REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 177B OF 2016

BOB MORGAN SECURITY LIMITED.....APPELLANT

VERSUS

SOSPETER BANGOYA OYANGE.....RESPONDENT

(An appeal from the judgement and decree of the Chief Magistrate's Court at Nairobi, in CMCC No. 5275 of 2014 delivered on 18th March 2016, by Hon. M. Obura (Mrs.) PM)

JUDGEMENT

1) Sospeter Bangoya Oyange, the respondent filed a compensatory suit against Bob Morgan Services Ltd, the appellant herein, for the injuries he sustained while working for the appellant at J.K.I.A as a security guard. The appellant filed a defence to deny the respondent's claim. Hon. Obura, learned Principal Magistrate, heard and determined the suit in favour of the respondent in the sum of ksh.814,400/= for both general and special damages.

2) The appellant being dissatisfied preferred this appeal and put forward the following grounds:

> ***1. THAT the learned magistrate erred in law and in fact when she failed to find that the respondent had failed to proof his case on a balance of probability and the resultant judgment is therefore erroneously in law and fact.***
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> ***2. THAT the learned magistrate erred in law and in fact when she failed to find that the appellant had taken all reasonable precaution towards the safety of the respondent and provided all the requisite apparel while he was working.***
>
> ***3. THAT the learned magistrate erred in law and in fact when she failed to consider that the respondent had not produced any evidence to prove that he had requested for the replacement of his allegedly worn out boots.***
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> ***4. THAT the learned magistrate erred in law and in fact when she failed to consider that the appellant had no control over the systems of work of its client Jomo Kenyatta International Airport (KQ) where the respondent was stationed and that the respondent was injured while undertaking duties outside the scope of employment and which duties were not undertaken at the instance, request and for the benefit of the appellant.***
>
> ***5. THAT the learned magistrate erred in law and in fact when she failed to find that the respondent was solely to blame for the accident for stepping on the dolly while counting luggage which he ought to have known was dangerous.***
>
> ***6. THAT the learned magistrate erred in apportioning liability in the manner she did and awarding excessive damages to the respondent.***
>
> ***7. THAT the learned magistrate erred in failing to consider the appellant's submissions.***

3) When this appeal came up for hearing, parties recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the evidence which was presented before the trial court. I have also considered the rival written submissions together with the authorities cited. Though the appellant put forward a total of seven grounds of appeal, those grounds basically revolve around the twin issues of liability and quantum.

4) On liability, the appellant is of the submission that the respondent engaged himself in a dangerous conduct of stepping on the luggage dolly contrary to the specific instructions of the employer of counting the luggage without stepping on the dolly luggage. Therefore, it is the appellant's assertion that the respondent was wholly to blame for causing the accident.

5) The respondent on the other hand is of the view that he tendered credible evidence which proved that had the appellant taken the necessary

precaution at the respondent's work place, he would not have been injured.

6) The respondent pointed out that the appellant failed to controvert the evidence he adduced showing that the shoes he was provided with were not in good condition. The respondent also stated that the decision to apportion liability should not be disturbed because the court arrived at the decision based on the evidence and submissions presented by the parties.

7) I have carefully perused the judgment of the trial court and it is apparent that the learned principal Magistrate noted that the respondent testified claiming that his boots were worn out and were not replaced despite requesting. The trial magistrate further stated that the respondent had said that the luggage dolly was raised forcing him to step on it thus he shipped and sustained serious injuries.

8) The learned Principal Magistrate further noted that the appellant presented evidence in which its witness stated that the respondent was to blame for his misfortune. The appellant's witness is quoted to have said that the appellant supplied all the necessary protective gear and that it was upon the respondent to request for the replacement of the worn out boots since he knew the dangers of counting luggage while stepping on the dolly.

9) In the end, the learned Principal Magistrate concluded that the plaintiff had failed to show that he made a request to be supplied with new boots. She also concluded that the appellant's witness did not avail any records to show how often the boots were replaced hence it was possible that the respondent's boots were not replaced and worn out.

10) The trial Principal Magistrate also concluded that the respondent took a risk and ought to have exercised due care for his own safety hence he was to blame for exposing himself to the risk of injury. I am satisfied that the learned Principal Magistrate came to the correct conclusions on liability after taking into account all the relevant material. Both the appellant and the respondent were equally to blame. The decision on liability cannot therefore be faulted.

11) On quantum, the appellant is of the submission that the award of ksh.800,000/= was manifestly excessive and not in line with comparable awards. The appellant cited **the case of Jitan Nagra =vs= Abidnego Nyandusi Oigo (2018) eKLR** where the court awarded a sum of kshs.450,000/= for compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. The appellant also cited the case of **Civicon Ltd =vs= Richard Njomo Omwancha & 2 Others (2019) eKLR** where this court awarded the claimant kshs.450,000/= for a fracture of the left tibia and fibula.

This court was urged to adjust downwards the award from ksh.800,000/= to ksh.450,000/=.

12) The respondent is of the submission that the award is commensurate with similar awards for near similar injuries and that the same is neither high nor low hence it should not be disturbed.

13) There is no dispute that the respondent suffered swollen, tender right leg and fractures on the right tibia and fibular. He also suffered 15% permanent incapacity on the right lower limb. In her judgement, the learned Principal Magistrate stated that the authorities relied upon by the respondent were in respect of more serious injuries and found the case of **John Mose (minor) =vs= Petroleum and Industrial Services Ltd (2014) eKLR** to be relevant where the claimant was awarded ksh.180,000/= for a fracture of the right tibia.

14) The trial magistrate increased the amount from ksh.180,000/= to ksh.800,000/= arguing that she considered the inflationary trends. It is apparent that the above case was decided in the year 2014. It cannot be said that within two years the aforesaid amount can increase by a staggering ksh.620,000/=. However, the authorities relied by the respondent appear to have been in respect of near similar injuries with those obtaining in this appeal.

15) In the case of **Charles Mwania & Another =vs= Batty Hassan (2008) eKLR,** the claimant was awarded ksh.800,000/= for a fracture of the right tibia and fibular. The respondent also cited the case of **John King'ara Nderi =vs= Gachini Kagwe Nairobi H.C.C.C. no. 4750 of 1993 (unreported)** where the plaintiff was awarded ksh.628,194/= for compound fractures of the tibia and fibula shafts in the year 1997.

16) Having reviewed the authorities cited and supplied, I am convinced that the award by the learned principal Magistrate is commensurate with the injuries sustained and that it is within comparable awards. I therefore find no merit in the appeal as against quantum.

17) In the end, this appeal is found to be without merit. The same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 20th day of September, 2019.

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent