



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 568 OF 2015

HEZRON MWANGI KARAKACHA.....APPELLANT

-VERSUS-

EMCO BILLETS & STEEL LIMITED.....RESPONDENT

(Being an appeal against the judgment and decree of Hon. A.M. Obura (Mrs.) (Principal Magistrate) delivered on 10th November, 2015 in CMCC NO. 5073 OF 2012)

JUDGMENT

1. Hezron Mwangi Karakacha, the appellant in this instance, instituted a suit vide the plaint dated 10th August, 2012 in which he prayed for general damages and special damages in the sum of Kshs.3,000/ against the respondent for breach of statutory duty of care, plus costs of the suit and interest thereon.
2. The appellant pleaded in his plaint that sometime on or about the 25th of November, 2010 while undertaking his lawful and employment duties as a helper glass cutter at the respondent's premises in Nairobi area, he was assigned with the responsibility of charging scrape when some metal particles entered his right ear, causing severe injuries.
3. The appellant set out the particulars of breach of the respondent's contractual obligations as well as the particulars of breach of the respondent's statutory obligations.
4. The respondent entered appearance and put in its statement of defence dated 24th October, 2012 to deny the respondent's claim.
5. At the trial, the appellant relied on the evidence of two (2) witnesses while the respondent closed the defence case without calling any witnesses. Subsequently, the parties filed and exchanged written submissions.
6. The trial court eventually dismissed the suit with costs to the respondent.
7. The aforesaid judgment now constitutes the subject of the appeal, with the appellant putting forward the following grounds in his memorandum of appeal dated 18th November, 2015:
 - (i) *THAT the learned trial magistrate took into account irrelevant issues and arrived at a wrong conclusion.*
 - (ii) *THAT the learned trial magistrate misdirected herself in both law and fact and arrived at a wrong conclusion by dismissing the suit.*
 - (iii) *THAT the learned trial magistrate failed to consider the solid evidence tendered by the appellant's witness.*
 - (iv) *THAT the learned trial magistrate erred in both law and fact and arrived at an award of quantum which was very low.*
8. This court invited the parties to file written submissions on the appeal. On the subject of liability, the appellant argued that since the respondent did not deny the occurrence of the accident in its defence, the trial court ought to have found it wholly liable, citing the case of **David Kituu Nzuma v Epco Builders Limited [2003] eKLR** where the court acknowledged that the plaintiff in that case had adduced evidence to show that he was forced to undertake duties against his will and for which he was not qualified, thereby finding the defendant liable.
9. The appellant further argued that the trial court ought to have considered his evidence that he was never provided with the necessary protective gear to enable him perform his duties adequately and that the respondent did not call any witnesses to counter such evidence. In

this respect, the appellant referred this court to the case of **Kimatu Mbuvi v Benson Nguli [2010] eKLR** wherein it was held that in a scenario where a party does not call any evidence to rebut allegations of negligence, then liability cannot be challenged.

10. As concerns quantum, it was the appellant's contention that the award of Kshs.150,000/ as general damages which the trial court would have made had the suit succeeded was inordinately low and was made without considering relevant factors such as the nature of injuries sustained by the appellant and the medical evidence tendered before her.

11. The appellant was of the view that an award of Kshs.797,000/ would have been sufficient, thereby placing reliance on the case of **Ann Chebet Cheruiyot v Samwel Kipkurui Bore [2014] eKLR** where the court awarded the sum of Kshs.500,000/ as general damages for injuries similar to those sustained by the appellant.

12. It was also the appellant's contention that the trial court ought to have awarded the sum of Kshs.14,000/ as special damages.

13. On its part, the respondent in urging this court to uphold the trial court's decision to dismiss the appellant's suit, submitted that the appellant did not bring any evidence to show that he was truly injured while in the course of his employment, hence the respondent could not be held liable for the injury sustained. The respondent referred this court to the authority of **Statpack Industries v James Mbithi Munyao [2005] eKLR** where it was rendered that evidence ought to be adduced to prove an allegation of fact.

14. On quantum, the respondent contended that should this court be persuaded to set aside the trial court's finding on liability, then it would be proper for the appellant to be awarded nominal damages.

15. Furthermore, it was the respondent's submission that the injuries in the authority of **Ann Chebet Cheruiyot v Samwel Kipkurui Bore [2014] eKLR** do not replicate those suffered by the appellant since those suffered in that case were of a more severe nature.

16. The respondent also supported the trial court's award on special damages, adding that should this court be inclined to award costs for the doctor's court attendance, then it would be fair for the appellant to be awarded costs for only one attendance.

17. I have considered the rival submissions on appeal and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

18. It is clear that the appeal is challenging both the finding on liability and quantum. I therefore deem it practical to address the grounds of appeal under the two limbs.

19. In relation to the first limb on liability, the trial proceedings show that the appellant in his testimony as PW1 stated that on the material day, he was forced to work in the furnace section by a Mr. Njenga who was the Personnel Officer and that he was not provided with protective gear.

20. During cross examination, it was the appellant's assertion that he was employed as a general worker but trained on the job as a glass cutter.

21. The appellant went on to explain that he did not receive any training in handling the furnace and that the material day was his first day to work in that department.

22. It was also the appellant's assertion that following his injury, he visited Gurunanak Hospital on the same day and was also later treated at Lyons Hospital at a later date.

23. In her judgment, the learned trial magistrate reasoned that whereas the appellant had established his employment with the respondent, he did not adduce any evidence to show that he received treatment at Gurunanak Hospital, adding that the dates borne in the report by Lyons Hospital are inconsistent with the facts.

24. The learned trial magistrate further stated that the appellant had not only failed to call any of his colleagues to corroborate his story but had additionally failed to prove he was injured while in the course of his duties.

25. It is apparent from the evidence which I have re-evaluated that there is no dispute as to the employment of the appellant with the respondent. Going by the averments made in the respondent's statement of defence, it is also apparent in paragraph 3 of the same that the respondent attributed the accident solely to negligence of the appellant.

26. It is now a well settled principle of law that parties are bound by their pleadings. This principle was restated by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** as follows:

"...parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce."

27. The court in the above-cited case went on to appreciate that courts of law are equally bound by the pleadings of the parties.

28. It is my observation that whereas the respondent stated in its submissions that the appellant did not prove to the required standard that he was injured in the course of his employment, the respondent's pleadings tell a different story as seen above. The respondent cannot be heard to contradict its pleadings.

29. In any event, it is noted that the respondent did not call any evidence to controvert the appellant's evidence that he was in the course of his employment when the accident occurred and that he was neither provided with protective gear to ensure his safety in the performance of his duties nor trained in the duties for which he was assigned on the material day.

30. In my view, notwithstanding the fact that the appellant did not avail any treatment notes before the trial court to show that he was treated at Gurunanak Hospital, he was able to adduce the medical evidence to confirm that he was later on seen at Lyons Sight First Eye Hospital and subsequently examined by Dr. Cyprianus Okoth Okere who prepared a medical report.

31. Furthermore, it is plausible that there was a typo error in the date of 17th July, 2011 indicated on the report by Lyons Sight First Eye Hospital since the said report bears a stamp of the Hospital dated 17th July, 2012.

32. To my mind and with respect to the learned trial magistrate, I find that she placed undue focus on the absence of the initial treatment notes and the confusion in dates on the aforementioned report while overlooking the fact that the appellant had pleaded the *res ipsa loquitur* doctrine and tendered evidence to support his claim, which evidence was not at all controverted by the respondent at the trial.

33. In the circumstances of the case, I am convinced that the appellant having discharged his legal and evidentiary burden of proof, the evidentiary burden of proof shifted to the respondent to demonstrate that the appellant was not injured at his work place and that he was either solely to blame or at the very least contributed to the injury. This was not done.

34. From the foregoing, I am therefore satisfied that the appellant proved his claim on a balance of probabilities.

35. The respondent's submissions do not constitute evidence. The learned trial magistrate erred when she put too much weight to the same instead of restricting herself to the pleadings and evidence placed before her. The learned trial magistrate's analysis and finding on liability were therefore erroneous and ought to be interfered with.

36. The second limb of the appeal concerns itself with the question on whether the award of damages was inordinately low. On general damages, the appellant proposed the sum of Kshs.797,000/ citing the abovementioned case of **Ann Chebet Cheruiyot** (*supra*) whereas the respondent did not offer any amount under this head.

37. The learned trial magistrate awarded the sum of Kshs.150,000/.

38. It is apparent that the learned trial magistrate did not consider the relevant principles in making the award of damages.

39. The medical evidence on record is consistent with the nature of injuries sustained by the appellant. The appellant is indicated as having sustained subrural perforation of the right ear drum. The medical report dated 27th July, 2012 prepared and produced by Dr. Cyprianus Okoth Okere (PW2) classified the appellant's injury as grievous harm.

40. The judicial authority of **Ann Chebet Cheruiyot** (*supra*) which was decided by this court a few years back constituted comparable injuries to those suffered by the appellant herein though the plaintiff in that instance suffered additional injuries.

41. I have also looked at the more recent case of **Ahmed Mzee Famau t/a Najaa Coach Ltd & another v Veronica Ngii Muia aka Veronica Muiya aka Veronica Ngui Muiya [2017] eKLR** where the court upheld an award of Kshs.500,000/ for injuries to the ear amongst other injuries.

42. Being guided by the above-cited authorities, I am satisfied that the award of Kshs.150,000/ was inordinately low and I will substitute it with a reasonable award of Kshs.400,000/ having acknowledged that the appellant herein sustained a singular injury to the ear which has since healed as indicated in the aforesaid medical report.

43. On special damages, whereas the appellant sought for the sum of Kshs.3,000/ plus Kshs.12,000/ as costs for the doctor's attendance, the trial court awarded Kshs.2,000/.

44. Upon re-evaluation of the evidence, I have come to the conclusion that the sum of Kshs.3,000/ was both pleaded and proved in line with the law on special damages. I will therefore substitute the learned trial magistrate's award accordingly.

45. In the end, the appeal succeeds both on liability and quantum and is therefore allowed. Consequently, the order dismissing the appellant's suit is set aside and is substituted with an order of entry of judgment in favour of the appellant and against the respondent as follows:

a) General damages	Kshs.400,000/
b) Special damages	Kshs.3,000/
Total	Kshs.403,000/

The appellant shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full. The appellant shall also have costs of the appeal.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent