REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 120 OF 2011

C.B. GENERAL CONTRACTORS LTD. ....APPELLANT

VERSUS

CORNEL ODHIAMBO ODEYO......................................RESPONDENT

(An appeal from the Judgment and decree of Hon. Michieka delivered on 26th June, 2010 in Mombasa CMCC No. 1574 of 2010)

JUDGMENT

1. On 8th July, 2011, the defendant/appellant filed a memorandum of appeal raising the following grounds of appeal:-

(i) That the Learned Magistrate misdirected himself in not reminding himself of the crystallized principles of law at the time of awarding general damages;

(ii) That the Learned Magistrate erred in law and fact in failing to appreciate that on the basis of material and evidence placed on record the Respondent had not proved his case on a balance of probabilities as required by law in civil cases;

(iii) That the Learned Magistrate erred in law and fact in failing to make a proper finding on whether the injuries sustained by the Respondent were caused by the negligence of the Appellant whether directly or indirectly;

(iv) That the Learned Magistrate erred in law and fact in awarding general damages to the plaintiff which were so inordinately high as to represent an entire erroneous estimate;

(v) That the Learned Magistrate erred in law and fact in awarding costs of the suit to the plaintiff whereas there was no evidence that the Plaintiff issued any demand and notice of intention to sue;

(vi) That the Learned Magistrate erred in law and fact in disregarding the appellant’s defence;

(vii) That the Learned Magistrate failed to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong decision in view of the evidence on record;

(viii) That the Learned Magistrate erred in law and fact in failing to exercise his discretion judicially (sic) in making the awards by failing to take into account the applicable principles of law correctly;

(ix) That the Learned Magistrate proceeded on wrong principles of law and misapprehended the appellant’s submissions and authorities before him in a material aspect to arrive at the quantum that he arrived at.

2. The appellant prays for this court to:-

(a) Allow the appeal and set aside the award of general damages and substitute the same with its own award; and

(b) Provide for costs of the appeal.

3. The appellant’s Counsel filed his written submissions on 9th February, 2016. The respondent’s Counsel filed his on 9th March, 2017. In highlighting his submissions, Mr. Mokaya, Learned Counsel for the appellant condensed the grounds of appeal into 3 main issues. These are,

(i) if the appellant was 100% liable for the accident, (ii) if the Hon. Magistrate was correct in making an award of Kshs. 200,000/= as general damages; and (iii) who will bear the costs of the appeal.

4. Counsel cited the case of **Selle vs Associated Motor Boat Company Ltd**. [1968] EA 123 at p. 126 on the duty of the 1st appellate court. He submitted that the Hon. Magistrate erred by apportioning liability at 100% against the appellant. He stated that the evidence adduced showed that the respondent had worked at the appellant's yard for 3 months. He knew the trade and the risk attached to the job. He therefore had a duty to seek for protective gear and also avoid getting into harm's way.

5. Reference was made to page 22 of the record of appeal where the respondent states that he did not ask for gloves. It was Mr. Mokaya's contention that liability should have attached to the respondent. He referred to the case of **Vyatu Ltd. Vs Osman Collins Wadika**, Kisumu Civil Appeal No. 137 of 2006 where the Judge held that the respondent was aware of the risk he was taking while working on a slippery machine but did not ask for a ladder. Liability was therefore apportioned.

6. It was the appellant's Counsel's position that no evidence was adduced to show that the appellant's working conditions were conducive to attracting injuries to the person of the respondent. He prayed for apportionment of liability at 50:50.

7. It was the view of the appellant's Counsel that the quantum awarded in the sum of Kshs. 200,000/= was on the high side considering that the injuries the respondent sustained was to a finger and Doctor Ndegwa in his evidence concluded that the respondent sustained soft tissue injuries. Mr. Mokaya indicated that the respondent's nail that had been damaged had grown and therefore an award of Kshs. 80,000/= should have been sufficient. He relied on the case of **Timsales Ltd. vs Penina Ochieng Omondi** [2011] eKLR where Kshs. 60,000/= was awarded for amputation of a small finger. He prayed for the award of Kshs. 200,000/= to be set aside for being excessive. He also prayed for the appeal to be allowed with costs to the appellant.

8. He relied on the case of **Eldoret Steel Mills Ltd. vs Lawi Odhiambo Amende** [2011] eKLR where Azangala J., (as he then was) referred to the Court of Appeal case of **Butler vs Butler**, Civil Appeal No.49 of 1983, where the court laid down the principles upon which an appellate court can interfere with, in an award of damages. These are:-

(i) if the lower court acted on the wrong principles;

(ii) if the court has awarded damages that are so excessive or so low as to represent an erroneous estimate of the damages; and

(iii) if the lower court has taken into consideration matters it ought not to have considered, or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.

9. Mr. Ngaine, Learned Counsel for the respondent submitted that it was not disputed that the respondent was an employee of the appellant and that he was injured in the course of duty. Counsel stated that the respondent slipped and got injured which he blamed on the appellant's failure to provide gloves and protective boots and no good reason was given as to why they were not provided.

10. Counsel asserted that it is the duty of the employer to provide the safety equipment required and a safe working environment. He submitted that the appellant called no witnesses to rebut the respondent's evidence that he was not provided with protective gear and a safe working environment. In his view, the appellant was 100% liable.

11. Counsel stated that a medical report was produced which summarized the injuries as severe soft tissue injuries, as such, an award of Kshs. 200,000/= was proper and reasonable considering the element of inflation.

12. In response to the respondent's submissions, Mr. Mokaya stated that the Doctor who testified classified the injuries as soft tissue in nature. He added that no authority was submitted to this court as a precedent to show the general damages that were being awarded at the time the accident happened. He wound up his submissions by stating that the authorities he had relied on had not been controverted.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If liability should be apportioned; and

(ii) If the amount of quantum awarded should be disturbed.

13. This court is alive to the duty of the first appellate court as enunciated in the case **Selle vs Associated Motor Boat Company Ltd** (supra). PW1 was Dr. Stephen Ndegwa. He testified before the lower court that on 31st May, 2010, he examined the respondent herein, who had been injured by a building block on 10th May, 2010 at his place of work. He sustained a crush injury on his index finger. He was treated at Seaside Clinic and allowed 2 weeks off duty. At the time when the respondent was examined, his finger had a deep septic wound at the edge and it was painful. He concluded that the injuries were soft tissue in nature and that the respondent's nail might not grow or a damaged nail might grow. The medical report dated 31st May, 2010 was produced as plf. exh. 1. PW1 charged Kshs. 2,000/= for the said report. He produced receipt No. 5713 as plf. exh. 2. He stated that court attendance costs were Kshs. 3,000/=. He produced receipt No. 5825 as plf. exh. 3 for the same.

14. On cross-examination, PW1 stated that he saw the respondent 21 days after he sustained the injury. The wound was at the distal end, across the nail. He saw the respondent later and noted that the nail was damaged but it had grown.

15. PW2 was Cornell Odhiambo Odeyo, the respondent herein. He testified that he used to work at Coast Builders General Contractors (appellant) daily as a casual worker. He joined them on 2nd February, 2010 but got injured at 4:15 p.m., on 10th May, 2010. He stated that the incident happened when he was moving stones from a lorry to site. As he was throwing a building block, he slipped, fell and the stone he was carrying crushed his right index finger nail. He was treated at Seaside Clinic where he was taken by the appellant's foreman, Alex Onyango.

16. PW2 had testified in the lower court that he had sued the appellant for not providing him with gloves and safety boots. He stated that he would not have slipped if he had boots on and gloves would have prevented serious damage. He said that he was not negligent. He produced a demand notice addressed to the appellant as plf. exh. 4. He further stated that the original treatment notes were retained by the foreman. He informed the trial court that although the injury healed, he felt pain when holding things.

17. On cross-examination he asserted that he was injured by a stone and that he had worked for 3 months. He did not report the incident to the Ministry of Labour.

18. The appellant tendered no evidence in the court below. The Hon. Magistrate considered the evidence and awarded damages in the sum of Kshs. 200,000/= to the respondent. It is to be noted that the 4th page of the typed judgment is missing from the record of appeal but it is available in the original file.

19. In his judgment, the said Magistrate noted as follows:-

> ***"the only submissions confirmed to have been filed were the plaintiff's with no explanations (sic) as on the defendant's submissions despite Mr. Mutugi having been present in court holding brief for Ms Sudi for the defendant on 4th May, 2011 when I gave directions for filing of written submissions. I then fixed a date for judgment in the presence of Miss Ngugi for the defendant and Mr. Nanji holding brief for Ms. Abuodha for the plaintiff."***

20. My understanding of what the Hon. Magistrate was lamenting about was that on 25th May, 2011 as borne by the handwritten and typed proceedings, both Ms Ngugi for the defendant and Mr. Nanji who held brief for Ms. Abuodha for the plaintiff were present in court. Mr. Nanji informed the court that Ms. Abuodha had filed her submissions. There was no word from Ms. Ngugi to confirm if she had filed hers. The Hon. Magistrate was therefore perplexed as to how the defendant's (appellant's) submissions found their way in the court file. The respondent's submissions were filed and paid for on 20th May, 2011. The original file does not contain the final submissions filed by the appellant in the court below. The same are however included on pages 38-52 of the record of appeal. The said submissions are dated 25th May, 2011. If they were filed in the course of the day on 25th May, 2011 after the Hon. Magistrate had mentioned the matter, he was duty bound to consider the same. His judgment is however silent on whether he considered any of the submissions that were on record. This court will therefore consider the submissions and authorities that were relied upon by the parties in the court below.

21. The respondent had prayed for the appellant to be held 100% liable for the injuries that he sustained, more so as his evidence was not controverted. The appellant's Counsel had prayed for the respondent to be held fully liable for the injuries he sustained, and if not, that liability should be apportioned at 50:50.

22. The present case is distinguishable from **Vyatu Ltd vs Osman Collins Wandika** (supra) which Counsel for the appellant relied on, in that in the said case, the appellant called evidence to rebut the respondent's evidence. In apportioning liability the court stated that the evidence showed that the respondent was aware of the risk he was taking while working at a slippery machine which he attempted to climb in order to discharge the heavy load he was carrying. He did not bother to ask for a ladder to make his work easier. Consequently, he was partly responsible for the consequences of his own negligent omission which led to his injury. The court therein agreed with the Learned Magistrate's apportionment of liability at 60:40 in favour of the respondent. In this case the evidence of the respondent is uncontroverted. It is clear that the appellant failed to issue the respondent with gloves and safety boots. I therefore uphold the Hon. Magistrate's finding that the appellant was 100% liable for the injuries suffered by the respondent.

23. On quantum of damages, the respondent's counsel had in the lower court prayed for an award in the sum of Kshs. 300,000/=. His Counsel had relied on **Joel Edwards Odhiambo vs Wilson Mboya Opee and Another**, Nairobi HCCC No. 3295 of 1987, where Mwera J made an award of Kshs. 70,000/= on 7th October, 1992 to a plaintiff who had suffered soft tissue injuries to both shoulders and the chest. He fully healed without any permanent incapacity. The injuries suffered by the respondent herein and those suffered by the plaintiff in the case of **Joel Edwards Odhiambo** (supra) which Counsel for the respondent relied on in the court below, are not comparable.

24. He had also cited the case of **Manji Govind & Co. vs Munga Nzaka Munga**, Mombasa Civil Appeal No. 116 of 1989. Counsel however availed the authority of **Munga Nzaka Munga vs Manji Govind & Co.,** Mombasa HCCC No. 601 of 1987, where the plaintiff suffered a compound fracture of the proximal phalanx of the index finger together with a tendon injury to the same. The fracture healed with a deformity and complete anklyosis of proximal inter-phangeal joint leading to a weak hand grip of the right hand. The plaintiff therein was right handed and this affected his ability to work as a laborer. He was awarded Kshs. 50,000/= for pain, suffering and loss of amenities and Kshs. 50,000/= for partial loss of earning capacity. The latter award was however set aside by the Court of Appeal which held that it was not pleaded and no evidence was led to support it.

25. The appellant had submitted on an award in the sum of Kshs. 80,000/= as the respondent sustained soft tissue injuries and the injured nail had started growing as at the time he testified in court. On the issue of quantum of damages, Counsel for the appellant had relied on the case of **Apithao Aman vs Pump Maintenance E.A. Limited**, Mombasa HCCC 468 of 1984 where an award of Kshs. 16,000/= was made on 24th June, 1986 to a plaintiff who sustained an injury to the right hand resulting in loss of the distal part of the terminal phalanx of the right ring finger with half the nail. The injuries healed with a resultant mild weakness of the right hand. The damages awarded in the case of **Apithao Aman vs Pump Maintenance** (supra) were made the year 1986, this court therefore has to look at the element of inflation in deciding whether or not it should vary the award of damages herein.

26. The respondent herein suffered a deep 3 cm long cut wound on the terminal phalange and damage to the nail bed and complete nail

avulsion. Although at the time of examination on 31st May, 2010 the Doctor was of the opinion that no new nail would grow due to nail damage to the nail bed, it was evident as at the time the respondent testified in court that a new nail was growing. The injuries were classified as nail and soft tissue injures.

27. Having considered the authorities that were relied upon in the lower court, It is my considered view that an award in the sum of Kshs. 200,000/= was on the higher side. I find the case of **Munga Nzaka Munga vs Manji Govind and Co.** (supra) to be more applicable to the circumstances surrounding this case. The authority cited before this court by counsel of appellant of **Timsales Ltd. vs Penina Ochieng Omondi** (supra) is also relevant to the circumstances of this case.

28. On the submission that the appellant was not served with a demand notice, the respondent produced plf. exh. 4 which was a demand letter addressed to the appellant, by Ms J.A. Abuodha & Co. Advocates. The issue of non-delivery of a demand letter was not even put to the respondent through cross-examination.

29. I set aside the award of Kshs. 200,000/- and substitute thereof with an award of Kshs. 100,000/=. The appellant has partly succeeded in his appeal and the respondent will therefore meet a third of the costs of the case in the court below and of this appeal. Two-thirds of the costs of this appeal and in the case in the court below will be met by the appellant. Interest is awarded to the respondent at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of January, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mokaya for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant