.

6. In cross-examination, he admitted that he was employed as a mason; that he was painting the building walls alone; that he had used the same ladder on previous occasions; that he fell on the back holding the ladder; and in the process he lost his grip and fell down. He said he had informed the general manager Mr. Njuguna, that the ladder was getting weak, who had promised to get him better working materials. He said his supervisor was one Macharia who he also told about the weak ladder, but admitted that he had not put that information in his statement.

7. There was no other witness for the complainant. The sole defence witness was George Njuguna Wangari DW1, the General Manager of the Defendant. He testified that the Plaintiff was the head of maintenance department; he stated that at the time of the accident the Defendant's manager on duty was not aware of the accident; that the accident was not reported to management and hence no first aid was administered; that it was irregular for the Plaintiff to be at work alone; that he was ascending work without permission; that the Plaintiff was supposed to ensure the ladder was in good condition always; that all employees are issued with protective clothing, helmet, gloves, gumboot and overall; that he could not tell if the Plaintiff had worn protective clothing; and that the ladder was a wooden one.

8. In cross-examination DW1 said that he was away when the accident occurred; that after the fall, the Plaintiff continued working which would not be the case if he had fractures; that he was not aware of the alleged injuries to the Plaintiff's private parts; that the Plaintiff was a supervisor although DW1 did not have a letter to show that; that the Plaintiff was earning about Kshs 18,000/=; that the Plaintiff fell from a ladder about 2-3 metres from the ground, but he was not sure the height the Plaintiff had climbed; that the company sacked the Plaintiff for absenteeism; and that the company gave the Plaintiff time to heal from his injuries.

9. On liability the trial court found that as much as the Plaintiff blamed the Defendant for the accident, he also ought to have taken reasonable precautions while on duty to ensure his safety; that the Plaintiff knew the risks in his job, and being a supervisor he should have ensured he had protective gear and that the ladder was safe. Thus the trial magistrate apportioned liability at 60%:40%. The court also referred to the cases of **Kakuzi Ltd v John Macharia Mwangi Njeri [2007] (sic [2009]) eKLR**, which held that an employee must strictly prove the employer's liability. Further, the cases of **Wilson Musigisi v Sasini Tea & Coffee Ltd [2006] eKLR** and **Mumias Sugar Limited v Samson Muyinda HCCA No. 58 of 2000 Kakamega** (unreported) were referred to, in both of which it was held that an employee using a manual tool doing manual work and who is in control of the tool, must take care of himself and not expose himself to injury or harm recklessly.

10. In my view, the Plaintiff had done the work of painting using the ladder before. He said he "*had used the same ladder previously,*" that he "*had not noted anything wrong with the ladder previously.*" But he also said that:

"I had informed general manager Mr. Njuguna that the ladder was getting weak. My supervisor was Mr. Macharia and I had informed him about weak ladder."

11. In light of the above admission by the Plaintiff, and in the absence of any rebuttal by the Defendant that the Plaintiff had notified the Defendant of the weakness of the ladder, I believe that the Plaintiff bears some liability as does the Defendant. I agree with the apportionment of 60%:40% in favour of the Plaintiff, that the trial magistrate reached. No basis has been laid in the appeal to persuade me to interfere with the apportionment on liability given by the trial magistrate. I would uphold the trial magistrate's finding on liability.

12. The Appellant relied on the **Wilson Nyanyu Musigisi** case. There, Kimaru J agreed with Waweru J, in **Mumias Sugar Company Limited v Samson Muyinda Kakamega H.C.C.A 58/2000** (Unreported) that:

".....where an employee is engaged in manual labour that does not require exceptional skill and injures himself, then such an employee cannot hold his employer liable under statute or common law."

In the **Mumias Sugar** case, however, the complainant was using a tool he could control, namely, a panga for cutting sugar cane; Similarly in **Wilson Nyanyu's** case, the Plaintiff was using a slasher when he got injured.

13. This is quite distinct from the present case where the Plaintiff was not handling a tool but was standing upon equipment, not being a tool, but a ladder, which he was not controlling. In the **Mumias Case**, Waweru J explained himself as follows:-

"He [the employee] would hold a cane in one hand and cut its lower part with a panga in the other hand. It was a simple operation which the Respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga." (Emphasis added)

14. The ladder in this case is less capable of being controlled. It is like a bridge or a chair belonging to the employer on which the employee rests his weight but which may buckle down. The **Mumias** and **Wilson Nyanyu** cases are thus distinguishable from this case. There is far greater responsibility on the employer in the present case to ensure the ladder was safe than there is on the employee.

15. In the appeal the only substantive submission on quantum was that the award given by the trial court was “excessively generous.” The Appellant relies solely on the case of **Godfrey Wamalwa & Another v Kyalo Wambua [2018] eKLR** where the appellate court reduced an award of Kshs 853,000/= to Kshs 700,000/= for what counsel alleged were more severe injuries. The Appellant proposes an award of Kshs 500,000/=.

16. In the **Godfrey Wamalwa** case, the injuries were: compound fracture of the right distal tibia/fibula; cut wound on the scalp; and wound on the chest and cut on the lower lip. Further, **Godfrey Wamalwa’s** case has no reference to the level of disability. In the present case, the level of disability was assessed at 20% permanent disability including, loss of libido and restricted movement of the shoulder. The injury to the testicles was stated to lead to atrophy. Thus the injuries in the present case were rather more long lasting despite the fact that in **Godfrey Wamalwa**, the Plaintiff spent a longer period in hospital and suffered a shortened limb.

17. The question is whether the trial court took into account some wrong principle, or took into account an irrelevant factor or left out of account a relevant factor, or misapprehended the evidence so as to arrive at a figure that was inordinate so as to impel this court to actively interfere with the award. (see **Kemfro Africa Ltd t/a Meru Express Services & Another v A M Lubia & Another (No. 2) 1982 - 88 1 KAR 727**).

18. I am not persuaded that a case has been made out by the Appellant to demonstrate that the principles for interference in the trial court’s award are evident.

Disposition

19. In light of the foregoing, the grounds of appeal on liability and on quantum having failed, the appeal is dismissed with costs.

Administrative directions

20. 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 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 Executive Officer, Naivasha.

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

22. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 29th Day of October 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Wambui holding brief for Wachira Kibanya for the Appellant
2. No representation for Matunda for the Respondent
3. Court Clerk - Quinter Ogutu