



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT AKAKAMEGA**

**CIVIL APPEAL NO. 14 OF 2016**

**MUMIAS SUGAR & COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MOHAMMED KWEYU SHABAN.....RESPONDENT**

**J U D G M E N T.**

1. The respondent herein was working for the appellant. He was injured while on duty. He sued the appellant for compensation and was awarded Kshs. 800,000/= in general damages. The appellant was aggrieved by the award and filed this appeal on the grounds that:

1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion of the same.
2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the appellants.
3. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
4. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellants.
5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence present on behalf of the appellants.
6. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellants while the onus of proof lay with the respondent.
7. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable.
8. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

2. The appeal was opposed by the respondent through the submissions of his advocates , **Mukisu & Co. Advocates.**

**The case for the Respondent:**

3. The case for the respondent was that he was employed by the appellant as a fitter. That in August, 2012, the company was conducting the annual maintenance of its equipment. That on the 4<sup>th</sup> August, 2012 at 2.30 pm the respondent and a colleague were fixing some bolts inside the C- 149 conveyor . The machine had been switched off. Then all over a sudden the carrier started to move which meant that somebody

had switched it on. They had not been alerted of the move. The respondent and his colleague were thrown away by the moving carrier. The respondent was injured on the back. He was taken to the company clinic where first aid was administered. He was referred to Eldoret Referral Hospital. He was also treated at St. Mary's Mission Hospital Mumias. Later he was examined by Dr. Andai who prepared a medical report for him. He thereafter sued the appellant in claim of general and special damages. He blamed the appellant for the accident as an agent/ employee of the company switched on the conveyor belt without alerting those who were working inside the carrier. He contends that the appellant was vicariously liable for the injuries.

#### **Case for Appellant:-**

4. The appellant called one witness in the case, James Kamau DW1. His evidence was that he was a supervisor with the appellant in the extraction section. That on the 4<sup>th</sup> August, 2012 he was called by a colleague who informed him that there was an accident at C- 149 carrier. He went to the site and found the respondent and another person being moved to the medical centre by other colleagues. The system was alleged to have been accidentally started but nobody admitted starting the system. That the system had to be isolated both mechanically and electronically before work commenced. They could not find out who activated the system. That the main switch was a distance away, about 30 m away. That it is the fitter, the respondent who was required to activate the process. That the switch was on the ground floor while the respondent was working on the first floor. That the maintenance was to take 4 weeks and the said machine was supposed to be effectively switched off. That he was not aware that the machine has been switched on.

#### **Response**

5. The respondent responded that the machines had been switched off for annual maintenance. That before moving to the machine, they were required to notify the supervisor in charge of electricians so that he could remove the fuse from the machine. He said that they were not responsible for the switch. That on this day, they told the electrician to make a switch off. They went to the mills at 8 am. The accident took place at 2 pm. That the switch boxes were very far from where they were working. He does not know who switched on the machine.

#### **Findings by the trial magistrate**

6. The trial magistrate found that the accident was caused by the negligence of the defendant's agent acting as authorized agents of the defendant. That there was no contributory negligence on the part of the plaintiff/ respondent.

#### **Submissions by advocates on liability**

7. The advocates for the appellant, **L.G. Menezes & Co. Advocates**, submitted that the respondent did not identify the person who is alleged to have ignited the switch. That this was important because liability attached to an employer due to the tortious acts of their employees. The employer in that case cannot be held vicariously liable when there is no evidence that it is their employee who switched on the machine. Further that it is the respondent himself who was responsible for the whole process. That he cannot thereby blame the company for his own negligence.

8. The respondent's advocates on the other hand submitted that the accident took place during the annual maintenance period when the machines were not expected to work. That the switch was on the ground floor while the respondent was working on the 2<sup>nd</sup> floor. That there was thereby no contributory negligence on the part of the respondent. That the principles of *res ipsa loquitur* applies in the case.

#### **ANALYSIS AND DETERMINATION**

##### **Duty of first appellant court**

9. The duty of a first appellant court was well stated by **Sir Clement De Lestang, V.P in Selle V Associated Motor Boat Company (1968) EA 126 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 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 if it appears either that he has clearly failed on some points 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 ( Abdul Hameed Saif Vs Ali Mohamed Sholan ( 1955),22 E.A.C.A 270)'*

10. In addition an appellate court will only interfere with a finding on a question of fact of a judge who tried the case where the finding is based on no evidence or a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles in reaching the finding that he did –see **Ndiritu Vs Ropkoi & Another (2004) eKLR(C.O.A)**

##### **Findings on liability**

11. There is no dispute in this case that the respondent was employed by the appellant. There is no dispute that the respondent was injured in the cause of duty. The question is as to who was responsible for occasioning the accident.

The respondent was injured while working inside the conveyor. It cannot be said that the respondent and his colleague entered the conveyor when the conveyor was on. It is not possible for a person to board a moving conveyor. The conveyor must have been switched off when the

respondent and his colleague boarded it.

12. For the conveyor to have started moving when the respondent was working inside means that somebody had switched it on ( or that the switch button was defective and it switched itself on which was not alleged in this case). The switch was not where the respondent was. It is not him or his colleague who could have ignited the switch. It must be the appellant's agent/employee who did so. A stranger cannot have accessed the milling area to switch on the machine. If so the appellant should be able to identify the person who did so and in any case that would still prove negligence on the part of the appellant for allowing a stranger into the milling area to ignite the switch. In all the circumstances of the case, the appellant was responsible.

13. The appellant's supervisor DW1 stated that the machines had to be switched off during the annual maintenance period. It was the duty of the appellant's technicians to make sure that the machines were switched off during the maintenance period. The only duty of the respondent and his colleague was to confirm from the technicians that the machines were switched off before they started working which act they did on the material day . I find no truth that the respondent and his colleagues were responsible for switching off the machine before they started working. That was the duty of the appellant's technicians as testified by the appellant's supervisor, DW1. The respondent did not in any way contribute to the occurrence the accident. The appellant was 100% vicariously liable for the accident. I do not fault the trial magistrate's finding on liability.

#### **Quantum:**

14. The trial court awarded Kshs. 800,000/= in general damages. This court can only disturb the quantum of damages awarded by the trial court if it can be shown that the court took into account an irrelevant factor, or left out of account a relevant one, or the amount is inordinately low or inordinately high that it was wholly erroneous estimate of the damages –see ***Kemfro Africa Ltd t/a Meru Express Services Vs Lubia & Another ( 1982-88) I KAR 777.***

15. According to the medical report by Dr. Andai PEx6, the respondent had sustained prolapse of intervertebral discs between L4 – L5 and L5-S1 vertebrae with moderate compression on cauda equine . The doctor opined that these were serious soft tissues injuries which were going to persist for a long time. That there was more than 50% chance of developing chronic osteo arthritis of the back in future as a further complication.

The report by the Dr. Andai indicated that at the time of examination on 19/9/14 the respondent was wearing a cosset around the lower region of the trunk. When the respondent appeared in court for the hearing of the case he was wearing the cosset.

16. The respondent was also examined by the appellant's company doctor. According to the report of the said doctor, PEx2 , the respondent suffered prolapse disc at L4/L5 thus affecting his lower limbs because of nerve compression as a result of which he had recurrent lower back pain. The Doctor opined that this will affect him throughout his life. He awarded 15% permanent total disability.

17. The advocates for the appellant had in the lower court submitted that an award of Kshs. 80,00/- was sufficient compensation. They had relied on the case of ***Gilbert Odhiambo Owour Vs Nzoia Sugar Company, Bungoma Civil Appeal No. 46 of 2010 (2012) eKLR***, where ***Muchelule J.*** awarded Kshs. 50,000/= for severe soft tissue injuries of swollen and tender left foot and ankle that caused limited movements in the left ankle joint and foot.

The advocates submitted that the award of Kshs. 800,000/= was inordinately high and erroneous . That normal awards for soft tissue injuries range between Kshs. 50,000/= to Kshs. 120,000/=

In this appeal the advcoates cited two other authorities:

- ***Mokaya Mochama Vs Julius Momanyi Nyokwoyo , Kisii HCCA No. 101 of 2010 (2013) eKLR***, where Sitati J. on appeal increased the award to Kshs. 70,000/= from Kshs. 27,000/= in a case where the appellant had sustained severe soft tissue injuries comprising of cerebral concussion( i.e lost consciousness for a short duration), deep cut wound on the back of the head and bruises on the right foreleg.
- ***Jeredi Ukilu Osango Vs Geowave Ship Contractors Ltd , Mombasa HCCA No. 49 of 2013*** , where ***Kasango J.*** on appeal awarded Kshs. 180,000/= in general damages for soft tissue injuries on the head .

17. The advocates for the respondent had on the other hand submitted in the lower court that general damages to the sum of Kshs 1,500,000/= was sufficient. They had cited the case of ***Joseph Kitheka Vs Stephen Mathuka Pius , Nairobi HCC No. 1750 of 1999*** where ***Kasanga J*** ( as he then was ) awarded Kshs. 1,280,000/= in general damages for fracture of tibia and fibula ,fracture of left radius and ulna and blunt head injury concussion and bruises to the scalp. They asked the court to uphold the award in that the respondent was expected to have a permanent disability for life.

18. The injuries sustained by the respondent herein were not comparable to the injuries sustained in the authorities cited by the advocates for the appellant. None of the claimants in those authorities had suffered a permanent disability.

The submissions by the said advocates failed to appreciate that the respondent had suffered serious injuries involving herniation of L4/L5/S1 which were described by both doctors who examined him as severe that were going to persist for a lifetime.

19. The authority relied on by the advocates for the respondent on the other hand involved fractures whereas in the case under consideration there were no fractures.

20. I have tried to get authorities with comparative injuries to those sustained by the respondent. The closest case I have come across is the case of **Sammy Machoka Oira Vs Josphat Mwangi Kihuro & Another (2008) eKLR** where the plaintiff had sustained multiple soft tissue injuries on the head , neck , abdomen right wrist , tenderness over the cervical spine and disc **prolapse at level L4/L5/S1**. The plaintiff in the case experienced backache, had spasm of muscle of his back, numbness over right thigh and calf, not able to bed or lift heavy loads and could not travel in vehicles especially on brumby roads. Permanent disability was assessed at 12%. **Nambuye J** (as she then was) awarded Kshs. 1,750,000/= in general damages.

21. In this case the respondent had sustained comparative injuries to those sustained in Sammy Machoka Oira (supra), though in that case the injuries were for more serious. Permanent incapacity in the case under consideration was assessed at 15% while in the Machoka Oira case it was 12%. The respondent herein was awarded less than half of what was awarded by Nambuye J in the above cited case. The respondent herein suffered serious injuries that are to persist throughout his lifetime. In the circumstances the award of Kshs. 800,000/= cannot be said to be inordinately high or erroneous estimate of the damages.

In the foregoing, I find no merits in the appeal. The appeal is accordingly dismissed with costs to the respondents.

**Delivered, Dated and signed at Kakamega this 14<sup>th</sup> day of June, 2018.**

**J. NJAGI**

**JUDGE**

In the presence of:

N/A for appellant

N/A for Respondent

George Court Assistant

Parties: Appellant.....absent

Respondent.....absent