**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.187 OF 2011**

**TEXPRO LTD.....................................................................APPELLANT**

**-VERSUS-**

**SAMUEL MUTHEE KARIUKI.....................................RESPONDENT**

**(An appeal from the Judgment and Decree of Hon. E. Tanui, Resident Magistrate in Nakuru CMCC Number 1920 of 2005 on 12th May, 2011).**

**JUDGMENT**

1. This appeal arises from a suit filed by respondent in the lower court claiming kshs 93,600 and general damages for the injuries he sustained while working for the appellant. The plaintiff/respondent availed 4 witness while the appellant never called any witness. The trial magistrate found the appellant/defendant 100% liable and awarded the respondent kshs 100,000 general damages, special damages kshs 2,500 and kshs 8,500 salary in lieu of notice making a total of kshs 111,000.

2. Being aggrieved by the trial magistrate’s determination, the defendant filed this appeal on the following grounds: -

> *i. That the learned magistrate erred in law and in fact in finding that the defendant (appellant) was liable without further making a finding whether or not the plaintiff was injured on 30th May, 2005 and on 29th August, 2005.*
>
> *ii. That the learned magistrate erred in law and in fact in finding that the defendant (appellant) was liable despite there being no evidence adduced showing that the defendant(appellant) was negligent on 30th May, 2005 and on 29th August 2005.*
>
> *iii. That the learned trial magistrate erred in law and in fact in not taking into consideration the evidence by the defendant’s written submissions. If the learned magistrate did consider the same, she misapprehended the evidence and the issues raised.*
>
> *iv. That the learned trial magistrate erred in law in imposing a burden on the defendant (appellant) to prove that it was not negligent*

3. Parties agreed to proceed by way of written submissions.

**APPELLANT’S SUBMISSIONS**

4. The appellant submitted that this appeal is on both liability and quantum; that the appeal is on three limbs being, whether the respondent was injured on 30th May 2005, whether the respondent proved that the appellant was negligent and on quantum.

5. On the first limb the appellant submitted that the trial magistrate erred in finding the respondent was injured on 30th May 2005 yet no medical evidence was adduced or tendered to that effect and further misled itself that the treatment of 5th August was as a result of the injuries sustained on 30th May 2005.

6. The appellant further submitted that the respondent was injured two months prior to the said date and failed to seek medical attention yet the injuries alleged were serious but no explanation was given for such delay.

7. Further that the trial magistrate in his judgment erred in his reasoning when he shifted the burden of prove from the respondent to the appellant on the ground that the defendant did not call evidence to controvert the plaintiff’s evidence that he had an accident on the 30th May 2005 and held the defendant 100% liable.

8. On the 2nd limb, the appellant submitted that no evidence was tendered to prove negligence on the part of the appellant as the respondent

stated in Court that by bad luck he slipped on a pipe on the floor, fell and used his small finger to support himself. The appellant submitted that in that scenario, it is the respondent who was negligent as he failed to adhere to the training accorded to him and he put the pipes haphazardly on the floor thus causing his own accident.

9. The appellant relied on the case of **Nairobi HCC No. 152 of 2005 Stat Pack Industries Vs James Mbithi Munyao** cited in **Rashid Ali Faki Vs A.O Said Transporters (2016)eKLR** where the Court held as follows:-

> **"…Although an employer's duty is to take all reasonable steps to ensure the employee's safety, he cannot babysit an employee. He is not expected to watch the employee constantly. The Employer has no obligation to follow the activities of the employee…"**

10. On quantum, the appellant submitted the assessment of damages must be by reference to the particulars of injuries as enumerated in the plaint and as established by evidence at the trial but the trial magistrate failed to consider the appellant's submissions on quantum and ultimately gave an award which was outrageous in the circumstances. The appellant submitted that the award of general damages was outrageous and the maximum award should not have exceeded Kshs. 50,000/=

**RESPONDENT'S SUBMISSIONS**

11. The respondent submitted that an appellate court can only interfere with the finding of apportionment of blameworthiness of the lower court only on exceptional circumstances; and submitted that the respondent was injured on the 30th May 2005 while dismantling and loading metal pipes into a lorry when some metal pipes slipped from the lorry and seriously injured his left hand breaking his fingers; that the accident was reported to the supervisor on 31st May 2005. That the respondent's evidence was corroborated by PW4 and it was their evidence that although they were trained on how to load and carry pipes but they had not been provided with protective gloves. The respondent produced medical evidence to show that he sought specialized treatment on 5th August 2005. PW4 was also an employee of the appellant. They submited they concur with the trial magistrate that the appellant did not adduce any evidence to the contrary.

12. The respondent submitted that he was employed by the appellant as a driver and he could be allocated other duties like dismantling and loading pipes as he was doing on the fateful day and state that even though the appellant trained its workers on how to conduct themselves while working, it failed to provide protective gears likes gloves and gumboots; that it failed to provide a safe working environment.

13. On quantum the respondent submitted that the applicable principles of law are that the appellate court will not interfere with quantum of damages unless the trial court either took into account an irrelevant facts or left out a relevant factor or where the award was too high or too low as to amount to an erroneous estimate or where the assessment is not based on any evidence.

14. The respondent submitted that the sum was reasonable and was not vitiated on the wrong principles of the law. Respondent submitted that from the testimony of PW2, the respondent suffered a permanent disability on his left hand as per the medical report produced as exhibit 3 and the same was not challenged. In the lower court the appellant submitted an award of Kshs. 20,000/= while the respondent submitted an award of Kshs. 600,000/=, the trial magistrate awarded a sum of Kshs. 100,000/=

**ANALYSIS AND DETERMINATION**

15. This being the first appellate court, my role is to reevaluate evidence adduced in the trial court as set out in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the Court stated as follows: -

> **"…An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"**

16. In view of the above position, I have perused the proceedings in the trial court and considered alongside the submissions filed herein and consider the following as issues for determination:-

*i. Whether the respondent was injured.*

*ii. Whether the appellant is to blame for the injuries and to what extend.*

*iii. If the respondent was injured, whether damages awarded are sufficient for injuries sustained.*

**i. Whether the respondent was injured on 30th May 2005**

17. The respondent proved that he was working for the appellant at the material time by availing NHIF card which showed she was contributing to the appellant and NHIF and NSSF card number 651204623 which showed that he was the defendant's employee and the cards showed that his contributions went up to October 2005. He testified that he was employed by the appellant as a driver to transport tents and he would dismantle the tents. He said at the time he was involved in an accident in Tanzania, he was Morris's co-driver and he could not read the speedometer.

18. The doctor confirmed in his report that the respondent sustained injuries on 30th May 2005 that resulted in permanent disability of the left

arm. He got this from the initial treatment record.

19. The records officer PW3 from Nakuru Provincial Hospital by PW3 casualty record card 7899 serial number 140903 and said that they relate to injuries nitrated in August 2005 but never found in their record injuries for 30th May 2005; and that injuries for 5th August 2005 are indicated as soft tissue injuries.

20. The respondent however never mentioned having been treated at Nakuru General Provision Hospital for the injuries of 30th May 2005. He produced treatment note and X-ray from Pall Dispensary and medical report from Dr. Kiamba

21. PW4 testified that he was employed together with the plaintiff/respondent by the appellant/defendant when while working on 30th May 2005 at between 7 to 8 pm the metallic pipes they were loading slipped into the plaintiff/respondents hands and injured him on two fingers of his left hand.

22. The appellant however failed to challenge treatment record availed in Court by the respondent in respect to injuries of 30th May 2005. Injuries in the initial treatment note is consistent with injuries captured in the medical report upon examination and evidence of PW4 who indicated that he was working with the respondent at the material time.

**ii. Whether the respondent proved negligence on part of the appellant and to what extent.**

23. The respondent indicate that he was not provided protective gadgets in particular gloves. The appellant never adduced evidence to the contrary. Pw4 admitted that they were trained on how to carry their work. The respondent was experienced in the work as per evidence adduced. Being an experienced employee, he was expected to work with extra caution to avoid any injury. In my view liability should have been apportioned but more was expected of the appellant; the injury would have been reduced by use of protective gear. I therefore apportion liability at 30:70 in favour of the plaintiff/Respondent.

**iii. If the respondent was injured, whether damages awarded are sufficient for injuries sustained**

24. In respect to assessment of damages, I note from the medical report that the plaintiff/respondent sustained the following injuries: -

a. Dislocation of the left 4th proximal interphalangeal joint.

b. Dislocation of the 5th proximal interphalangeal joint.

c. Complaints at the time of examination was pain on the left 4th finger and pain and deformity on the left 5th finger.

25. I note from the record that the plaintiff/respondent proposed damages of kshs 600,000 while the defendant/appellant proposed kshs 20,000. Kshs.100,00 was awarded which in my view was reasonable considering the injuries above. I will not therefore interfere with assessment of damages.

**26. <u>FINAL ORDERS</u>**

1. Appeal on liability is hereby allowed and liability apportioned at 30:70 in favour of plaintiff/respondent

2. Appeal on damages is dismissed.

**Judgment dated, signed and delivered via zoom at Nakuru This 12th day of November 2020**

**……………………**

**RACHEL NGETICH**

**JUDGE**

**<u>In the presence of</u>:**

Jenifer - Court Assistant

Mr. Mureithi H/B for Mr. Kisila Counsel for the appellant

No appearance for counsel for the Respondent