



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 162 OF 2016

AWAN AUTOS LIMITED.....APPELLANT

- V E R S U S -

RICHARD ONYANGO OMONDI....RESPONDENT

(Being an appeal from the judgement and decree of Hon. M. Chesang

(Mrs) Resident Magistrate in Nairobi (Milimani Law Court)

in CMCC No. 2730 of 2012 dated 29/4/2015)

JUDGEMENT

1) Richard Onyango Omondi, the respondent herein , filed a compensatory suit against Awan Autos Limited the appellant herein for injuries he sustained while he was working for the appellant. It is alleged vide the plaint dated 3rd March, 2017 that the respondent who had been employed by the appellant as a security guard, was assigned the duty of assisting in the loading of spare parts onto the forklift when one of the spare parts being lifted fell off crushing the respondent's right hand fingers, leading to their amputation.

2) The appellant filed its defence dated 16th July, 2012 in which he denied the respondent's allegations. Hearing proceeded exparte, in the absence of the appellant. In the end, Hon. Chesang, learned Resident Magistrate entered judgement for the respondent and against appellant. The appellant was found wholly liable and respondent was awarded ksh.1,000,000/= for general damages.

3) Being aggrieved by the award, the appellant preferred this appeal and put forward the following 6 grounds of appeal in its memorandum of appeal.

1. The learned magistrate erred in law and fact by accepting and relying on a medical report produced by the respondent whose contents were totally at variance with the respondent's oral and written testimony and other medical record produced by the respondent.

2. The learned magistrate erred in law and fact by allowing and relying on evidence that did not support what was pleaded in the plaint.

3. The learned magistrate erred in law and fact by failing to consider the statement of defence on record, the various witness statements filed by the defendant together with documentary evidence in support thereof.

4. That the learned magistrate misdirected herself when she reached the conclusion that the appellant was 100% liable having regard to the circumstances under which the accident occurred and the evidence of the respondent as presented to court orally and by way of a written statement.

5. The award of damages was manifestly excessive and not based on any analysis or reasoning.

6. The learned magistrate misdirected herself by awarding interest on the judgment award from the date of filing the plaint contrary to known practice in the award of general damages.

4) The aforesaid grounds may be summarised into three main grounds namely;

- i. Whether or not the trial magistrate erred in law and fact on apportionment of liability
- ii. Whether or not the trial magistrate erred in law and fact on her award on general damages.
- iii. Whether or not the trial magistrate erred in law and fact on her award of interest on general damages.

5) When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

6) The first ground of appeal is on of liability. The trial magistrate found the appellant wholly liable for the injuries sustained by the respondent. The appellant submits that the events as described by the respondent in the plaint, the written statements and at the hearing raised more questions than answers. The description of the alleged accident as told by the respondent could not be true and failure by the trial magistrate to detect this, led to her make a wrong decision on liability. Similarly, the appellant submits that applying the reasonable man’s test, the respondent must be able to state what preventive measures he took to mitigate his chances of getting injured. The appellant stated that the respondent took risk upon himself because it is common knowledge that when holding the object to be lifted by a fork lift, one is exposed to the risk of being injured if his hands are caught between the object and the surface where the object to be lifted was being placed. That any reasonable man would have removed his hand as fast as he could to avoid the same being trapped. The appellant submitted that the respondent failed to take precautionary measures and liability should be apportioned against him.

7) The respondent submits that Mr. Rizwani, removed the forks of the forklift while the respondent was holding onto the heavy spare part which crashed his fingers. The respondent states that the defence did not rebut his evidence and the trial court had no other evidence to weigh the respondent’s case against and had to accept the respondent’s unchallenged version. The respondent further argued that the apportionment of liability was well founded. Richard Onyango Omondi, the PW1 stated that on 10/8/2011 he was injured while working for the appellant which sells motor vehicle spares. The respondent was employed as a security guard but on the day of the accident, his employer, the appellant, instructed him to go and help at the forklift side. He said he carried a lorry engine, which fell on his hand whlie he forklift was reversing injuring three of his right hand fingers which were later amputated. The respondent was taken to MP Shah Hospital. The respondent stated that he cannot work and has not been able to get any work as a result of the injury. He used to earn 6000/= per month. The view of this court is that the respondent having been moved by the appellant to assist with forklift work he exposed him to the risk of injury where his fingers were crushed when the forklift load fell on his hands. I am convinced that the trial magistrate applied the law and facts correctly in arriving at her apportionment of liability where the appellant was held wholly liable.

8) The second ground of appeal is whether or not the trial magistrate erred in law and fact on her award on general damages. The appellant submits that the award on damages was manifestly excessive and was not based on any analysis of sound reasoning. The appellant states that no valid medical evidence was presented in support of the alleged injuries and the medical report by Dr. Wokabi was in admissible. The aforesaid report placed the respondent’s permanent disability at 12%. It is the submission of the appellant that this assessment meant the injuries were very minor and the respondent’s claim that he was not able to use his right hand was grossly exaggerated and false. The respondent submits that he prayed for damages for loss of earnings and had asked the court to award him ksh.500,000/=. And ksh.600,000/= for general damages. The trial court elected to make a global award of kssh.1,000,000/= as general damages and bore in mind the nature and extent of injuries suffered and the present trends by the courts. I find that the award on damages was reasonable and ought not to be disturbed.

9) The third ground of appeal is whether or not the trial magistrate erred in law and fact on her award of interest on general damages. The appellant submits that the practice and procedure in civil litigation are that interest on general damages will if awarded accrue from the date of judgment. The trial magistrate in her judgement, awarded interest on the amount awarded in general damages from the date of filing the suit. The appellant states that by so doing, the trial magistrate misdirected herself on all known practices in civil litigation. The respondent did not submit on this ground of appeal.

10) Looking at the judgement the trial magistrate awarded costs of the suit and interest from date of filing of plaint to the respondent. With respect, I agree with the submissions of the appellant that interest should be charged from the date of judgement

11) In the end, this appeal partially succeeds, the trial court finding on liability and quantum is upheld. The finding on interest on damages is set aside and it is substituted with an order directing interest at court rates be charged from the date of judgement until payment in full.

12) In the circumstances of this case I think a fair order on costs of the appeal is to direct which I hereby do that each party meets its own costs.

Dated, Signed and Delivered in open court this 16th day of March, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent