



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 60 of 2017

MICHAEL KIPCHUMBA.....APPELLANT

VERSUS

CHANNAN AGRICULTURAL CONTRACTORS.....RESPONDENT

(Being an Appeal from the Judgment and Decree Hon.

B.Kasavuli (SRM) in WinamSRMCC NO.166 of 2016

delivered on 25th August 2016)

JUDGMENT

Michael Kipchumbasued (hereinafter referred to as appellant) sued CHANNAN AGRICULTURAL CONTRACTORS(hereinafter referred to as respondent) in the lower court claiming damages for injuries allegedly suffered on 11th August, 2016 as a result of negligence of respondent's agent and/or servant.

The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on **25th August 2016**, the learned trial Magistrate found that the appellant had not proved his case and dismissed it with costs to the respondent.

The Appeal

The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 15h September, 2017 filed the Memorandum of Appeal dated 1st September 2017 which sets out 4 grounds of appeal which I have summarized into 3 grounds to wit:-

- 1. The Learned Magistrate erred in law and in fact in failing to critically and comprehensively analyse the plaintiff's case with the right principles in mind thereby dismissing it**
- 2. The Learned Magistrate erred in law and in fact by heaping all the burden of proof on the plaintiff despite lack of rebuttal evidence from the respondent**
- 3. The Learned Magistrate failed to take into account the relevant principles governing the award of damages such that he reached an erroneous estimate which was so low in the**

circumstances given the nature of injuries suffered by the plaintiff

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 8.1.17; the parties were directed to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

Appellant holds the view that his evidence that he was an employee of the respondent and was injured while working for the respondent was not controverted and that it was therefore an error on the part of the trial magistrate to dismiss his case.

Respondent's submissions

Respondent holds the view that appellant did not prove negligence on the part of the respondent, that the respondent was his employer or that he was on duty on 11.8.16 when the accident allegedly occurred.

The evidence

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

The duty of the first appellate court was explained in the case of ***JABANE VS OLENJA [1986] KLR 661***

***“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi - vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.*”**

Appellant testified that he was working as respondent's tractor driver. He stated that on 11.8.16, he was waiting for his tractor to be loaded when a bale operator caused the bale machine to run over his leg as a result of which he was injured.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions by counsels for both parties.

From the pleadings on record, the issue of whether appellant was a qualified driver was not in issue and it was therefore not necessary for him to produce a valid driving license at the trial.

To prove that he worked for the respondent, appellant produced weighbridge tickets with the name of the respondent as the transporter. The respondent did not tender any evidence to disapprove the fact that the said tickets had been issued to the appellant in the course of his employment with them. This court is therefore satisfied that the appellant was able to establish that he was an employee of the respondent.

Appellant testified that he was waiting for his tractor to be loaded when he was injured and did therefore not proceed with the delivery. It would therefore not have been expected of him to produce a weigh bridge ticket for a delivery that he did not make. For that reason, I find that the trial magistrate erred when he found that the appellant could only prove that he was on duty by production of a weighbridge ticket for the 11.8.16

As regards negligence, appellant blamed the bale operator that caused the bale machine to run over his leg as a result of which he was injured. Since appellant's evidence as not controverted, I find that the bale loader was negligence and the respondent is vicariously liable for the negligent acts of its bale loader.

I have considered the case of *Statpack Industries v James MbithiMunyao [2005] eKLR* and the court is satisfied that the appellant proved a causal link between respondent's servant's negligence and his injury. The real cause of the accident was established to be the bale operator causing the bale machine to run over appellant's leg as a result of which he was injured

On quantum, appellant suffered fracture of left tibia and fibula that healed with a 2 cm scar and tenderness on the left leg. The learned trial magistrate stated that he would have awarded Kshs. 200,000/- had appellant proved his case.

The guiding principles for interfering with an award of damages were explained in the case of *Butt Vs Khan [1977] 1 KAR LAW JA (cited in the case of Kenyatta University Vs Isaac KarumbaNyuthe [2014] eKLR)* where it was held that:-

“An appellate court will not interfere with an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the wrong principles, misapprehended evidence in some material respect and gave a figure inordinately high or low”.

The principles were restated in the case of *KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR* in which the Court of Appeal held inter alia that

“ the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be a wholly erroneous estimate of the damages”

General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal observed in *Simon Taveta v Mercy MutituNjeru Civil Appeal 26 of 2013 [2014] eKLR* as follows:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.

Appellant had asked for Kshs. 450,000/- and had cited *Lucy MuthoniMucaki v FridahNyaguthii [2015] eKLR* where the court on appeal awarded Kshs. 450,000/- for left ankle fracture dislocation and soft tissue injury on the left first toe with post traumatic arthritis of the left ankle joint and *Salome MunagiOjongaVs Henkel Kenya Limited[2003] eKLR* where the court awarded Kshs. 300,000/- for

Bimalleolar fracture of the left ankle joint with displacement of the fracture fragments. Respondent did not make any submission on quantum.

The authorities cited by the appellant relates to fractures of the ankle joint. Appellant did not suffer any permanent incapacity. It is the duty of advocates to cite relevant authorities to guide the trial court. There is no evidence that the learned trial magistrate, in assessing the damages in the sum of Kshs. 200,000/- proceeded on wrong principles, took into account an irrelevant factor or left out of account a relevant one that would warrant this court to disturb the quantum of damages awarded.

In the result the appeal is allowed and the dismissal order set aside and substituted with the following orders:

i. Liability is apportioned at 100% against the respondent

ii. General damages is awarded at Kshs. 200,000/

iii. The appellant shall have costs of the appeal.

DATED AND DELIVERED THIS 8th DAY OF March 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix &Carolyne

Appellant - N/A

Respondent – N/A