REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 196 OF 2013

PIONEER HOLDINGS (AFRICA) LIMITED.....APPELLANT

-V E R S U S –

FRANCIS SHITSUKANE ABAKALA.....1ST RESPONDENT

AMARDA SECURITY SERVICES LIMITED ..... 2ND RESPONDENT

(Appeal from the judgement of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts by the Hon. T. W. C. Wamae (Mrs) CM, delivered on 25th March 2013 in CMCC no. 8228 of 2007)

JUDGEMENT

1. Francis Shitsukane Abakala, the 1st respondent herein, filed a compensatory suit before the Chief Magistrate's Court at Nairobi against Pioneer Holdings (Africa) Ltd, the appellant herein and Amarda Security Services Ltd, the 2nd respondent herein, for the eye injuries the 1st respondent suffered while in the course of training. It is said that the appellant was being trained when the fire extinguisher he was handling exploded thus seriously injuring him. The court heard the suit and eventually the 1st respondent was given a judgment in the sum of ksh.2,500,000/= as general damages. Being dissatisfied the appellant put forward a total of 11 grounds namely:

> ***1. THAT the learned trial magistrate erred in law and fact in reaching a finding of liability against the appellant despite the absence of evidence to support such a finding.***
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> ***2. THAT the learned trial magistrate erred in law and fact in disregarding the evidence of the three witnesses called by the appellant and the 2nd respondent who were all present during the fire fighting training exercise the subject of the suit and all who were emphatic that the purported incident the subject of the suit never occurred.***
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> ***3. THAT the learned trial magistrate erred in law and fact in disregarding the evidence of Dr. Wambugu called by the appellant and who testified that the 1st respondent's medical condition was pre-existing and was in place even before the date alleged for the occurrence of the purported incident the subject of the suit.***
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> ***4. THAT the learned trial magistrate erred in law and fact in disregarding the fact that the 1st respondent (plaintiff) did not call any independent witness to back up his allegations of the occurrence of the incident in light of the vehement denials thereby by both the appellant and the 2nd respondent.***

5. THAT the learned trial magistrate erred in law and fact in disregarding the unanimous evidence that there were more than forty (40) guards present during the training yet none of the other guards experienced the incident alleged by the 1st respondent.

6. THAT the learned trial magistrate erred in law and fact in failing to hold that the explosion of a gas cylinder in the midst of a crowd is an incident that would ordinarily have a major impact and cause so much damage that it cannot one unnoticed.

7. THAT the learned trial magistrate erred in law and fact in entering judgment against the appellant yet it was not in dispute that the 1st respondent was not an employee of the appellant.

8 THAT the learned trial magistrate erred in law and fact in failing to hold that the omission to enjoin into the case the entity that conducted the fire fighting training, Messrs Electro Car Limited, rendered the entire case fatal.

9. THAT the learned trial magistrate erred in law and fact in awarding judgment in favour of the 1st respondent on the basis of "sympathy" rather than on the law and rules of procedure pertaining to the rules of burden of proof.

10. THAT the learned trial magistrate erred in law and fact in awarding general damages that are grossly excessive and beyond the limits ordinarily awarded for similar damages.

11. THAT the trial magistrate's finding and awards were against the weight of evidence.

2. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

3. I have re evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of 11 grounds, it is clear in my mind that two grounds stand out for determination namely the question touching on liability and quantum.

4. The first nine grounds of appeal are basically grounds put forward to impugn the decision on liability. It is the submission of the appellant that there was no sufficient evidence showing that the appellant was liable for the accident. It is argued that there was sufficient evidence which showed that the accident did not take place therefore the trial magistrate gave judgment in favour of the 1st respondent on sympathy grounds. The appellant pointed out that there were about 40 guards who were on training together with the 1st respondent and none of them was injured nor reported the incident. The trial magistrate was accused of failing to analyse the evidence thus arriving at an erroneous conclusion. The appellant further argued that the evidence of Dr. Wambugu show that the 1st respondent's ailment was pre-existing the date of the accident. The appellant further argued that the 1st respondent's case should have been treated as a case of injury at the work place and by that reason whereof the employee claim against an employer thus the appellant should have been discharged from the suit, since the 1st respondent was not the appellants employee. The 1st respondent is of the view that the trial magistrate's decision should not be interfered with. Having re-evaluated the evidence which were presented before the trial court, it is clear from the recorded evidence that the initial treatment notes of the 1st respondent shows that the 1st respondent was injured on the date of the accident and no evidence was tendered by the appellant to controvert the same. The treatment notes also confirm that the 1st respondent suffered chemical burns from an exploded fire extinguisher. The evidence tendered by both sides indicates that the fire drill occurred on the day and time stated by the respondent. Faced with these kind of evidence, the trial court found that the incident actually occurred and as a result, the 1st respondent got injured and subsequently became blind. The evidence of both Dr. Wambugu and Dr. Okere confirm that the 1st respondent was totally blind when they individually examined. Both also confirmed the patient (1st respondent) also suffered from glaucoma. With respect, I agree with the holding of the trial magistrate that on a balance of probabilities, the 1st respondent proved his case, that he was injured on the material date. The appellant allowed the 1st

respondent to be trained but failed to provide him with protective gear such as goggles. On the other hand I also agree that the 2nd respondent's agent, Electro Car conducted a fire drill and training exercise without due care and attention and therefore the 1st respondent is vicariously liable. I find no plausible ground to interfere with the decision on liability.

5. On quantum, the appellant is of the view that the award of kshs.2,500,000/= was excessive and grossly above the norm. The appellant relied on four decisions to beseech this court to interfere with the decision on quantum.

1. Charles Ochola v Mumias Sugar Co. Ltd, High Court Civil Appeal No. 81 of 2012

By the decision delivered in October 2014, an award of kshs100,000.00 was on Appeal enhanced to kshs.300,000.00 by the High Court (S. Chitembwe, J).

2. Waridi Ltd v Charles Adwogo Kidaga, High court Civil Appeal No. 68 of 2010

By the decision delivered in November 2015, an award of ksh.400,000.00 was on Appeal, upheld by the High Court (A. Mbogholi Msagha, J).

3. F.K.G. v Alice Njoki & Another HCCC no. 1174 of 2001

By the decision delivered in September 2004, an award of ksh.500,000.00 was assessed by the High Court (Angawa, J).

4. Fred Ben Okoth v Equator Bottlers Ltd, Court of Appeal, Civil Appeal No. 45 of 2014

By the decision delivered in November 2015, an award of kshs 650,000.00 was on appeal, upheld by the Court of Appeal (Musinga, Gatembu & Murgor JJA).

6. The 1st respondent was of the view that the decision on quantum should not be disturbed because the authorities relied upon by the appellant relate to cases where liability was shared between parties involved and the resultant blindness was partial unlike in this appeal.

7. I have on my part re-evaluated the submissions on quantum.

The authorities cited by the appellant are in respect of awards made between kshs.300,000 to 650,000/=.

8. The record shows that the 1st respondent relied on the case of **Leah Wambui Githuthu =vs= The Attorney General and another (2005) eKLR** where this court gave an award of ksh.2,000,000/= as general damage where the victim suffered 100% visual incapacity. The trial magistrate noted that at the time of delivering her judgment 7 years had lapsed from the date the above cited case was decided. She took into account the inflationary rates and added on to a sum of ksh.500,000/= to compensate. In my view, I do not think the award is high nor excessive. I find the award to be reasonable.

9. In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.... for the Respondent