



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 436 OF 2013**

**BENARD NYAGA MUNENE .....PLAINTIFF**

**VERSUS**

**MILLENNIUM STAR ENTERPRISES LTD.....DEFENDANT**

**(Being an appeal from the Judgment/Decree made on 18<sup>th</sup> July 2013 by Hon. Mr. T.S. Nchoe (SRM) Milimani Commercial Courts in CMCC No.6192 of 2010)**

**Judgement**

The appellant, Bernard Nyaga Munene was the plaintiff in the lower court. He filed the suit vide the plaint herein dated 2<sup>nd</sup> September, 2010 which was amended on 20<sup>th</sup> January, 2011. The Appellant's claim arose out of an industrial accident which occurred on 5<sup>th</sup> November, 2008 while he was working for the Defendant who is the Respondent herein. The Appellant attributed the accident to the Respondent's alleged negligence and/or breach of duty.

2. The Respondent filed a statement of defence and denied the claim. The Appellant filed a reply to the defence.

3. At the conclusion of the case, the lower court held that the Appellant had failed to prove his case on a balance of probabilities and dismissed the Appellant's case. The Appellant was aggrieved by the judgment of the lower court and appealed to this court on grounds that can be summarized as follows:

(a) That the trial magistrate erred in holding that the Appellant had not proved his case on a balance of probabilities.

(b) That the trial magistrate erred in that he failed to assess the general damages that he would have awarded if the plaintiff's case had succeeded.

(c) That the trial magistrate erred in not holding the Respondent liable for failure to provide safe working conditions.

(d) That the trial magistrate erred in that he failed to consider all the evidence and the submissions and arrived at a wrong conclusion.

4. The appeal was canvassed by way of written submissions. I have considered the said submissions.

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“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 (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

6. In his evidence before the lower court, the Appellant (PW1) testified that he was an employee of the Respondent. That his work was that of a service man at the Respondent’s tyre centre and he had four years experience. That at the material time the Appellant was changing a motor vehicle’s tyres. It was the Appellant’s evidence that he changed the tyres and while alighting from the motor vehicle which was a pickup he slipped on his wet shoes and fell on the wet floor which had a pot hole. The Appellant fractured his right hand wrist and was treated at St. Mukasa hospital that referred to Kiambu hospital. The Appellant blamed the Respondent for failure to provide him with protective gear to wit gum boots.

7. Dr. Cyprianus Okere (PW1) and Dr. Rahman Hindu (PW4) who examined the Appellant confirmed the fracture of the wrist. The Appellant’s hand was on a plaster of Paris for eight (8) weeks. There was a mal-union of the bones and a wire was fixed. Dr. Cyprianus Okere assessed the degree of incapacity at 5%. He charged Ksh.1500/= for his report and Ksh.3000/= for attending court and produced receipts for the said sums of money.

8. The Respondent’s witness, DW1 Eng. Fernando Kariuki the Respondent’s managing director conceded that the Appellant was an employee of the Respondent at the material time. That the Appellant’s duties included cleaning his (Appellant’s) work place. He blamed the Appellant for failure to observe the work regulations and safety procedures. The Respondent’s witness denied that there was a pothole on the floor and stated that the Appellant left the job on his own volition.

9. Looking at the Appellant’s evidence, it comes out clearly that he blames the falling down on three things. That is the pot hole, the wet floor and the wet shoes. Who was responsible for these three items? If indeed there was a pothole on the floor, it was the Respondent’s responsibility to repair the same. However, the Respondent has denied the presence of the pothole. The issue of the pothole therefore boils down to the Appellant’s word vis a vis the Respondent’s and vice versa. The Appellant’s evidence does not reflect where the water that made the floor wet came from or how his shoes became wet. On the other hand the Respondent’s evidence was that the Appellant was supposed to keep his work place clean. It is however noted that the Respondent has said nothing in regard to whether the Appellant was supplied with any safety boots or any safety gear. In the circumstances of this case both parties seem to have equally contributed to the accident. I apportion liability on a 50:50 basis.

10. The ground of appeal that the trial magistrate failed to assess the general damages was conceded to by the Respondent.

11. On the assessment of general damages, the Appellant had submitted in the lower court for an award of Ksh.250,000/= . He relied on the following authorities:

**a) Athuman Kombo v Mbuni Transport Co. Ltd –Msa HCCC No.706/1989**

**b) Majibu Yenge Taura v Kenya Ports Authority Msa HCCC 603/1991**

In both cases Kshs.70,000/= was awarded as general damages for a fracture of the wrist.

12. The Respondent's side did not submit on the issue of quantum either in the lower court or in this court.

13. Taking into account the passage of time and inflationary trends, I think a sum of Ksh.150,000/= as general damages on 100% liability basis would be reasonable compensation for the Appellant.

14. The plaintiff prayed for Ksh.10,500/= medical expenses and Ksh.1500/= for the medical report. Dr. Cyrianus Okere produced a receipts for Ksh.1500/= for the medical report and a receipt for Ksh.3000/= for attending court. However only the Ksh.1,500/= was specifically pleaded and proved. I award the same. The Appellant did not adduce any evidence in respect of the other medical expenses.

15. The total award comes to Ksh.151,500/= less 50% contribution. The final figure is Ksh.75,750/=

16. The upshot is that the judgment of the lower court is set aside. Judgment is entered for the Appellant for Ksh.75,750/=. The Respondent to meet the costs in the lower court and interest. The appeal having succeeded partially, each party to bear own costs.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of March, 2017**

**B.THURANIRA JADEN**

**JUDGE**