

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 220 OF 2015

W.E. TILLEY (M) LIMITED.....APPELLANT

VERSUS

STEPHEN WAIGANJO MWANGI.....RESPONDENT

(Being an appeal from the judgment of the Hon. E. Wanjala

delivered on 9th December, 2016 in CMCC NO.834 of 2016)

JUDGMENT

The respondent was injured in the cause of his employment with the appellant. He brought this suit for damages for the injuries he sustained and blamed the appellant for the same. The appellant denied the respondent's claim but after the full trial the court found in favour of the respondent and held the appellant fully responsible for the injuries sustained by the respondent. The court then proceeded to award the respondent the sum of Kshs. 900,000/= general damages plus Kshs. 4,000/= special damages. The appellant was aggrieved by the said judgment and lodged this appeal.

In the Memorandum of Appeal dated 12th May, 2015 the lower court was faulted for holding the appellant guilty of breach of statutory duty and negligence, when the respondent was unable to pin point any shortcomings on the part of the appellant vis a vis that duty of care. The lower court was also faulted for awarding the sum of Kshs. 900,000/= general damages when the only injury was of the most minimal nature. Finally, the court was faulted for considering that an arachnoid cyst was caused as a result of the said accident.

Both parties have filed submissions herein and cited some authorities. The respondent had worked with the appellant for two years. He told the court that they were supplied with gloves and gumboots. They had asked for helmets but were not given. In the process of working on the material day, they were loading fish into a container when a box fell and hit him on the head. He had been asked by the manager to collect some fish that had dropped on the ground when this happened. Apart from the pleadings he did not describe how this box fell onto his head causing the injury. It was in his evidence that his head had previously been injured.

He called one Dr. Kago who produced the medical report exhibit 1 and which is part of the record of appeal. On the other hand the appellant called Dr. M.M. Qureshi a consultant neurosurgeon who testified and produced the medical report defence exhibit 1. Dr. Kago under cross examination told the court that the blunt injury cannot lead to a cyst. Dr. Qureshi on the other hand observed that the scan to the head showed a cyst which however was not related to the accident.

The medical reports are in agreement that the plaintiff sustained the injuries as set out in the plaint, that is, blunt injury on the head, head injury, soft tissue injuries, physical and psychological pains.

The appellant did not deny the injury sustained by the respondent and in the absence of any other contradicting evidence, then the doctrine of *res ipsa loquitur* applies and therefore I find the appellant was wholly to blame for the injuries sustained by the respondent.

The learned trial magistrate was rather casual in his consideration of the medical report and the general damages awarded. I have no doubt however that he read the cases cited because he refers to the proposed awards. Whatever the case, the cyst alleged to have been found in the respondent's head may or may not be connected to the said accident. There was no proper analysis by the doctors as to the age of the said cyst or more importantly, if that can be determined by medical evidence. It is therefore a misdirection to rely on that condition to assess damages payable.

The appellate court may interfere with the award of the lower court if it is inordinately too high or too low so as to reflect an erroneous assessment thereof, or if the lower court applied wrong principles, or where the lower court took into consideration immaterial leaving out material facts.

Having reviewed the evidence as required of me and going by the material presented, the appellant at most suffered a concussion and related soft tissues injuries. Those injuries could not attract the award of Kshs. 900,000/= as awarded by the trial court. I find the award inordinately high to attract interference. Doing the best I can, I find that the correct award should be Kshs. 300,000/=. Proved special damages amount to Kshs. 4,000/=.

Accordingly, this appeal succeeds by setting aside the judgment of the lower court and in place thereof enter judgment in favour of the respondent in the sum of Kshs. 300,000/= general damages and Kshs. 4,000/= special damages. The respondent shall have the costs of the suit in the lower court in full while he shall be entitled to 1/3 costs in this appeal.

Dated, signed and delivered at Nairobi this 27th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE