



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 210 OF 2017

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

VERSUS

JUDITH OMBOK.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court of Kenya at Nairobi by the Honourable Mmasi on the 24th day of April 2017 in Nairobi Chief Magistrate's Civil Suit No 1787 of 2013)

JUDGMENT

INTRODUCTION

1. In his decision of 24th July 2017, the Learned Trial Magistrate, Hon G Mmasi, Senior Resident Magistrate, entered judgment on a hundred (100%) per cent basis in favour of the Respondent against the Appellant for sum of Kshs 4,457,000/= made up as follows:-

General Damages Kshs 2,000,000/=

Future Treatment Kshs 2,160,000/=

Special damages Kshs 297,000/=

Kshs 4,457,000/=

2. Being dissatisfied with the said decision, the Appellant herein filed the Memorandum of Appeal dated 2nd May 2017 and filed on 5th May 2017. He relied on nine (9) grounds of appeal.

3. Its Appellant's Written Submissions were dated 8th February 2019 and filed on 11th February 2019 while those of the Respondent were dated and filed on 12th April 2019.

4. Parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having considered the grounds of appeal and the parties' respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

1. Whether or not the Learned Trial Magistrate had jurisdiction to hear and determine the matter.

2. Whether or not the Learned Trial Magistrate erred in finding the Appellant liable for the injuries that were sustained by the Respondent.

3. Whether or not the Learned Trial magistrate erred in having awarded the Respondent general damages, special damages and future medical expenses.

8. This court therefore found it prudent to deal with the said issues under distinct and separate heads.

I. LIABILITY

A. JURISDICTION

9. Ground of Appeal No (1) was dealt with under this head.

10. The Appellant submitted that the Trial Court ought not to have found it liable because it (Trial Court) did not have jurisdiction to hear and determine the case on ground of limitations provided in Section 4(2) of the Limitations of Actions Act Cap 22 (Laws of Kenya).

11. It pointed out that the Respondent sustained injuries fifteen (15) years before suit was filed and that in granting leave to appeal out of time, a trial court ought to consider the length of the delay and the interests of an opposing party as regards its right to a fair trial relating to witnesses and records which may not be available after a long period.

12. It stated that Section 10(6) of the Employment Act 2007 provides that an employer can only keep its employees' details for a period of five (5) years after termination.

13. It relied on the case of **Ivita vs Kyumbu (1984) KLR 441** in support of its argument that the Respondent's delay in prosecuting her case was prolonged and inexcusable. It was therefore its submission that it was not accorded fair trial.

14. On her part, the Respondent submitted that the Appellant raised a Preliminary Objection on 22nd February 2016 on the same grounds but that the same was dismissed and the suit fixed for hearing. She averred that the Ruling of 3rd June 2016 was not appealed from and consequently, the issue of jurisdiction of the Trial Court could not be raised at this point.

15. This court was in agreement with the Respondent that the Appellant could not raise the merits or otherwise of the Trial Court's decision in dismissing its Appeal on account that it did not have jurisdiction at this stage. Indeed, the Appellant could not purport to argue the said issue after the matter was heard and determined. Notably, it did not appeal against the said decision.

16. This court did not therefore find any merit in the Appellant's Ground of Appeal No (1) and the same is hereby dismissed.

B. APPORTIONMENT OF LIABILITY.

17. Grounds of Appeal No 3 and 4 were dealt with together as they were related.

18. The Appellant submitted that the Learned Trial Magistrate erred in having found it a hundred (100%) per cent liable for the injuries and poor health of the Respondent because in Dr. Fred Otsyeno's Medical Report, it was indicated that the Respondent had been assaulted by a hospital employee and as a result, sustained traumatic injury to her left ear drum. It also stated that the Medical Report, containing hearsay evidence, showed that the Respondent was thrown off a chair to a table injuring her back. It also set out her injuries as having been injuries to the knees, neurotic symptoms from the effect of these injuries, injuries in her left ear due to an assault at the hospital and total right knee replacement.

19. On her part, the Respondent relied on the same Medical Report to argue that before tripping and falling on a wheel chair which caused her to be thrown towards a table which injured her back. She relied on the Medical Report of Dr Otsyeno who indicated that she was retired on medical grounds and averred that she had previously been able to perform her functions normally.

20. It was her case that the Appellant did not adduce any evidence to rebut her testimony of how she was injured and that because it owed her a duty of care, it was liable for the injuries that she sustained for negligently leaving loose electric and telephone wires that led to the accident.

21. Notably, the Appellant did not call any witnesses. In the absence of any evidence to the contrary, this court came to the conclusion that the Respondent was injured under the circumstances that she told the Learned Trial Magistrate as her evidence was not rebutted and/or controverted by the Appellant.

22. Having said so, it was evident from her evidence that she tripped on the loose cables. While it is true that the Appellant ought to have taken all reasonable precautions to ensure her safety, she was also required to have exercised due diligence, care and attention.

23. In her evidence, she testified that on 17th February 2016, she was given a long serving award. She was not therefore a new employee who was unaware of her working environment and surroundings.

24. It was not clear from her evidence how the Appellant was responsible for the loose cables. Indeed, in her Witness Statement, she had stated that she fell in a hall which would then have necessitated her to have exercised more caution as it was not a small area. It was therefore the considered view that liability ought to be apportioned at 80%-20% in the Respondent's favour as she was also partly to blame.

25. In the circumstances foregoing, this court found and held that Grounds of Appeal No (3) & and (4) were not merited and the same are hereby dismissed.

II. QUANTUM

A: GENERAL DAMAGES

26. Grounds of Appeal No 5 and 6 were dealt with together as they were related.

27. The Appellant argued that the Learned Trial Magistrate erred for having awarded the Respondent Kshs 2,000,000/= general damages whereas it had not been proved that she sustained the injuries at her work place.

28. Having already found that her evidence was un rebutted, this court was not persuaded by the aforesaid argument by the Appellant.

29. On her part, she submitted that she sustained thirty five (35%) per cent – fifty (50) per cent injury. It was therefore her argument that the general damages were way below what she ought to have been awarded.

30. A perusal of the Medical Report of Dr Fred Otsyeno dated 11th November 2012 showed that after tripping over loose cables, the Respondent sustained a back injury. He opined that post laminectomy syndrome was a worrying difficult problem that a patient would have to live with and hence recommended that she be retired on medical grounds. In his Medical Report dated 2nd October 2015, he put her incapacity at thirty five (35%) per cent spinal cord loss and indicated that she used walking aid.

31. This court did not see the Medical Report of Prof John E.O Atinga dated 13th October 2015, that was adduced in evidence by consent, in the Consolidated Record of Appeal that was filed on 7th February 2019. It, however, found a copy of the same in the Supplementary Record of Appeal that was dated and filed on 5th June 2018.

32. In his Medical Report, Prof Atinga noted that the laminectomy on the Respondent's lumbar spine was done by Prof Sande in 1990. He opined that it would be difficult to strictly apportion the persistent back problem, which he put at fifty (50%) per cent spinal instability, to the fall on the material date because her back had already been compromised.

33. The court was thus more persuaded by the prognosis of Prof Atinga that it was not possible to attribute the back problem that led to the Respondent being retired on medical grounds on the fall because she started having a back problem on or about 1990 which was eight (8) years before her fall. Indeed, this was a fact that was conceded by Dr Fred Otsyeno in his Medical Report dated 2nd October 2015 when he stated that:

“The problem got worse necessitating an operation of laminectomy which was carried out by Prof Sande in 1990”

34. Although the general damages she was awarded would not ordinarily have been unreasonable, the same portended a challenge to the court for the reason that the fall in 1998 only made the Respondent's back problem worse but it was not the cause of her back problem.

35. Doing the best it could, this court came to the conclusion that a global sum of Ksh 500,000/= general damages was reasonable compensation in the circumstances of the case because she still fell and sustained injuries leading to her retirement on Medical Grounds.

36. In arriving at the said figure, this court had due regard to the following case:-

(1) Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR.

The Plaintiff therein sustained minor bruises on the back.

In 2018, Joel Ngugi, J. reduced the general damages from Kshs 350,000/= to Kshs 100,000/=.

(2) Purity Wambui Muriithi vs Highlands Mineral Water Co. Ltd [2015] eKLR

The Plaintiff therein had sustained injuries to the left elbow, pelvic region, lower back and left knee.

In 2015, the Court of Appeal reduced the general damages from Ksh 700,000/= to Kshs 500,000/=.

(3) Samson Macharia Mwangi & Another vs Abdifatah Mohamed Khalif [2017] eKLR

The Plaintiff therein suffered a fracture of the nasal bone, bruises on the face with cuts and lower spine which was referred to as epiduritis at level of vertebrae 7 and 2. He was subsequently treated for spondylitis permanent incapacity was put at forty five (45%) per cent.

In 2017, while reducing the general damages from Ksh 800,000/= to Kshs 550,000/=, Githinji J was of the view that had the back injuries been pleaded a sum of Ksh 250,000/= would have been fair.

37. In the circumstances foregoing, this court found and held that Grounds of Appeal No (3) & (4) were not merited and the same are hereby dismissed.

38. Grounds of Appeal No (5) and (6) of the Appellant's Memorandum of Appeal dated 2nd May 2017 and filed on 5th May 2017 were therefore not merited and are hereby dismissed.

B: FUTURE MEDICAL EXPENSES

39. Ground of Appeal No (7) was dealt with under this head.

40. The Appellant relied on the same argument that this court rejected hereinabove to argue that the Respondent could not be awarded future medical expenses because it could not be ascertained if she sustained the injuries in her place of work.

41. On her part, the Respondent urged this court to consider Dr Fred Otsyeno's Medical Report dated 2nd October 2015 in which he had recommended that she would require a sum of Kshs 18,000/= monthly at a modest hospital, for medication for her entire life.

42. This was an argument that the Learned Trial Magistrate agreed with and thus awarded her Kshs 2,160,000 made up as follows:-

$$18,000 \times 12 \times 10 = 2,160,000/=$$

43. This court noted that in his decision, the Learned Trial Magistrate recorded that he had awarded the Respondent a sum of Kshs 2,160,000/= for future treatment. However, the body of his judgment, he made reference to the said sum as having been for future earnings. This confused the court but it appeared to it to have been an inadvertent mistake on his part as the sum of Ksh 18,000/= Dr Otsyeno had recommended was in respect of medical treatment.

44. Having said so and taking into account Prof Atinga's prognosis, it was not possible to attribute the claim for future medical expenses to the Respondent's fall at the office. There was no doubt in the mind of this court that the fall may have exacerbated her injuries to the back but it could not be said to have been the cause of the injury for the reason that she had had back problems culminating in a laminectomy that was done on her lumbar spine in 1990 by Prof Sande.

45. For the reason that the fall nonetheless contributed to the Respondent's back pain leading to her medical retirement, this court found it prudent to award her a global sum of Kshs 500,000/= for future medical expenses as the same was pleaded in the Amended Pleint.

46. In the circumstances foregoing, this court found and held that Ground of Appeal No 7 was not merited and the same is hereby dismissed.

C. SPECIAL DAMAGES

47. Ground of Appeal No 8 was dealt with under this head.

48. The Appellant's argument on this issue was still the same, that the Respondent could not be awarded special damages she did not prove her claim. However, it was immaterial in view of the court's finding hereinabove.

49. Whereas special damages must be specifically pleaded and proven, just as the court faced a challenge to ascertain how much the fall contributed in the Respondent incurring special damages, this court exercised its discretion and awarded her a global sum of Kshs 50,000/= special damages as not all special damages may have related to the fall only, the Respondent having suffered several injuries before her fall on the material date.

50. In the circumstances foregoing, this court found and held that Ground of Appeal No 8 were not merited and the same are hereby dismissed

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal was not merited and the same is hereby dismissed.

52. However, bearing in mind that an appellate court has power to re-evaluate and re-assess the evidence that had been adduced in a Trial Court and come to its own independent conclusion, this court hereby sets aside and/or vacates the judgment in the sum of Kshs 4,457,000/= that was delivered by the Learned Trial magistrate on 24th July 2017 in favour of the Respondent against the Appellant and in its place, it hereby directed that judgment be and is hereby entered in favour of the Respondent against the Appellant for the sum of Kshs 840,000/= made up as follows:-

