



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

(CORAM: R.MWONGO, J)

HCCA NO 223 OF 2012

KENYA STEEL FABRICATORS LIMITED.....APPELLANT

VERSUS

TOM MOKI.....RESPONDENT

JUDGMENT

Background

1. This is an appeal from the judgment of Hon. C Obulutsa, SPM in Milimani Commercial Court CMCC No 5980 of 2009. In his Judgment, rendered on 17th April 2012, the Learned Magistrate found for the Plaintiff/Respondent herein and awarded damages of Kshs. 350,000/= for fracture of the right index finger. The Magistrate found for the Plaintiff, on the basis that there had been requisite proof and that the Plaintiff had sustained 4% permanent disability.
2. In the appeal, the Appellant asserts that: the award was inordinately high and excessive given the nature of the injuries; that the Leaned Magistrate failed to appreciate the Defendant's evidence, submissions and authorities; that the learned Magistrate erred in apportioning liability at 100% against the Defendant; and that the award of the Magistrate was an erroneous estimate. The Appellant seeks that the award be set aside and revised.
3. This being a first appeal, this court's duty is to re-evaluate and examine the evidence on record and arrive at its own conclusion, taking into account that this court did not have the opportunity to hear or see the parties as they testified and therefore, make an allowance in that respect. See **Selle & Anor v Associated Motor Boat Co Ltd & Another (1968) EA 123**.
4. The evidence in the lower court was adduced by the Plaintiff/ Respondent and a Doctor Wokabi, a consultant surgeon. For the Defendant /Appellant, the evidence was adduced by Sammy Gachie, a general fitter for the Defendant/ Appellant. All the evidence of all witnesses shown in the record covered barely two typed pages. It was therefore not detailed.
5. The Plaintiff's evidence was simply that he worked on a one year contract as a welder for the Defendant company. On 25th November, 2008 he was at the workshop changing gutters that were rusted. He was on a ladder and there were three other employees attending to the work. While he was on the ground one of the other workers was pulling down a gutter. It broke off and crashed into him, hitting his hand and fracturing his finger. He was hospitalised. He said he was not given a helmet – but that he had been issued gloves and an overall by his employer.
6. Doctor Wokabi testified that he examined the Plaintiff on 9th July 2009, about seven months after the accident. He examined the X-ray films and a report on the Plaintiff, which revealed a laceration and fracture of the distal phalanx of the left index finger. At the time of examination, the Plaintiff was unable to bend the finger or grip tightly with it. He assessed permanent functional disability at 4%, noting that as a welder the Plaintiff will encounter difficulties with manipulating and dexterity due to stiffness of the finger.
7. Sammy Gachie's evidence for the Defendant was that on the material day, he was working on the gutters with the Plaintiff when one of the gutters came loose and fell on the Plaintiff's hand, injuring his finger; that it was the plaintiff who was pulling the gutters down while he, Gachie, held the rope; he stated that there was protective gear at work kept on benches in the workshop for workers to pick and use, but that the Plaintiff did not have any protective gear on.

Analysis of Parties' cases

8. Both parties filed written submissions as directed by the court, and both relied on their submissions. It was submitted for the Appellant – citing **Kemfro Africa Ltd t/a Meru Express Service v A M Lubia & Oliver Lubia** depends on whether it is satisfied that:

“...the judge took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”

I am satisfied that this is the correct principle to follow in an appeal, and I adopt the same.

9. In the lower court, the Learned Magistrate made reference to **Francis Kanake v AG HCCC 2036 of 1992** and **Joseph Mbiria v Jamlick Kirimi HCCC 866 of 2001** cited by Plaintiff. The Defendant cited **Simba Posho v Fred Muchira CA 65 of 2000** and **Joseph Wahome v Municipal Council of Nyeri HCCC 2 of 2006**. I have perused the aforesaid authorities, and analyse them as follows.

10. In **Francis Kanake’s case**, the court awarded 100,000/= for fracture of metacarpal of left index finger, and an arm with soft tissue injury. This was in 1992. In **Joseph Mibiria’s case** of 2001 Ringera J awarded 175,000/= for soft tissue injuries to the head neck and legs in addition to fracture of two metacarpal bones.

11. In **Simba Posho Mills**, the Plaintiff’s fingers were crushed by a moving roller. The tip of one of his fingers had to be amputated, and he was unable to use his right hand. The degree of permanent disability assessed by the doctor was 8%. This was in 2002 and the amount awarded in the lower court was Kshs 360,000/= with liability apportioned at 80%: 20%. On appeal, the High Court reviewed the general damages figure to 180,000/=.

12. In **Joseph Wahome’s case**, the accident occurred in 2004. Liability was apportioned in the lower court at 90%: 10%. The Plaintiff there sustained a compound fracture of the middle left hand finger, leading to its deformation after it had healed. Further, half of the tip of the left index finger was missing. The lower court awarded Kshs 120,000/= in general damages for these injuries. On appeal, Makhandia, J (as he then was) reviewed and increased the award of general damages to Kshs180,000/=. The determination was made in October, 2008.

13. Closer to the present period, in a case supplied by the Appellant, namely, **Olouch Eric Gogo v Universal Corporation Ltd [2015] eKLR** on an appeal from a suit filed in 2005 and determined in 2006 by the lower court, the High Court (Aburili J) held: that the appellant there who had sustained injuries involving “crushed injury to the left thumb with fracture of mid phalanx” was entitled to an award of Kshs 200,000/= in general damages for pain suffering and loss of amenities. There, the defendant was found 100% liable.

14. In his submissions opposing the appeal, the respondent cited two authorities: **Francis Ochieng and Another v Alice Kajimba [2015] eKLR** where the High Court, Majanja, J awarded Kshs 350,000/= for “multiple soft tissue injuries without fractures [in addition to] head injuries which aggravated the injuries”. In **Isaac Katambani Iminya v Firestone East Africa(1969) Ltd [2015] eKLR** Seron J, increased an award to Kshs 350,000/= for general damages for multiple soft tissue injuries without fractures also aggravated by head injuries.

15. In my assessment of the evidence on record, I note that the Plaintiff admits to having been availed gloves and overalls for protective use whilst at work. He said in cross examination:

“We were not given helmets, only gloves and overalls” (Highlighting added for emphasis).

On his part, DW1, Sammy Gachie, the plaintiff’s workmate who was working on the gutters with the Plaintiff at the material time, stated that:

“We were given protective gear at the workshop. They are put on the shelves for the workers to pick and use.” (Highlighting added for emphasis).

In re-examination, he said

“I had a harness and he (the Plaintiff) did not have his protective gear on”

16. This evidence was not taken into account at all by the Learned Magistrate. He merely found that the system of work provided by the Appellant as employer was not safe; that the plaintiff worked for the appellant – which was not disputed – and that plaintiff was injured on duty. He found the appellant wholly liable.

17. As shown above, the evidence of the defence does indeed corroborate the Plaintiff’s evidence that there was protective gear available for the workers to use. In my view, therefore, if the Plaintiff had worn the gloves provided for his safety, it is highly probable that the injury to his finger from a falling gutter would have been less severe. I am therefore willing to find contributory negligence on the defendant/respondent’s part in the amount of 10%. I therefore apportion 90% of the liability to the Appellant company and 10% to the Respondent/defendant..

18. In terms of damages, I take the view that the injuries sustained in both **Joseph Wahome’s** and **Simba Posho Mills cases** were more serious than those in the present case. The accidents were of course about five years earlier, and therefore taking into account inflation and cost of living, the amounts today would be higher than then. I am more inclined to go along with the assessment in 2015 in the **Eric Oluoch Gogo case**, cited above, where the injuries are more similar being a fracture of the thumb. It is also a more recent assessment.

19. I would assess general damages at 260,000/= for the sole fracture of one finger with 4% permanent disability. Apportioning liability at

90%: 10%, I would reduce the aforesaid amount by 10% leaving a balance of Kshs 253,000/=. Deducting further the Workmens Compensation of Kshs 33,000/=, leaves an amount of 220.000/= .

20. In conclusion, I allow the appeal, set aside the lower court's judgment, and review the damages as follows:

a. General Damages Awarded 270,000/=

Less 10% contribution 27,000/=

Total 253,000/=

b. Add Special Damages 2,000/=

Less Workmen's Compensation 33,000/=

Grand Total Net 222,000/=

21. Accordingly, the Plaintiff is hereby awarded Kshs 222,000/- , reduced from the previous net amount of 319,000/= awarded in the lower court.

22. The Appellant shall have the costs of the appeal.

23. Orders accordingly.

Dated and Delivered at Nairobi this 27th Day of September, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1.for the Plaintiff/ Applicant

2.for the Defendant/Respondent

Court Clerk.....