REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 406 OF 2015

NAILS & STEEL PRODUCTS LIMITED.....APPELLANT

-V E R S U S –

JAMES MACHARIA TUAMU.....RESPONDENT

(Being an appeal from the judgement of Hon. Lorot, Senior Resident Magistrate delivered on 6th August, 2015 in Nairobi CMCC No. 4976 of 2012)

JUDGEMENT

1) James Macharia Tuamu, the respondent herein, filed a compensatory suit against **Nail and Steel Products Ltd**, the appellant herein, for the injuries the respondent allegedly suffered while working for the appellant on 15.02.2012. The appellant denied the respondent's claim. The suit was heard and determined in favour of the respondent by Hon. Lorot H.R who awarded a sum of kshs.256,500/= plus costs and interest. The appellant was dissatisfied hence it preferred this appeal.

2) On appeal, the appellant put forward the following grounds in its memorandum:

> ***1. The learned magistrate erred in law and in fact by holding that the defendant was 100% liable or at all to blame for the accident contrary to the evidence before him.***
>
> ***2. The learned magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the appellant.***
>
> ***3. The learned magistrate erred in law and in fact as the evidence did not support the finding of the injuries sustained by the plaintiff in the judgment.***
>
> ***4. The learned magistrate award of damages in particular considering the injuries sustained by the plaintiff was inordinately high in that it was on erroneous estimate of damages without due regard being made to the injuries sustained and the comparable cases.***
>
> ***5. The learned magistrate erred in law and in fact in holding that the plaintiff's injuries were of a serious nature contrary to the evidence adduced to prove the same.***

3) It is apparent from the above grounds that this court has been invited to determine the twin issues touching on liability and quantum.

4) On the question of liability, the appellant has argued that the learned trial magistrate fell into error by finding that the appellant is 100% liable for the accident. The appellant pointed out that the evidence adduced before the trial court show that the respondent was in full control and command of the cutting machine hence he is the author of his own misfortune. It is said that the respondent had worked for five years as a machine operator hence he had the skill, knowledge and the expertise to operate the machine and there was no evidence that the machine was defective. The appellant further argued that the respondent had failed to show the causal link between the injury sustained and the appellant's negligence. It is the submission of the appellant that the respondent was equally to blame for the injuries he sustained and he bore greater responsibility of ensuring that he averted the danger but he failed to do so therefore he should shoulder 60% liability. It is the submission of the respondent that the appellant was solely to blame for the accident. He argued that the cutting machine he operated required seven people to successfully manage and that on the material day he was not assigned other assistants to help him operate the machine. The respondent further stated that he had reported that the machine was faulty to the appellant but the appellant was not keen to repair it thus breaching the duty of care it owed to him. I have carefully re-evaluated the evidence tendered before the trial court. I have further considered the rival submissions. The record shows that the respondent testified and also summoned the doctor who examined him to testify in support of his case. The respondent stated that on the fateful day he reported on duty at 4.30pm for the night shift and worked upto 7.30pm when he was injured. He stated that he operated the machine which cuts metal sheets. The respondent alleged that the machine required about seven people to operate but on that day he was alone. He said that he was required to step on the metal sheet so that it doesn't

fall and since it was heavy, he stepped on the stepper but the metal sheet hit a nut which landed on his feet thus putting it in between the roller and the sheet. The respondent said he screamed for help and his colleagues rushed to where he was and switched off the roller making it possible for him to pull out his foot which was badly injured. It is the evidence of the respondent that the rollers should have been covered and that he required many helpers. He also stated that the machine was faulty. The appellant did not deem it fit to summon witnesses to controvert the respondent's evidence. The respondent has specifically stated that the machine he operated was faulty. He also alleged that he operated the machine alone and yet the same required several people. He further alleged that the roller was not covered. I am satisfied that the respondent tendered credible evidence to link the appellant with the accident. There is no doubt that the appellant breached the duty of care it owed the respondent.

5) In the circumstances of this case, I am convinced that the appellant was wholly to blame therefore the trial magistrate's decision on liability cannot be faulted.

6) On quantum, it is apparent that the respondent was awarded a sum of ksh.250,000/=. The appellant is of the submission that the aforesaid award is inordinately high. The respondent was of the view that the award is low hence it should be enhanced. Dr. Wokabi (PW1) testified before the trial court and produced a medical report he prepared on the respondent. He stated that the respondent suffered a crush injury on the right foot toes and that he sustained deep wounds as a consequence. The doctor further noted that the 2nd, 3rd and 4th toes of the right foot were deformed, crowded and rode on each other. He assessed the functional disability at 4%. The trial magistrate formed the opinion that ksh.256,500 was adequate compensation. The appellant pointed out that the respondent cited authorities which did not match the injuries he sustained. It is said the injuries in respect of the cases cited were more serious than those obtained in this case. The appellant did not suggest any figures on appeal. However it is clear from the appellant submission's made before the trial court that the appellant had proposed a sum of ksh.50,000/= as adequate compensation. On appeal I have already stated that the respondent is complaining that the award is inordinately low and has urged this court to revise the award upwards to ksh.1,000,000/=. The proposal is untenable since the respondent has not filed a cross-appeal, therefore the respondent has to contend in defending the award at hand. I have considered the authorities cited by both sides and I am not persuaded that the award is high nor low. I am satisfied the award is commensurate with the injuries and is in tandem with past awards in respect of near similar cases.

7) In the end, I find no merit in this appeal. The same is dismissed in its entirety with costs to the respondent.

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 Respondents