REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 518 OF 2015

KAMILI PACKERS LIMITED.....APPELLANT

-VERSUS-

PAUL MUHABI MARETE.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Respondent Paul Muhabi Matere sued Kamili Packers Ltd for damages on account of breach of contract and breach of duty to care plus costs.

2. The cause of action arose on 18/10/2011 while the Respondent was going about his lawful duties within the Appellant's premises when he got injured. He sued the Appellant by themselves, its servants and/or employees or agent for negligence. He laid down several particulars of such negligence.

3. The Appellant filed their defence on 26/11/2012 and admitted the Respondent as its employee but denied any breach of contract as per paragraph 4 of the plaint or breached duty to care. They blamed the Respondent solely a substantially for the accident leading to his injury at work, out of his own negligence or carelessness.

4. After parties were heard fully, Appellant was held 100% to blame and damages were awarded.

- **General damages Kshs.600,000/=**
- **Costs and interest**

5. Appellant was aggrieved by the verdict and filed the appeal with grounds;

> **(i) That the learned magistrate erred in law by finding the Appellant 100% liable in negligence in disregard of the sum of evidence adduced at the hearing in regard to Respondent's evident contributory role in the accident.**
>
> **(ii) That the learned magistrate erred in law and fact by awarding general damages for pain and suffering at Kshs.600,000/= which award was inordinately high and excessive and not commensurate with the injuries allegedly sustained by the Respondent.**
>
> **(iii) That the learned magistrate misdirected herself in both law and in fact by reaching a decision contrary to the principle of stare decisis that comparable injuries should be compensated by comparable awards.**
>
> **(iv) That the learned magistrate misapprehended the severity of the injuries and further erred in law and in fact by arriving at an award that is so manifestly high as to amount to an erroneous estimate of any loss or damage suffered by the Respondent.**

6. Parties were directed to file submissions to canvass appeal.

APPELLANT'S SUBMISSIONS:

7. Appellant submits that a reading of Section 107 of the Evidence Act dictates that it is trite law that he who asserts must prove. The burden of proof that acts of negligence took place lies on the Respondent as illustrated by the principles in the case of ***Mount Elgon Hardware vs Millers C.A No. 19 of 1996*** and ***Mwaura Mwalo vs Akamba Public Road Services Ltd HCC No. 5 of 1989.***

"The burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rests on the claimant throughout the trial on absence of probabilities."

8. Appellant rely on the case of ***Frida Kimotho vs Ernest Maina HCCC No. 3720 of 1995***, where the court;

"The happening of an accident is not in general prima facie evidence of negligence. The Respondent must ordinarily give affirmative evidence of negligence on the part of the Appellant which caused the accident.'

9. Noteworthy, and as can be inferred from page 40 of the Record of Appeal, the Respondent had been working for the Appellant for over seven (7) years before he got injured. During examination in chief, the Respondent acknowledged the import of wearing protective gear. Interestingly, he claimed that during the seven (7) years, the Respondent did not use protective gear despite being vividly aware of the risks attached to the job.

10. Other than the above plan allegations, no documentary evidence was produced to proof that the Respondent was not equipped with the necessary protective gear. During cross examination as illustrated in page 32 of the Record of Appeal the Respondent did not provide any evidence to confirm that he indeed asked for protective gear and similarly that the same was not availed.

11. Further, the Respondent did not adduce any evidence that he took all the necessary care of his own safety in undertaking his duties despite being aware of the risks involved. In the case of ***Amalgamated Saw Mills vs David K.Kariuki [2016] eKLR*** where the learned **Mulwa J.** in dismissing the appeal held in cases of manual nature.

"An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety."

12. In the instant case, the work at hand of manual nature, which the Respondent had effectively conducted for seven years and was very much aware of the risks involved and consequently the precautionary measures that ought to be undertaken, which he failed to take, resulting to the accident.

13. In light of the above argument, the evidence adduced by the Respondent, it is submitted that the vicarious liability of acts of alleged negligence and or breach of statutory duty was not established on a balance of probability by the Respondent to warrant a 100% liability apportioned on the Appellant.

14. Whether the award is inordinately high and excessive; The Respondent pleaded in the plaint that he suffered injuries, particularly compound fractures of the left third and 4th phalanges, partial amputation of the distal phalanx of the left ring finger and lacerated scars. During examination in chief of the doctor testified to the fact he opined that the Respondent had suffered a permanent incapacity of 6%. On cross examination he confirmed that the analysis of incapacity had been done two (2) months after the accident and he had not examined the Respondent since then. The learned magistrate awarded general damages of Kshs.600,000/= for pain and suffering as a result of injuries suffered.

15. Appellant rely on the case of ***Kenya Steel Fabricators Limited vs Tom Mkoi [2018] eKLR*** which while citing ***Kemfro African Ltd t/a Meru Express Service vs A M Lubia & Oliver Lubia***, the court held;

"The judge took into account irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

16. In the instant case, taking consideration of the injuries sustained, it submit that the damages awarded in February 2015 were manifestly high and excessive and the same ought to be placed aside. An assessment is not without limits. A court must therefore be guided by precedents. In the case of ***Kigaraari vs Aya (1982-88) I KAR 768,*** it was stated as follows;

"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

17. While remaining faithful to the doctrine of state decisis, appellant rely on the case of ***Kenya Steel Fabricators Limited vs Tom Mkoi (2018) eKLR*** where the injuries sustained included the sole fracture of one finger with 4% permanent disability. The Honourable **Judge Richard Mwongo** awarded the general damages of Kshs.260,000/=. The aforementioned determination was made on 27th September, 2018.

18. In the above mentioned case, the court cited Simba Posho Mills where the Respondent's fingers were crushed by a moving roller. The tip of one of his fingers had to be amputated and he was unable to use his right hand. The degree of permanent disability was assessed by the doctor was 8% in 2002, the amount of general damages was awarded at Kshs.360,000/= and the same was reviewed by the High Court to Kshs.180,000/=.

19. The Honourable Judge further cited Joseph Wahome case, where the accident occurred in 2004 and the Respondent sustained compound fracture of the middle left hand finger, leading to its deformation after it had healed. Further the half of the tip of the index finger was missing. The lower court awarded general damages of Ksh120,000/= and on appeal, the High Court in October 2008 reviewed the same to Kshs.180,000/=.

20. Following the above jurisprudence of the related injuries, we submit that in the light of the injuries sustained by the Respondent an award of Kshs.600,000/= is ordinately high and the same is excessive and pray that the same be set aside.

RESPONDENT'S SUBMISSION

21. The respondent submitted that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rests on the claimant throughout the trial.

22. It is also a fact that the standard of proof of negligence in torts and civil matters is on a balance of probabilities. See on page 31-32 from paragraph 17 of the record of appeal the Respondent's un-rebutted evidence on negligence/liability was captured.

23. This evidence was not rebutted by the Appellant herein at the trial. The defence closed their case without calling any witness. Only Respondent's counsel filed written submissions which I have considered together with the evidence on record.

24. On page 41 paragraph 16 the court held "the Respondent gave his evidence which was not controverted at all on how he got injured and why he blames the Appellant for failure to avail him a safe working environment and safe apparatus like gloves which would have minimized his injury if not prevented him getting injured.

25. On page 41 paragraphs 1-7 the court further held 'despite the Appellant alleging negligence on part of the Respondent, no evidence was availed to prove the said allegation.

26. Consequently its humble submission that no error law was done by the lower court by finding the Appellant 100% liable since the appellate never adduced any evidence to contract that of the Respondent on negligence or to show that the Respondent in any way contributed to the accident.

27. Further there was no protection or fence installed on the machine which had moving parts to protect the Respondent.

28. It was the onus of the Appellant to adduce documentary evidence if they wished to prove that they had equipped the Respondent with protective gear. Indeed, under Section 74 of the employment it's the employer who's mandated to keep written records of all employees.

EVIDENCE ADDUCED

29. Dr. Cyprianus Okere, a private medical practitioner told court on 5/12/2011 he examined the Respondent Paul Muhabi Matere who had been involved in an industrial accident on 18/10/2011 when a machine he was operating, cut his hand. He classified the injuries as fracture of the 3rd and 4th digital fingers and partial amputation of the distal phalanges of the left ring finger. He was admitted to Kenyatta National Hospital (KNH) for 10 (ten) days where debridement and disarticulation of the ring finger was done and wire fixed in the middle finger.

30. In his opinion, he told court the partial amputation of the distal phalanx of the left ring finger and fracture of the distal and middle phalanges of the middle finger could be classified as maim. He gave the Respondent a permanent incapacity degree of 6%. He relied on the medical records from Kenyatta National Hospital and produced his medical legal report as exhibit P1 (a) and receipts for same charge and court attendance as exhibit P1 (b) and P1(c) respectively.

31. PW2 Paul Muhabi Matere told court he used to work as a machine operator with Kamili Packers, the Appellants herein operating a KISE MACHINE used for grinding cereals. He explained how on 18/10/2011 at 10.00 am he was going about his usual duties. His hand was trapped by the pulley as he was feeding the said machine with cereals. He was rushed to their first aid office where the 1st aide assisted him before referred to Mbagathi Health Centre and given Kshs.1,000/= for treatment. He was further referred to Kenyatta National Hospital where he went the following day where he was admitted and underwent treatment upto 7/11/2011. He produced a staff card as exhibit P4, NHIF card exhibit P6 and his counsel's demand letter as exhibit P7.

32. Other documents e.g. bundle of documents from Kenya National Hospital and copy of NSSF statement (MFI P3 and P5 respectively) were withdrawn by Respondent's counsel after the defence objected to the admissibility.

33. The Respondent categorically blamed the Appellant for his injuries arising from the negligence in a duty to care by not providing him with a safe working environment or system of work. The working space was overloaded and not sufficient for the work he was discharging or a safe protective gear and specifically gloves, helmet, goggles, masks or gumboots. Had he had the gloves, he said, the injury to his fingers would not have been serious. He had asked for supply for one was provided. He claimed the City Inspectorate had visited the factory and warned against lack of provisions of protective gears but the Company Directors did not comply or need the warding. He denied any negligence or careless on his part since he had worked on the same machine for the last 7 years before he got injured, and followed instructions given.

34. When cross-examined, he reiterated his evidence in chief and that when he insisted on issuance of protective gear, the directors would threaten them with sacking.

35. In re-examination, he confirmed operating other machinery apart from the one that injured him. He confirmed no safety grills were installed at all on guard rails, although in meetings with management, they pointed out this. The defence closed their case without calling any witness.

ISSUES, ANALYSIS AND DETERMINATION

36. The twin issues are; whether **the holding on liability was justified and whether the award was inordinately high?**

37. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial. **(*See Selle vs. Associated Motor Boat Company Ltd (1968) 123).***

38. In the case of ***Mbogo vs Shah And Another (1968) EA 93*** the Court clearly stated thus:

> ***"….. It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

39. There was no doubt that the Respondent was an employee of the Appellant company and the Appellant does not deny this in paragraph 3 of the defence. The only particulars of negligence pleaded was that they failed in their duty to care exposing the Respondent to harm. The Respondent gave his evidence which was not controverted at all on how he got injured and why he blames the Appellant for failure to avail him a safe working environment and safe apparatus like gloves which would have minimized his injury if not prevented him getting injured.

40. Despite the Appellant alleging negligence on part of the Respondent, no evidence was availed to prove the said allegation. The respondent submitted that it was the onus of the Appellant to adduce documentary evidence if they wished to prove that they had equipped the Respondent with protective gear. Indeed, under Section 74 of the employment it's the employer who's mandated to keep written records of all employees.

41. The appellant submitted that the Respondent did not adduce any evidence that he took all the necessary care of his own safety in undertaking his duties despite being aware of the risks involved. It cited the case of ***Amalgamated Saw Mills vs David K. Kariuki [2016] eKLR*** where the learned **MULWA J**. in dismissing the appeal held in cases of manual nature.

> ***"An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety."***

42. In the instant case, the work at hand of manual nature, which the Respondent had effectively conducted for seven years and was very much aware of the risks involved and consequently the precautionary measures that ought to be undertaken, which he failed to take, resulting to the accident.

43. Thus the court is of the view that the respondent was to share blame to a lesser extent as he never demonstrated the precautionary measures he took to avoid the accident. The court thus adjust liability to 80%:20% in favour of the respondent.

44. There are principles which determine when to disturb an award.

45. The Court of Appeal in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) kar*** set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

> **"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."**

46. In ***Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003*** the Court of Appeal held that: -

> ***'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257)."***

47. *The same was reiterated in the case of* ***Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR,*** where the Court of Appeal held that –

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
>
> ***'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in***

some material respect, and so arrived at a figure which was either inordinately high or low."

48. In ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs*** **AM. Lubia** and **Olive Lubia (1982 –88**) **1 KAR 727** at p. **730 Kneller J.A.** said: -

> ***"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 so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V. Manyoka [1961] EA 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto [1970] EA 414, 418, 419. This Court follows the same principles."***

49. And in ***Gicheru vs Morton and Another (2005) 2 KLR 333*** this Court stated:

> ***'In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled." See also Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.***

50. The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal.

51. The Respondent's counsel suggested an award of Kshs.800,000/= in general damages for pain for pain and suffering and loss of amenities.

52. The trial court and I have looked at the medical document prepared by Dr. Cyprianus Okoth Okere dated 5/12/2011. He confirmed the Respondent was injured in an industrial accident where he worked as a machine operator with Kamili Packers Limited on 18/10/2011 and sustained compound fractures of the left third and fourth phalanges and partial amputation of the distal phalanx of the left ring finger. He still had pain in the left hand.

53. The doctor gave him permanent incapacity of 6% and classified injury as maim. I did not look at other medical documents that were just marked for identification but not produced. The rules of evidence are clear.

54. The appellant rely on the case of ***Kenya Steel Fabricators Limited vs Tom Mkoi (2018) eKLR*** where the injuries sustained included the sole fracture of one finger with 4% permanent disability. The Honourable Judge Richard Mwongo awarded the general damages of Kshs.260,000/=. The aforementioned determination was made on 27th September, 2018.

55. In the above mentioned case, the court cited **Simba Posho Mills** where the Respondent's fingers were crushed by a moving roller. The tip of one of his fingers had to be amputated and he was unable to use his right hand. The degree of permanent disability was assessed by the doctor was 8% in 2002, the amount of general damages was awarded at Kshs.360,000/= and the same was reviewed by the High Court to Kshs.180,000/=.

56. The Honourable Judge further cited J**oseph Wahome** case, where the accident occurred in 2004 and the Respondent sustained compound fracture of the middle left hand finger, leading to its deformation after it had healed. Further the half of the tip of the index finger was missing. The lower court awarded general damages of Ksh120,000/= and on appeal, the High Court in October 2008 reviewed the same to Kshs.180,000/=.

57. Following the above jurisprudence of the related injuries, appellant submits that in the light of the injuries sustained by the Respondent an award of Kshs.600,000/= is inordinately high and the same is excessive and prays that the same be set aside.

58. I have looked at quoted authorities and find some to be persuasive, only that some awards are over 10 years old and inflation. I find an award of Kshs.600,000/= to be inordinately high and unfair in the circumstances in favour of Respondent against the Appellant. Thus the court reduces the same to Ksh. 300,000.

59. Thus the appeal succeeds to that extent with orders that ;

a. Liability is apportioned at 80%:20% in respondent's favour.

b. General damages for pain and suffering Ksh. 300,000.

c. Parties to bear their costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF NOVEMBER, 2019

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C. KARIUKI

JUDGE