



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**CIVIL APPEAL NO. 160B OF 2016**

**GODFREY MASIALI.....APPELLANT**

**VERSUS**

**SHEMAKO CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment of Honourable Resident Magistrate N. Moseti*

*delivered in Eldoret CMCC No.529 of 2014 on 8<sup>th</sup> November, 2016)*

**JUDGMENT**

Before this court is an appeal arising from the judgment of Hon. Moseti in the Eldoret CMCC Civil Suit No. 529 of 2014 which was delivered on 8<sup>th</sup> November 2016.

Being aggrieved by the said judgment, the appellant herein filed an appeal dated 28<sup>th</sup> November 2016 and raised 8 grounds, as per the memorandum of appeal, upon which the appeal is buttressed.

The trial magistrate dismissed the appellant/plaintiff's suit upon finding that the appellant/plaintiff didn't prove his case on a balance of probability.

The plaintiff/appellant instituted legal proceedings against the

defendant/respondent in the Lower Court vide his amended pleadings dated 28<sup>th</sup> July 2014.

In the lower court pleadings, the plaintiff sought to recover special damages and general damages from the defendant for negligence and/or breach of statutory duty of care that occasioned bodily injuries on him during the ordinary course of his work. The alleged bodily injuries are:-

- a) Fracture of the pelvic ring.
- b) Fracture of the left ankle.
- c) Fracture of the right tibia.
- d) Multiple lacerations.
- e) Fracture of the scapula.
- f) Loss of blood and severe pains incurred during and after the injury.

The particulars of special damages that the plaintiff sought to recover from the defendant were:

- a) Treatment expenses.....Kshs. 11,223.00

b) Medical report.....Kshs. 3,000.00

**Total.....Kshs. 14,223.00**

The defendant company filed its defense on the 1<sup>st</sup> September 2014 and denied responsibility for the alleged bodily injuries suffered by the plaintiff. The defendant claimed that they had no implied nor expressed contractual obligation towards the plaintiff as he was not their employee.

The defendant company also claimed that the plaintiff was not on duty on the 16<sup>th</sup> of November 2013, on the day the alleged cause of action arose.

The defendant company further claimed that if the plaintiff was injured in their premises, then the same was as a result of the plaintiff's negligence and carelessness, wholly or substantially on him.

The defendant company claimed that they could not and should not be held vicariously liable for the alleged acts of recklessness or negligence of its employees.

The plaintiff, in his reply to the defendant company's defence dated 12<sup>th</sup> September 2014 denied the defendant's defence wholly and reiterated the contents of his plaint dated 28<sup>th</sup> July 2014.

At the trial, the appellant herein testified that he was on duty on 6<sup>th</sup> November 2013, building a basement with his colleagues when the basement caved in and fell on him thereby occasioning on him serious bodily injuries. The appellant/plaintiff claimed that he was consequently taken to Mediheal Hospital for treatment.

According to a medical report of the appellant/plaintiff, produced in evidence at the trial court and marked as PMFI 2, the appellant was admitted at Mediheal Hospital & Fertility Center on 6<sup>th</sup> November 2013 and examined by Dr. Njoroge. According to the report, the appellant/plaintiff sustained the following injuries-

g) Fracture of the pelvic ring.

h) Fracture of the left ankle.

i) Fracture of the right tibia.

j) Multiple lacerations.

k) Fracture of the scapula

The appellant/ plaintiff was discharged from the hospital on 13<sup>th</sup> November 2013 with instructions that he should use a wheelchair and that he should have an arm sling on his right upper limb. The applicant/plaintiff was to go for further tests on the 27<sup>th</sup> October 2013.

At the trial court, as proof of employment, the plaintiff/appellant produced an employment and an attendance card both produced as evidence and marked as PEXH 1 (a) and PEXH 1(b) respectively.

### **DETERMINATION**

It is clear to this court that the appellant herein was an employee at the respondent's company at the time the alleged cause of action arose.

It is also not in doubt that the appellant was on duty at the defendant's premises on 16<sup>th</sup> November 2013. The plaintiff/appellant's initial pleadings had indicated that the alleged cause of action arose on the 16<sup>th</sup> November 2013 but subsequent to consent between the parties, and of which was adopted by the trial court, the date was changed to 6<sup>th</sup> November 2013. The trial court, in discrediting the credibility of the plaintiff's evidence, based its rationale for its judgement on the variance of the dates the cause of action arose. It is the finding of this court that on this front, the trial court erred in disregarding the consent entered by both parties and adopted by the court on the 23<sup>rd</sup> June 2015.

The trial court, in further discrediting the plaintiff/appellant evidence questioned the quickness with which the plaintiff/appellant returned back to work. This court however holds the view that the fact that the plaintiff returned back to work within a short period of time should not be used as a ground for disputing the credibility of the plaintiff's evidence but rather the severity of the bodily injuries as alleged. The plaintiff/appellant returned to work within three weeks of sustaining the injuries. It is the finding of this court that the injuries must not have been as severe as the plaintiff alleged.

This court, in the conduct of this appeal, has its duty coined from the wordings of Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court as to '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' These principles were buttressed further by the Court of Appeal in the case of *Peter M. Kariuki vs. Attorney-General* [2014] eKLR where the court stated that,

*'We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.'*

In *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 stated the duty of the court in a first appeal to be as follows:

*'I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'*

This court has an obligation to make its own independent findings, based on the evidence on record. In view of the above, this court holds as follows;

- a) The appeal is allowed on the grounds that the trial magistrate erred in dismissing the plaintiff's suit in its entirety.
- b) Liability is apportioned wholly at 100% against the defendant.
- c) Assessment of the general damages of Kshs. 800,000/= as would have been awarded by the trial magistrate is hereby reduced to Kshs. 300,000 with due regard to the ballooned severity of the injuries alleged by the plaintiff/appellant at the trial court proceedings.
- d) Special damages in favour of the appellant at Kshs. 14,223/= is hereby allowed, having been pleaded and proved.
- e) The respondent shall meet the costs of the trial court proceedings.
- f) Each party to bear its own costs for this appeal.
- g) The principal amount to be settled 30 days of the delivery of this judgment, otherwise the same would attract an interest of 14% per annum from the date thereof.

**Dated, Signed and delivered at Eldoret this 30<sup>th</sup> day of July, 2019.**

**S. M. GITHINJI**

**JUDGE**

**30/07/2019**

In the Presence of:-

Mr. Mitei holding brief for Mr. Omusudi for the Appellant

Mr. Nyekwei is for the Respondent and is absent