REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 370 OF 2012

NK BROTHERS...................................APPELLANT

VERSUS

GILBERT OMERKUL.....................RESPONDENT

(Being an appeal from the Judgment and Decree on both liability and quantum of the Hon Mr. Obulutsa Chief Magistrate at Nairobi in Chief Magistrates Civil Case No 4232 of 2009 delivered on 3rd July 2012)

JUDGMENT

INTRODUCTION

1. In his decision of 3rd July 2012, the Learned Trial Magistrate Hon C. Obulutsa (Mr) Senior Principal Magistrate entered judgment in favour of the Respondent against the Appellant herein on a hundred (100%) basis for the sum of Kshs 433,000/= made up as follows:-

General damages	**Kshs 350,000/=**
Special damages	**Kshs 3,000/=**
Further medical Treatment	**Kshs 80,000/=**
	Kshs 433,000/=

Plus costs of the suit and interest.

2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 17th July 2012. He relied on ten (10) grounds of appeal.

3. Its Written Submissions were dated 24th April 2019 and filed on 10th May 2019 while those of the Respondent were dated 16th May 2019 and filed on 17th May 2019

4. Parties asked this court to deliver its decision based on the 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 Appellant's grounds of appeal and its Written Submissions together with those of the Respondent, it was clear to this court that the issues that had been placed before it were:-

1. Whether or not the Appellant was liable for the Respondent's injuries.

2. If so, whether the quantum that was awarded by the Trial Magistrate was so inordinately high or manifestly excessive so as to have warranted interference by the court.

8. This court therefore deals with the said issues under the following headings.

I. <u>LIABILITY</u>

9. Grounds of Appeal Nos 1,2,3,4,5,6,7,8,& 10 were dealt with together as they were all related.

10. The Appellant denied that the accident occurred or that it was negligent but that infect, it was the Respondent who was negligent for deliberately stepping on timber.

11. It stated that he did not provide evidence that he was its employee or tell the Trial Court what measures he took to avoid the occurrence of the accident. It therefore urged this court to find that he was not its employee.

12. It submitted that he had been employed as a casual employee of an independent contractor and that he had confirmed that the site was manned by an independent contractor. It relied on the case of **<u>Transcico Maina Mwangi vs Evan Mweha & John Wanyange Mweha [2014] eKLR</u>** where the court held that the plaintiff therein was owed a duty of care by the independent contract and not by the 1st defendant therein.

13. On his part, the Respondent submitted that the evidence on record showed that he was employed as a casual employee by the Appellant and that having been injured in the course of his employment, it was wholly liable for the accident that he sustained. It was his contention that his evidence was credible and was not rebutted.

14. In his Witness Statement dated 27th January 2012, he stated that on 26th March 2019, he was at his place of work called N.K. Brothers working as a casual when a timber ladder he was using to ferry timber in a construction site buckled under his weight causing him to fall as a result of which he sustained serious body injuries. The Appellant told the Trial Court that it would not call any witnesses.

15. In his judgment, the Learned Trial Magistrate noted that the Appellant did not call any witnesses. As a result, he found it to have been wholly liable on the ground that the Respondent was its employee.

16. This court agreed with the decision of the Learned Trial Magistrate for the reason that the only conclusion that he would have arrived at in the absence of any evidence to the contrary, was that the Respondent was at all material times, the Appellant's employee.

17. This court found and held that the Respondent was able to prove that fact as in contemplated under Section 107 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

18. The burden shifted to the Appellant to demonstrate the contrary as is stipulated in Section 108 of the Evidence Act that states that:-

19. He did not adduce any evidence to prove that the Respondent had been employed by an independent contractor who was doing construction work in its premises.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

20. In the circumstances foregoing, the court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8) and (10) were not merited and the same are hereby dismissed.

II. <u>QUANTUM</u>

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

22. In arguing that the damages that were awarded by the Learned Trial Magistrate were manifestly excessive, the Appellant relied on the case of **<u>Simon Taveta vs Mercy Mutitu Njeru [2004] eKLR</u>** where it was held that comparable injuries should attract comparable awards.

23. It pointed out that the Respondents doctor **(sic)** was clear that the Respondent did not suffer any permanent disability. It was emphatic that the Learned Trial Magistrate failed to take into account the medical reports that were presented to him. It was thus its submissions that the sum of Kshs 350,000/= that was awarded as general damages was manifestly excessive.

24. On his part, the Respondent was categorical that the said award was reasonable for the injuries he sustained.

25. A perusal of the Medical Report of Dr. C. O Okere (hereinafter referred to as ("PW 2") dated 17th June 2008 indicated that the Respondent suffered fractures of the right femur midshaft and neck of femur. He was hospitalised at Kenyatta National Hospital for six (6) weeks and K-nailing was done. The physical examination revealed a longitudinal scar on his upper leg laterally, a wound that was discharging pus and that he was limping.

26. In his prognosis, PW 2 opined that the wounds would need dressing and medication. The K-nail would need to be removed at a cost of about Kshs 80,000/=. He put the Respondent's degree of permanent incapacity at about twenty (20%) per cent.

27. There was no indication in the proceedings that the Appellant also had a Medical Report to be relied upon during trial. In fact, there was nothing to show that the same was to be produced without calling the maker bearing in mind that it did not call any witnesses.

28. Notably, save for submitting that the damages awarded to the Respondent were excessive, it did not provide any comparable cases to assist the court.

29. Having taken into account the injuries the Respondent sustained and the inflationary trends, this court came to the firm conclusion that the sum of Kshs 350,000/= that was awarded by the Learned Trial Magistrate was not inordinately high or manifestly excessive so as to have warranted interference by this court as was held in the case of **Kenfro African Ltd t/a Meru Express Services [1976] & Another vs Lubia & Another – (No 2) [1985] eKLR** where it was held as follows:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. This court follows the same principles."**

30. In arriving at the said conclusion, this court had due regard to the following cases:-

1. **Akamba Public Road Services v Abdikadir Adan Galgalo[2016] eKLR**

   An award of Kshs 800,000/= was set aside on appeal and substituted with an award for Kshs 500,000/= for a permanent partial disability of the right tibia and fibula due to fracture, fracture site, post fracture arthritis, pain and estimated permanent partial disability at three(3%) per cent.

2. **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR**

   An award of Kshs 300,000/= was made for blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia, fibula and soft tissue injuries.

3. **Rose Makombo Masanju v Night Flora alias Nightie Flora & another [2016]eKLR**

   The court awarded Kshs 500,000/= for fracture of the left wrist, comminuted fracture, frontal bone with hemosinus, concussion with loss of consciousness for three(3) hours, two(2) deep cut wounds on the forehead and right eye nerve injury -trigeminal neuralgia.

31. In the premises foregoing, this court found and held that Ground of appeal No (9) was not merited and hereby is dismissed.

DISPOSITION

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17th July 2012 was not merited and the same is hereby dismissed with costs to the Respondent herein.

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of October 2019

J. KAMAU

JUDGE