REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 110 OF 2015

SPINNERS AND SPINNERS LIMITED.....APPELLANT

-VERSUS-

JULIUS KIVIAS KEZENGWA.....RESPONDENT

JUDGEMENT

1. The respondent one Julius Kivias Kezengwa sued the appellant seeking general and special damages, and loss of earning arising out of injuries he sustained while engaged in his duties at appellant premises.

2. The appellant denied the claim and the suit was heard fully. The trial court awarded respondent: -

- **General damages Ksh. 300,000/=**

- **Loss of earning Ksh. 776,400/=**

- **Future medical costs Ksh. 70,000/=**

- **Special damages Ksh. 3,000/=**

Total Ksh.1,149,400/=

3. Being aggrieved by the verdict the appellant lodged instant appeal and set out 8 grounds of appeal. However, during submissions he compressed the same to –

- **Fact that trial court failed to appreciate or analyse pleading in suit especially plaint and defence, exhibits and submissions by defence.**
- **The trial court favored respondent evidence against appellant's evidence.**
- **There was no sufficient evidence to warrant prove of case on balance of probabilities.**
- **The payment of loss of earning was unjustified.**

4. The parties agreed to canvass appeal and were so directed to file submissions.

APPELLANT'S SUBMISSIONS:

5. That the learned trial magistrate erred in law and fact when he failed to properly appreciate and/or analyse pleadings filed in the suit particularly the plaint and the defence, the defence exhibits and the defence written submissions.

6. The particulars of negligence raised by the Respondent against the appellant were many. On his evidence in chief the Respondent only blamed the appellant for not properly servicing the machine. The respondent did not expound on this allegation.

7. That the learned trial magistrate erred in law and fact when he did not warn himself of the danger of favouring the Respondent's evidence against the defence without analysing the whole evidence put before him by both the appellant and the Respondent.

8. The Respondent made an allegation that he was on duty on 13/9/2012 when he was injured in the appellant's company. He did not call any witness to corroborate the same. The defence witness (DW1) denied that the Respondent was injured on that day or at all. That the Respondent was not a machine operator but a machine mechanic.

9. That, that day they was no injury recorded involving the Respondent as the company had kept accidents records for each day of occurrence in which the Respondent's name was not recorded. The learned trial magistrate failed to make a finding on defence evidence and proceeded to believe the Respondent evidence without assigning any reasons.

10. As shown in the defence evidence, there was no record or report of an accident by the Respondent on 13/9/2012. The defence produced documents of record in court. It is evident on record that the Respondent did not attend any hospital until 3rd October 2012. This was nearly one month from the date of injury.

11. The Respondent on cross examination responded that he did not go to hospital until 3/10/2012 because he did not have money. The defence witness stated clearly that the appellant company had contracted a doctor at Ruiru town. The Respondent ought to have gone there if he was injured as alleged and on the date alleged. Government hospitals also treat people free of charge.

12. The DW1 further stated that he was a present employee on 13/9/2012. He worked full day on 14th and 15th September 2012 following. The DW1 produced a duty roster for September 2012 as Dexh 2. With all the evidence including the documentary evidence produced by the defence, the Respondent's evidence remained a mere allegation based on lies and ought not to have found for the Respondent. Further, the alleged injuries were fractures and ought not to have waited for more than one month to seek medical treatment.

13. The learned trial magistrate erred in law and fact when he accepted wrong principles for payment of loss of earnings.

14. On the rest of the grounds, it submitted that no evidence of negligence against the appellant was given by the Respondent to prove the negligence alleged. The fact that an accident may have taken place leading to injury is no proof of negligence.

15. Lastly, even if an accident took place and the appellant was to blame, the Respondent ought to have been apportioned a contribution of not less than 50% as he was the author of the accident.

RESPONDENT'S SUBMISSIONS:

16. Before instituting the claim, the respondent served a demand notice on the appellant. The notice was produced in evidence as Respondent's exhibit No.7a. The appellant did not reply to the demand letter to deny that an accident involving the respondent took place at its premises on 13th September 2012.

17. The appellant at the hearing of the case in the lower court led evidence to demonstrate that no accident took place at its premises and that even if an accident took place, the offence did not receive any report of such an accident.

18. DW1, Bernard Ngaragai Kamau informed the court that ordinarily it is a supervisor who reports incidences of injury to the management. DW1 confirmed to the court that the respondent's supervisor was a Mr. Francis Barasa who was still in the employment of the appellant as at the date when DW1 was testifying.

19. He informed the court that Francis Barasa was to give him (DW1) information on any accident. DW1 failed to inform the court why Francis Barasa had not been called as a witness. Further DW1 failed to inform the court why Francis Barasa had not tendered a witness statement in court.

20. The court carefully considered the failure by Francis Barasa to testify and the fact that he was the respondent's supervisor and reached a finding in favour of the respondent. The court had discretionary power to reach a finding as it did. That discretionary power can only be interfered with by an appellate court on known grounds.

21. An appellate court will not interfere with the exercise of discretion by a lower court on findings of fact unless it be shown that the court erred on known grounds. There is absolutely no evidence that the court failed to consider evidence that would have enabled it reach a contrary finding.

22. On liability, the respondent testified that the machine he was working on was defective. The respondent was not a technician but a machine operator. The driver of a motor vehicle is not necessarily a mechanic. The respondent testified that the machine he was working on had a break down. He testified that waste had blocked the machine.

23. It was his testimony during cross examination that the machine had problems. That the night shift operator of the machine a Mr. Muchara had experienced difficulties/problems with the machine which was fixed.

24. The respondent testified that he had reported the faulty machine to his immediate supervisor, Mr. Francis Barasa. The respondent testified that whereas he had stopped the machine to remove waste, the machine restarted by itself trapping his hand. An electrician had to switch off the machine.

25. This evidence of course could only arise 2 conclusions that a person switched on the machine while the respondent's hand was removing waste from the machine or the machine was so deficient that it could trigger the one switch without prompting.

26. And the fact that the night operator of the machine had equally complained that the machine had a problem, surely the learned honourable magistrate could not be faulted on the findings made. He urged the honourable court to uphold the finding and dismiss the appeal herein.

27. On quantum, the appellant contended that the learned trial magistrate erred in law when he accepted wrong principles for payment of loss of earnings and that the learned trial magistrate awarded hefty and excessive damages.

28. On the limb of attack against the award for general damages for loss of earnings, the principles for assessment for loss of future earnings were common to both parties.

29. The appellant submitted that the court should award Kshs.3000 x 12 months x 11 years all totaling to Kshs.506,000/= but that the award was to be reduced by 60% contributory negligence. The appellant suggested an award of Kshs.303,600/=. The respondent on his part sought Kshs.7,000/= per month x 12 months x 16 years totaling Kshs.1,242,240/=.

30. The court adopted a multiplicand of Ksh.6,470/= being the amount in the letter of appointment, the court adopted a multiplier of 10 years and not even the 11 years that the appellant had suggested and assessed loss of future earnings at Kshs.776,400/= using the principles submitted upon by the parties.

31. In any event, the appellant did not tell the court why it had to depart from the amount the respondent earned when it suggested a multiplicand of Kshs.3,000/= per month while admitting in its submissions that the respondent earned Kshs.6,999/= per month.

32. Infact going by the principles suggested by the appellant, if the court adopted Kshs.6,999/= monthly earning as the respondent's earnings as submitted by the appellant and retained the multiplier of 11 years as suggested by the appellant, the award for future loss of earnings would be higher than the Kshs.776,400/= awarded.

33. Infact the only difference between the appellant's suggested principles of assessment is that the court did not ascribe any liability to the respondent and that the court adopted the earning of the respondent and not what the appellant suggested. The contest therefore against the court's award on this lacks merit.

34. On general damages, the respondent sought Kshs.900,000/=. The respondent suffered 20% incapacity. The appellant on its part suggested Kshs.200,000/=.

35. The court awarded Kshs.300,000/= in general damages. This amount is Kshs.100,000/= higher than the amount of Kshs.200,000/= suggested by the appellant while it is Kshs.600,000/= less the amount suggested by the respondent. Surely it is the respondent who should be complaining about an inordinately low award in general damages and not the appellant.

36. But appreciating that the composite figure for general damages, loss of future earnings and future medical costs is fair, the respondent is at peace with the court's award which award the respondent contends was pegged on the parameters set out by the parties themselves in their written submissions.

FIRST APPELLATE'S COURT DUTIES:

37. The first appellate court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.

EVIDENCE ADDUCED:

Respondent/Respondent's Case:

38. The Respondent testified that on 13th September 2012 while working at the appellant's premises as a machine operator, there was blockage on the said machine he was working on and he stopped the machine so as to remove waste but the said machine re-started itself and begun running and in the process he was injured on his right index finger.

39. It was his testimony that an electrician came and switched off the machine. Thereafter first aid was administered on him and was taken to Ruiru Sub-District Hospital for treatment. Thereafter he was referred to Kiambu Hospital where an x-ray was conducted. He stated that after sustaining the said injuries the appellant sacked him.

40. He blamed the company for the accident as they had not properly serviced the machine and for not providing him with gloves as they could have minimized his injuries.

41. During cross examination he stated that the machine he was operating is known as SOMET No. 145 and he was alone while operating the same. He further informed trial court that the machine was usually operated day and night.

42. During the night shift it was operated by one Muchana who informed him that the said machine had a breakdown but the same had been fixed. He switched off the said machine and while removing waste the machine restarted itself and that is how he got injured.

43. He informed trial court that he had earlier informed one Francis Barasa a machine maintenance mechanic about the machine breakdown but he did not act on the same. He was also told not to report to work on 14th and 15th September 2012.

Appellant/Appellant's Case:

44. DW1 one Bernard Ngaragari Kamau testified that he was a safety and training manager at the appellant's company. His testimony was that the Respondent used to work at the blanket weaving department and on 13th September 2012 there was no reported incident of any injury.

45. He outlined the procedure taken when one is injured, being that one has to inform his immediate supervisor. The Respondent's supervisor was one Francis Barasa. It was his testimony that the Respondent was not injured at the company's premises on 13th September, 2012.

46. During cross examination DW1 confirmed that the Respondent was on duty on 13th September, 2012 but did not work on 14th and 15th September 2012. It also emerged that one Francis Barasa was the Respondent's supervisor and was the one who was supposed to inform the management that the Respondent had been injured if at all.

ISSUES:

47. After going through the proceedings on record, pleadings and the parties submissions, I find the issues are ;

- ***whether the trial court failed to appreciate or analyse pleading in suit especially plaint and defence, exhibits and submissions by defence.***
- ***whether the trial court favored respondent evidence against appellant's evidence.***
- ***whether there was no sufficient evidence to warrant prove of case on balance of probabilities.***
- ***whether the payment of loss of earning was unjustified..***

What is the order as to costs

ANALYSIS AND DETERMINATION:

48. The Respondent testified that he was on duty on 13th September 2012 when he was injured. DW1 did produce a clocking system sheet which indicates that the Respondent was on duty on 13th September 2012 but was absent on 14th and 15th September, 2012.

49. DW1 did confirm to the trial court that it was the Respondent's supervisor's duty one Francis Baraza to inform them that the Respondent had been injured.

50. It came out clear that the procedure in reporting that an accident had occurred was not within the Respondent's hands but his supervisor one Francis Baraza. DW1 did confirm that the said supervisor Francis Barasa was still in employment at the appellant's company. In essence if one's name does not appeal in the accident register that does not mean he was not injured since his/her supervisor ought to inform the management of the same.

51. Nothing would have been much easier that for the appellant to call the Respondent's supervisor one Francis Baraza to shed light on this issue. Failure, to avail the said one Francis Baraza as a witness in this matter can be inferred that it might be prejudicial to their own case.

52. The Respondent's testimony was cogent and consistent and it is more credible than the appellant's witness. It was apparent therefore for trial court to find that the Respondent was injured at the appellant's premises.

53. The second issue for determination is whether the Respondent was the author of his own misfortune or the appellant contributed towards the same. The Respondent testified that on the material date he switched off the machine so as to remove waste but the machine restarted itself and at the time he had not been provided with gloves, which could have minimized his injuries.

54. This was not disputed by the appellant. Indeed, the provisions of the Occupational Health and Safety Act Cap. 514 Laws of Kenya makes it mandatory under section 6 of the said Act.

55. From the fore stated it is therefore clear that the appellant failed to provide protective gear and failed to ensure that the maintenance of the workplace is safe and without risks to health. The fact that the machine was faulty and the Respondent after reporting the same nothing was done on it demonstrate negligence on the part of the appellant.

56. This in return made the workplace unsafe. It was clear in trial court mind that the Respondent has proved his case on a balance of probability as required by law. Thus I uphold the finding of the appellant 100% liable.

57. In ***Butt vs Khan [1981] KLR 349*** where it was held 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 a wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

58. On quantum, there is evidence that, the Respondent suffered a fracture on the right index finger which were maim in nature. Dr. Ikonya

also stated that the finger had been deformed with stiff joint, and he will benefit from internal fixation and physiotherapy which would cost about Kshs.70,000/=.

59. That the Respondent had suffered a permanent incapacity of about 20% since he was a right sided person. For these injuries the Respondent proposed Kshs.900,000/= would be adequate as general damages. The appellant proposed a sum of Kshs.200,000/= would be adequate compensation.

60. The trial court Considering that the Respondent suffered 20% permanent incapacity, awarded respondent Kshs.300,000/= as general damages. The same was justified in the circumstances of the respondents injuries inflicted in the accident.

61. On loss of earnings, the Respondent did produce his appointment letter issued by the appellant which indicated that he used to earn Kshs.6,470/= per month. It was also his testimony that he was sacked by the appellant thereafter.

62. The Respondent proposed that the court to adopt a multiplier of 16 years. The appellant submitted that the court should arrive at loss of earnings based on discretion and not more than Kshs.3,000/= per month and the court adopt a multiplier of 11 years. This was appropriate and supported by the adduced evidence.

63. On loss of earning, evidence was led for the same to be awarded. The Respondent did produce his appointment letter which indicated he used to earn Kshs.6,470/= per month. Same was adopted by the trial court. The same court noted that it was also aware of the vagaries of life including road accident, incidences of HIV/AIDS and adopted a multiplier of 10 years. 6,470 x 10 x 12 = 776,400.The same cannot be faulted.

64. On future medical costs the trial court awarded respondent Ksh.70,000/= as provided for in the medical report of Dr. Ikonya. Special damages, was also awarded Kshs.3,000/= as pleaded and proved. The Respondent was also to recover doctor's attendance fees as costs.

i. In sum the court finds no merit in the appeal and dismisses the same with costs to the respondent.

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

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C. KARIUKI

JUDGE