REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 106 OF 2018

MARUTI MINING LIMITED.....APPELLANT

-VERSUS-

EDWARD MUHAJI BUHELO.....RESPONDENT

(Being an appeal from the judgment of the Honourable D. O. Mbeja (Mr) Senior Resident Magistrate at the Magistrate's Court at Nairobi, Milimani Commercial Court, Civil Case No. 7790 of 2016 delivered on 12th February, 2018)

JUDGEMENT

INTRODUCTION:

1. By a plaint dated 28/10/2016, the respondent instituted the proceedings against the appellant in lower court on 15/11/2016 seeking judgment for inter alia, general damages and special damages.

2. This is as a result of personal injuries the respondent sustained on 30/8/2015 while working and in the course of his employment at the appellant's premises. The respondent was injured at a building site along Mombasa road where he fell from a height.

3. The respondent has attributed acts of negligence on the part of the appellant for the accident and the resultant injuries that the respondent sustained.

4. The respondent sustained the following injuries;

- ***Bruises on both upper arms and right scapular.***
- ***Injury to the left lower back and hip joint.***
- ***Soft tissue injury to the head.***
- ***Subcapital fracture of the left femoral neck.***

5. On 17/1/2017 the appellant filed its statement of defence denying liability.

6. After the case was heard, the court made orders –

· The liability was apportioned at a rate of 80:20% in favour of the respondent. On quantum, the court awarded respondent general damages for pain and suffering Kshs. 200,000/= special damages proved and costs plus interest.

7. The appellant was aggrieved with aforesaid judgment thus filed appeal and set out the following 2 grounds:

(1) That the learned magistrate erred in law and in fact in finding that the respondent was entitled to the general damages, special damages and costs.

(2) That the learned magistrate erred in law and in fact in finding that the respondent proved his case on a balance of probabilities.

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

Appellant's Submissions:

9. It is the appellant's submission that the trial court failed to consider the appellant's defence or appreciate the entire evidence before it in its judgment. The defence produced the muster roll which proved that the respondent was not its employee at the time of the accident whereas the respondent herein did not produce an employment card or other document to support his claim. Further the accident register showed there was no injury that was reported on that day according to the appellant's witness ***Edward Edward Muhaji*** the supervisor.

10. The respondent's claim before the trial court was for compensation for the injuries he sustained while under the alleged employment at the appellant's company. Being the party seeking the orders of the court, the burden was always on him to prove, on a balance of probability, the fact that he was employed by the appellant, that he sustained injuries in the course of this employment and that the appellant, though its negligence caused the accident or omitted doing something leading to its happening.

11. The respondent conceded on cross-examination that he had not produced any document to prove that he was at the time of the alleged accident an employee of the appellant or that he was on duty on this day.

12. It is the appellant's argument that the finding of the trial court was against the evidence produced by the defence. The court further failed to consider the fact that employment and injury had been successfully refuted by the appellant herein.

13. It was incumbent upon the appellant to prove to the required standard, on a balance of probabilities any of the particulars of negligent acts attributed to the appellant as they so alleged to warrant the court apportioning liability as pleased. The respondent did not in any way whatsoever shake the appellant's clear testimony.

14. It is the appellant's submission that, the finding of liability in the ration of 20:80 is excessive and irrational. The appellant will rely on the principle of *volenti non-fit injuria.*

15. On *volenti non-fit* injuria the respondent staggered with his case before the trial court and in fact made it clear that, the ladder that he so used was not strong enough to stand his weight. However, Edward Edward Muhaji failed to explain to the court as a reasonable man, why he could not foresee the consequences associated with its continued usage. It is on this premise that the appellant submits that, the respondent contributed to his own misery and should be found 50% liable.

16. The general principle applicable in considering an appeal on quantum is that the assessment of damages by a trial court is an exercise of discretion and that the appellate court will not normally interfere with such exercise of discretion unless:-

i. The judge has either acted on wrong principles or awarded so excessive; or

ii. So inordinately low damages; or

iii. Has taken into consideration irrelevant matters; or

iv. Failed to take into consideration relevant mattes and in the result arrived at the wrong decision that would otherwise cause an injustice. This is per ***Hononurable P. J. O. Otieno in Securicor Security Services Kenya Ltd vs M.F and Another [2016] eKLR.***

17. The respondent pleaded particulars of injuries as follows:-

a) Bruises on both upper arms and right scapular.

b) Injury to the left lower back and hip joint.

c) Injury to the head-central.

d) Sub-capital fracture of the left femoral neck (slight compression of the femoral head onto the femoral neck).

18. The appellant wishes to rely on the following authorities:

(a) ***Reliable Freight Services Ltd & Another vs Henry Ingaru Mulama [2018] eKLR,*** in which case the court reduced the magistrate's court award of Kshs.900,000/= in general damages to Kshs.600,000/= having found that the Honourable Magistrate misapprehended both law and fact in reaching that determination.

(b) In a similar holding, **C. Kariuki** in ***Were Rodah & Another vs MMM [2018] eKLR,*** found that, an award of Kshs. 1,300,000/= is too expensive for the injuries claimed which were less severe. Thus inordinately high on the other hand comparing the cited authority by appellant where the award was Kshs.100,000/= for wounds on scalp would on the knee and fracture tibia and fibula.

(c) Further in the case of ***Godwin Ireri vs Franklin Gitong [2018]*** as cited in ***Luisa Marigu Mugo vs Nguyo Joseph Kingori & Another [2019] eKLR*** where the claimant sustained soft injuries being a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. The trial court awarded Kshs.300,000/= as general damages for soft tissues injuries. The appellant being aggrieved with the said award appealed to the High Court where **D. S. Majanja J** held that the award was inordinately high and set aside the same with an award of Kshs.90,000/= for the injuries as reasonable and just.

19. That considering the authorities above cited, and considering that the appellant sustained mild soft tissues injuries, it submit that the award of Kshs.200,000/= was inordinately high. The trial magistrate overlooked the principle that comparable injuries should as far as possible is compensated by comparable awards. The award of damages is meant to compensate the respondent but not to enrich the respondent.

20. The respondent as well failed to prove that he was employed by the appellant and as such is not entitled to the benefits under the Occupational Safety and Health Act No. 15 of 2007. It thus submit and pray that:

> ***(1) The Honourable Court finds that the appellant was not an employee of the respondent and as such not entitled to any claims from the appellant.***
>
> ***(2) The appeal be allowed and the judgment of Honourable D. O. Mbeja (Mr) dated 12th February 2018 be set aside.***
>
> ***(3) That in the alternative, if the court reaches a conclusion that the respondent was an employee of the appellant, it pray that the Honourable Court apportions liability arising from the accident in the ration of 50:50%; and***
>
> (4) ***The court be pleased to find the award of Kshs.200,000/= by Honourable D. O. Mbeja (Mr) was inordinately high and revise to Kshs.50,000/=.***

Respondent's Submissions:

21. The only issue that comes up for appeal is whether or not the award given was erroneous. It is trite law that a party is bound by its own pleadings. The appellant cannot now purport to formulate issues which do not emanate from its own appeal.

22. The question of whether or not the respondent was employed by the appellant or whether the trail court was correct or not in awarding liability at the ration of 80:20% is coming out in the submissions but not the appeal.

23. The respondent testified and informed the trial court that he indeed sustained those injuries. That testimony was corroborated by the evidence of Dr. Japheth Amugada who examined the respondent, relied on other treatment notes which are on record, and indeed observed the respondent and prepared a medical report to that effect.

24. On the other hand, the appellant did not bother to refer the respondent for second medical opinion if they disputed the findings of Dr. Amugada aforesaid. What they did was to attack his opinion but without any tangible evidence contrary to the doctor's report.

25. That it is clear that the respondent suffered multiple soft tissue injuries as well as a fracture of the left femoral neck. It is his submission that an award of Kshs.200,000/= less 20% liability was on the lower side given the serious nature of the injuries.

26. The respondent had submitted for an award of Kshs.300,000/= whereas the appellant had submitted that an award of Kshs.50,000/= would be sufficient. The respondent relied on the case of ***Kamenju Charles vs Gideon Muia Mutisya [2014] eKLR,*** in which the High Court upheld an award of Kshs.170,000/= for multiple soft tissue injuries in 2014. The respondent herein suffered such multiple soft tissue injuries plus a fracture of the left femoral neck.

27. It is his submission that the trial court's award was not inordinately high so as to warrant disturbance by this Honourable Court. The award reasonable in the circumstances and should stand. He submits that the appeal as filed herein has no merit and should be dismissed with costs.

EVIDENCE ADDUCED:

28. The respondent called Dr. Japheth Amugada who testified as PW1. He examined the respondent and prepared a medical report dated 13/6/2016 which he produced as an exhibit. The respondent was treated at Morningside Medical Clinic and Kenyatta National Hospital after the accident.

29. The respondent also testified as PW2. He was injured while working for the appellant. He also adopted a statement dated 28/10/2016 as part of his evidence in chief which I have considered together with a further statement dated 22/2/2017 whose contents I have also considered.

30. Prior to the accident the respondent had worked for about two continuous months at the construction section in the appellant's company and he was always supervised by 0ne Mr. Mwangi. They were eleven masons. Mr. Mwangi used to pay the workers weekly wages. The respondent also relied on the list of documents filed in court with the plaint as exhibit.

31. The defence on the other hand called Ogeto John Boniface, a Human Resource Supervisor who testified as DW1. It is his evidence that the respondent herein has never worked for the appellant. It was further his testimony that he had worked with the appellant for over 10 years and all injuries to the appellant's workers are recorded. He has never seen the respondent. He made reference to a record of injuries on 5/9/2015. Save for employees names, the identity card numbers are not disclosed on defence exhibit 1. There's no record for 30/8/2015.

32. During cross examination he stated that he knows one Mr. Mwangi and that he also knows the respondent. He saw the respondent at a construction site. He also saw the place the respondent fell. It was 70 metres from the location of the appellant company.

33. Jacob Mwangi, a Human Resource Manager with the appellant who testified as DW1, he stated that the accident occurred due to negligence of the respondent as he had been working in the same position for six years and therefore had experience.

34. The respondent had worked with the appellant for a considerable duration of time and is equally expected to have sufficient knowledge of risks involved at the place of work.

ISSUES:

35. After going through the evidence on record and parties submissions, I find the issues are; ***whether the respondent proved his case on balance of probabilities? What is the order as to costs?***

ANALYSIS AND DETERMINATION:

36. Respondent testified that prior to the accident the respondent had worked for about two continuous months at the construction section in the appellant's company and he was always supervised by 0ne Mr. Mwangi. They were eleven masons. Mr. Mwangi used to pay the workers weekly wages. The respondent also relied on the list of documents filed in court with the plaint as exhibit.

37. Jacob Mwangi, a Human Resource Manager with the appellant who testified as DW1, he stated that the accident occurred due to negligence of the respondent as he had been working in the same position for six years and therefore had experience.

38. The respondent had worked with the appellant for a considerable duration of time and was equally expected to have sufficient knowledge of risks involved at the place of work. In this regard the trial court was justified in finding and holding that, the respondent had established a prima facie case against the appellant on a balance of probabilities.

39. Further to hold that the respondent was also partly to blame for the injuries he sustained. He also voluntarily assumed the risk of injury and ought to have exercised extra caution at his place of work. In the result I agree with trial court holding that the respondent shoulders 20% on liability while the appellant was liable at 80%, consequently judgment entered in favour of the respondent against the appellant on liability in the ratio of 80:20 with the respondent shouldering 20% was justified in the circumstances.

40. In the case of ***Waladi Yasini vs Kenya Cargo Handling Services Ltd Civil Appeal No. 86 of 1986,*** the court held that, there is a duty imposed upon an employer to provide safe conditions of work and this position was replicated in the case of ***Mumias Sugar Co. Lt vs Charles Namatiti Civil Appeal No. 151 of 1987*** which this court agrees with.

41. Having the above in mind also reference is made to section 18 of the Occupational Safety and Health Act which provides that:

> ***"An occupier of non-domestic premises which have been made available to persons, not being his employees may use a plant or substance provided for their use there, shall take such measures as are practicable to ensure that the premises, all means of access thereto and egress therefrom available for use by persons using the premises, and any plant or substance in the premises provided for use there, are safe and without risks to health."***

42. The Act goes on to state that, ***"a person who has, by virtue of a contract, lease or otherwise, an obligation of any extent in relation to the – (a) maintenance or repair of a place of work or any means of access thereto or egress therefrom; or (b) prevention of risks to safety and health that may arise from the use of any plaint or substance in the place of work, shall for the purpose of subsection (1), be deemed to have control of the matters to which his obligation extends."***

43. On quantum, the general principles applicable in considering an appeal on quantum are that the assessment of damages by a trial court is an exercise of discretion and that the appellate court will not normally interfere with such exercise of discretion unless:-

> ***i. The judge has either acted on wrong principles or awarded so excessive; or***
>
> ***ii. So inordinately low damages; or***
>
> ***iii. Has taken into consideration irrelevant matters; or***
>
> ***iv. Failed to take into consideration relevant mattes and in the result arrived at the wrong decision that would otherwise cause an injustice.***

44. See ***Securicor Security Services Kenya Ltd vs M.F & Another [2016] eKLR***.

45. The plaintiff sustained the following injuries ;

> ***i. Bruises on both upper arms and right scapular.***
>
> ***ii. Injury to the left lower back and hip joint.***
>
> ***iii. Injury to the head-central.***

iv. Sub-capital fracture of the left femoral neck (slight compression of the femoral head onto the femoral neck).

46. Given the medical evidence so far adduced in the instant suit the injuries suffered as stated above, by the respondent together with the submissions filed and the authorities cited particularly the case of ***Kamenju Charles vs Gideon Muia Mutisya [2014] eKLR,*** judgment entered in favour of the respondent against the appellant for a sum of Kshs. 200,000/= in general damages for pain and suffering in all the circumstances of this case could not be said to be inordinately high. Same is to be subjected to 20% contribution on liability.

47. Thus the court finds **no merit in the appeal and in the premise dismisses same with costs to the respondent.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

…….……

C. KARIUKI

JUDGE