



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 293 OF 2016

ANKUSH ENTRPRISES LTD.....APPELLANT

VERSUS

JULIUS MUTUI MUSEE.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi Hon. C. Obulutsya SPM dated 3rd July, 2015)

JUDGMENT

The appellant was the defendant in the lower court following a suit by the respondent, who was the plaintiff in a claim for damages arising from injuries sustained while the respondent was carrying out duties in the course of his employment. The respondent blamed the appellant for negligence in failing to provide a safe system of work or protective gear thereby exposing the him to injury.

The appellant denied the respondent's claim and blamed him for the injuries he sustained in that he did not exercise any precaution or reasonable care of himself and exposed himself to danger. He was also blamed for failing to wear protective gear availed to him and carried his work carelessly and negligently leading to the injuries he sustained. It was also the appellant's position that while denying the respondent's claim the respondent solely caused or alternatively contributed to the said negligence.

After the full trial the trial court found in favour of the respondent by holding the appellant wholly to blame and proceeded to award Kshs. 1,500,000/= general damages, Kshs. 2,000/= special damages, Kshs. 90,000/= for further medical costs and Kshs. 483,000/= loss of earnings. The respondent was also awarded costs of the suit and interest.

Aggrieved by the said judgment the appellant filed this appeal faulting the lower court for holding it 100% liable for the accident, and failing to hold the respondent liable for contributing to the accident and injury. The appellant also states that the respondent was wholly or substantially to blame, and that the doctrine of *volenti non fit injuria* applied in the circumstances of this case. The award in general damages and loss of earnings was also faulted.

As the first appellate court I am required to evaluate the evidence adduced before the trial court and come to independent conclusions. Only the respondent testified in support of his pleadings while the appellant called one witness. According to the respondent, he was detailed to remove a shelter from the beams of a house under construction when the beam collapsed thereby causing him to fall down. As a result he sustained the injuries leading to the present claim.

After the injuries he was admitted at Kenyatta National Hospital for three months where some metal implants were fixed. It was his evidence that he was not negligent and was not provided with any safety gear. On the other hand, the only witness for the appellant testified that the respondent and other workers were provided with protective gear but some workers did not wear them.

In determining the issue of liability the trial magistrate stated as follows,

“The evidence is considered. Despite saying protective gear is given the defendant failed to give proof of the same. The court finds that by failing to give protective gear the plaintiff was exposed to the risk of injury. It is also clear the boards were ordered removed before the required period and exposed the plaintiff to injury.

The court is satisfied on a balance of probability that the plaintiff has established negligence against the defendants in full.”

With the evidence on record, it is not easy to determine who between the appellant's witness and the respondent is telling the truth. This is because from the pleadings and the evidence adduced, each party is blaming the other. It is therefore the word of the respondent as against that of the appellant's witness. The respondent said he and other workers were not provided with protective gear, and when they asked the foreman, one Ben Kiama, they were not provided.

On the other hand, the appellant's witness said the workers were given protective gear including the respondent but some did not wear them. That is why it is difficult to determine who among the two is telling the truth.

Under cross-examination, the respondent said he was the only one assigned to remove the shelters to the beams. They were told to do so after one day; yet they should be removed after one week. This information came out of cross examination and does not appear in his evidence in chief.

I have also looked at the respondent's witness statement dated 17th April, 2013 and filed on 23rd May, 2013. In that statement he said the ring beam had been concreted the previous day and they were told to remove the wooden shutters or supporters for reuse. The ring beam collapsed landing on the scaffold he was stepping on which broke and caused him to fall and sustain the injuries.

There is some consistency in that statement with his evidence in court; but there is no mention whatsoever about lack of protective gear which features prominently in his evidence in court. The respondent had all their right to decline to perform duties which appeared dangerous.

There is no evidence that he raised any concern or protested the instructions to perform those duties. It is understandable that he had to obey the instructions of his employer, but he was an experienced worker. He had worked since 2009 and this incident took place in 2012 a period of about 3 years. He ought to have known the danger of performing such duties.

The appellant had a duty of care to the respondent. The allegation by the respondent that the shutters to the beam were ordered removed a day after they were concreted has not been seriously challenged by the appellant. The respondent was therefore exposed to imminent danger by his employer. Both the appellant and the respondent were to blame for the negligence that led to the injuries sustained by the respondent. Considering the positions of the two parties, I find that the appellant was 80% to blame while the respondent contributed 20% thereof.

The respondent produced a medical report prepared by Dr. Wokabi alongside the P3 Form and treatment notes. According to the medical report by Dr. Wokabi dated 14th March, 2013 which was just about 5 months from the date of the injury the respondent suffered fracture of right radius and fracture of right ulna. He also suffered fractured ribs on the right side and fracture of the right shoulder blade. The fractures to the arm were fixed with metal plates. At the time of the examination, he had weakness of the right forearm and could not do any form of strenuous work with the limb.

There was no abnormality to the chest or shoulder blade. In the doctor's opinion the vitality of this limb will never be fully restored. The respondent who was a carpenter should have the metal plates removed later at an estimated cost of Kshs. 90,000/=. The fractures to the ribs caused him a lot of pain but will unite fully on their own and cause little disability. The fracture to the right shoulder blade will also heal and long disability will also be slight. The injuries sustained will have slight permanent disability at 10%.

The lower court considered the authorities cited by both parties. I have also considered the same including, **Peris Mwikali Maina vs. Peter Munyao Kimata (2008) e KLR, Anthony Mwendu Maina vs. Samuel Gitau Njenga (2006) e KLR and George Kingoina Maranga & another vs. Lucy Nyokabi Ndambuki (2006) e KLR.**

Comparable cases should attract comparable awards. The appellate court may not interfere with the discretion of the trial court in awards made thereby, unless the awards are inordinately too high or too low so as to portray a misleading assessment. The appellate court may also interfere with the awards of the trial court if wrong principles are applied in arriving at such awards, or if the court considered irrelevant and left out relevant facts.

The time when such awards were made and the depreciation of currency come into play. Taking into consideration the injuries sustained by the respondent herein, and guided by the medical report, I am constrained to observe that the award of Kshs. 1,500,000/= for general damages is on the higher side and therefore attracting interference by this court. I reduce the same to Kshs. 1,000,000/=

Future medical cost recommended by Dr. Wokabi has not been contested by the appellant. The sum of Kshs. 90,000/= is upheld and so is Kshs. 2,000/= special damages. Loss of earnings falls in the category of special damages which has to be specifically pleaded and strictly proved. The plaintiff alluded to that factor in his evidence but the appellant's witness confirmed that he was paid in full throughout his period of treatment. In the absence of any independent evidence I am unable to make any award for loss of earnings.

The claim for future earning capacity falls under the category of general damages. His permanent incapacity was assessed at 10%. He was a carpenter and it is common ground that his capacity will be limited in the performance of his duties. It is hoped that the medical intervention would enhance the strength of his arm.

Taking the doctor's guidance, 10% incapacity going by his daily earnings of Kshs. 700/= leads to a loss of Kshs. 70/= per day. On a 6 day week per month he would lose $70 \times 6 \times 4 =$ Kshs.1,680/=. He was 40 years old at the time of the injury and I believe a multiplier of 15 years is appropriate. Loss of earning capacity works out to Kshs. $1,680/= \times 12 \times 15 =$ Kshs. 302,400/=.

Accordingly, this appeal is allowed by setting aside the judgement of the lower court and in place thereof, there shall be judgment for the respondent against the appellant as follows,

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| a). General damages | Kshs. 1,000,000/= |
| b). Special damages | Kshs. 2,000/= |
| c). Future medical costs | Kshs. 90,000/= |

d). Loss of earning capacity Kshs. 302,400/=

Total Kshs. 1,394,400/=

Less 20% contributory negligence = Kshs. 278,880/=

Net balance Kshs. 1,115,520/=

To this extent only the appeal succeeds. Costs follow the event and the respondent shall have the costs in the lower court, while in this appeal each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 30th day of October, 2018.

A. MBOGHOLI MSAGHA

JUDGE