REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT APPEAL NO. 107 OF 2011

MICHIKURU TEA CO. LTD.....APPELLANT

VERSUS

DAVID NCHUBIRI AKWALU .....RESPONDENT

JUDGMENT

By a judgment delivered on 26th day of July 2011 by Hon. M.T.Kariuki Senior Resident Magistrate in Tigania SRM CC No. 103 of 2007, the magistrate found that the appellant herein liable 100% for the occurrence of the accident in which the respondent's right hand was hit and fractured and he lost five teeth when his jaw was also hit and broken. The Respondent testified that his boss one Mwobobia forced him to repair a tyre which was work done by mechanics at the factory. He also said that he was not provided with protective gears and the pressure machine he was using to put pressure in the tyre that burst didn't also have a working gauge.

The appellants witness confirmed he saw Respondent who was driver with appellant company repair tyre a work which was meant for mechanic. He was one of the mechanics and he had been trained.

DW1 confirmed accident happened and respondent was injured. The appellents were aggrieved by this judgment which gave an award of Kshs 500,000/= for pain and suffering ; Kshs 150,000/- for future medical costs and Kshs 42, 388/= as special damages. They filed this appeal on the grounds:-

1. That the Learned Trial Magistrate erred in law and Misdirected himself in framing the issues for determination in a manner which did not reflect the pleadings filed by the parties and the pertinent facts arising there from and eventually erred in his evaluation of the evidence leading to erroneous findings and entering judgement against the evidence on record.

2. THAT the Learned Trial Magistrate erred in Law and misdirected himself in failing to take into account relevant factors and taking into account irrelevant factors basing his findings on issues not arising from the pleadings filed by parties.

4. THAT the Trial Magistrate erred in law and misdirected himself in failing to take with account the effect of the defence of "Volenti non fit injuria" in evaluating the oral and documentary evidence adduced by the plaintiff as well as the evidence of the appellants witness.

5. THAT the Learned Trial Magistrate erred in Law and fact, and misdirected himself in failing to take into account the legal principle that an employers common law duty is not absolute and in failing to take with consideration the evidence adduced demonstrating that the respondent was liable in contributory negligence.

6. THAT the Learned Trial Magistrate erred in law and misapprehended the principles governing assessment of damages in making an award of damages for future medical expenses which was not supported by either pleadings, evidence on submissions of the respondent leading to a wrong exercise of discretion in the circumstances.

7. THAT the Trial Magistrate erred in failing to take into account the appellants submissions and the authorities cited therein on the sum awardable in special and general damages thereby arriving at an erroneous award in special damages and an excessive award of general damages representing a wholly erroneous estimate of the damage suffered by respondent in the matter.

Directions were taken that appeal be determined by way of written submissions. The appellants submissions were filed on 12th June 2013 and starting on ground 5 of the appeal submitted that the Respondent did not plead or particularize future medical expenses in the plaint; he didn't prove in his testimony about future medical expenses and Dr Macharia in Medical Report didn't quantify future medical expenses ExP1. The authority of Kenya Bus Services Ltd vs Jane Karambu Gituma C.A No. 241 of 2000 was referred to in support of submissions that future medical expenses must not only be pleaded but also be strictly proved as it is a form of special damages. The authority of Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006]eKLR Hon. Justice Mutungi at page 20 in affirming the position of the court of Appeal in Hahn vs Singh C.A No. 42 of 1983 [1985]eKLR 716 held:-

"".....Awarding of damages for future medical costs is irregular outside the known and established heads of damages under the Law of Torts.....

.....claims under future medical expenses remain futuristic and in same category as future loss of earning which can only be claimed and awarded under the head of general damages."

The appellants counsel urged that the award f Kshs 150,000/- for future medical expenses be quashed.

For the 1st ground it was submitted that the trial magistrate considered extraneous matters while considering evidence of DW1 which were not supported by Respondents pleadings. It was also said that the trial magistrate disregarded appellants evidence on record as against the evidence of the respondent while evaluating the facts, evidence and the law applicable and thereby arrived at a wrong conclusion of the law. In relying in the authority of Kenya Bus the appellant argued that the magistrate erred in taking into account irrelevant factors into quering as to why DW1 did not assist the Respondent in repairing the tyre yet the Respondent in cross examination admitted that the tyre repairs were done by the drivers and mechanics. It was also argued that the air pressure was in good working condition as DW1 had used it in repairing a small vehicle earlier and therefore there was proof the air pressure machine was in good working order.

For the 2nd, 3rd, 4th and 6th ground it was argued that there was no evidence tendered to persuade the court that the Respondent was actually forced to repair the tyre as he did not lodge any complaint with the employer not with the Labour office. It was submitted that the contentions that arose and which is the subject of the appeal is whether repair work done by Respondent was done voluntarily or it was forced upon him and if it was done voluntarily was the respondent so negligent in the repair work that he should be held liable under the doctrine of contributory negligence? It was argued that there was no evidence that Respondent sought help from mechanics to assist in repair of the tyre as it was his 1st time to undertake such repairs.

In relying in the case of Wareham t/a A F Wareham and 2 others vs Kenya Post Office Savings Bank C.A No. 5 & 48 of 2002, it was submitted that the Respondent had the burden to prove that he was forced to repair the tyre by Mr Mwobobia, hence the evidence he gave didn't support allegations that he was forced to undertake task beyond his scope of employment. It was argued that the trial magistrate arrived at a wrong conclusion after misapprehending facts presented before it and proceeded on the wrong principles of law and consequently came to wrong conclusion of law and found appellant 100% liable.

The appellant reiterated its submissions in the magistrates court and said that the Respondents suit should be dismissed or in the alternative liability be apportioned equally. Appellant referred to the authority of Shimo Ltd vs Thojas Imanali Nyabwange HCCA 34 of 2000 where liability was apportioned on the ground that the Respondent must have assessed the task ahead and concluded that he was in a position to handle it alone.

On quantum of damages it was submitted that the account should be alive to the fact that injuries were sustained sometime in August 2009 and therefore in the interest of conformity, uniformity and consistency of making awards, the court should as much as possible be guarded by judgments of the High Court and court of Appeal. It was argued that the trial court ignored the authorities submitted by appellant and Respondent which gave general damages in the range of Kshs. 80,000 to 150,000 and didn't explain how it arrived at the figure of Kshs 500,000/=. It was submitted that a fair award is Kshs. 200,000/=.

It was argued that the court:-

- Sets aside the order of the trial court awarding the costs of future medical expenses.
- Varies the order of the trial court which found appellant 100% liable and proceed to substitute with an order apportioning liabilities on the parties.
- Allow the Appellants appeal under the head of general damages & quash decision f the trial court in awarding general damages of Kshs 500,000/= to Respondent and substitute with an award of Kshs 200,000/= before contribution.
- Award cost of appeal to appellant.

On the part of the respondent it has been submitted that the trial magistrate properly understood the issues before him and captured the matters to be determined i.e liability and quantum of damages payable.

It was argued that grounds 2,3,4 and 5 are far fetched and should be dismissed. Counsel argued that trial magistrate was directed by evidence before him to arrive at the conclusion made. For Ground No. 5 it was disputed by Respondent on ground that future medical expenses was captured in the submissions and relied on authorities that pointed to the same direction. The Respondent said the doctors Medical Report indicated the Respondent required future medical care, an operation t remove metal plate on his hand.

In cross appeal the Respondent claimed the trial magistrate erred in awarding too little general damages. It was argued that Respondent suffered permanent injuries and that should have been considred and they are now asking for an award of Kshs. 2,500,000 as general damages and future medical expenses as well as special damages and costs of the suit.

Respondents counsel urged that appeal be dismissed for lack of merit and the cross appeal be found to be meritocious and general damages be enhanced.

In determining this appeal, this court has relooked and re-evaluated the evidence on record from the lower court and established issues for determination thus:-

1. Whether the Respondent proved his case on a balance of probabilities.

2. Whether award for Future Medical expenses was justified when not pleaded and only raised in submissions?

3. Whether finding of 100% liability on the appellant was justified from evidence on record?

4. Whether there was a case to apportion liability between appellant and Respondent.

I want to agree with the appellants from the onset that having perused the pleadings in the lower court, there is a prayer for future medical expenses which was not proved at all during evidence in chief by both the plaintiff and even:-

1. Whether the Respondent was an employee to the Appellant.

2. Whether an accident occurred where the respondent suffered injuries shown in the Doctor Macharia's report ExP1

3. Whether injuries were suffered in the course of the Respondents duty as employee of the Appellant.

4. Whether the Respondent was trained to repair puncture on a tyre.

5. Whether Respondent was supplied with protective gear that would have minimised injuries suffured.

6. Whether the Appellant provided conducive work Environment for the Respondent to carry out his duties.

7. Whether the Respondent proved on a balance of probabilities that he was entitled to award of general damages and Future Medical expenses as awarded by the trial magistrate.

8. Whether liability should be apportioned between the appellant and the Respondent.

The Respondent suffered injuries namely:-

- Loss of five upper teeth
- Compound fracture of the right hand and multiple fracture of the lower jaw for which Dr. Macharia in Medical Report ExP1 opinioned that he will require an operation to remove the plates implanted. He didn't estimate the cost of such operation and as much as the plaintiff prayed for damages for future medical expenses the amount Kshs 150,000/= was mere guess work. There was no formulae used to arrive at that figure. It is the view of this court therefore that the claim was not proved and can't be awarded.

It is not disputed that Respondent was even employee of the defendant. It is not disputed that he suffered an accident on 15th January 2005 while repairing a tyre. He was a driver but could no longer drive following the accident. He said when he was told by his boss to repair the tyre of a lorry he was driving he repaired its and inflated the tyre. That when he inflated the tyre had a burst and inner lock of the rim came out and hit him on the right hand and on lower jaw. The Respondent said it was not his duty to repair tyres but Mr Mwobobia told him to the repair. The appellants witness could not refute whether or not respondent was forced to repair the tyre contrary to his job description and Mwobobia didn't attend court to controvert the allegation that he forced the Respondent to do work that was not part of his duty. DW1 confirmed drivers do not fix tyres unless there was too much work. He said it was the work of mechanics to repair tyres in the factory. He confirmed one had to be skilled to repair a tyre which is mounted in a certain manner so that incase of a burst one is not injured.

DW1 confirmed he heard an explosion and saw tyre ring and rim in the air. He said the rim hit David's head. He confirmed they are never given helmets by appellant.

DW1 said he didn't know if David was skilled when employed. He confirmed David was a driver and not mechanic. He said he didn't know whether someone showed David how to work. He said the accident was not investigated by Motor Vehicle inspector and he didn't know what caused the explosion. I have gone over the evidence of DW1 to show that he confirmed evidence of Respondent that he was not meant to repair tyres but Mwobobia made him repair one. That he was not skilled in repairing tyres. That he was not supplied with protective gear such as helmet which could have minimised injuries when the rim hit his head. It therefore follows that the work environment was not conducive. The upshot of this is that the appellants failed to exercise duty of care towards the respondent and exposed him to danger which resulted in the accident that caused injuries that he suffered. There was no proof by providing Report of inspection to show the pressure machine was in good working conditions to avoid excess pressure that resulted in the explosion. I do find that the appellant didn't take all reasonable steps to ensure the Respondents safety as was held in the case of Stat Pack Industries vs James Mbithi Munyao HCC No. 152 of 2005 at Nairobi. The finding of Kimaru J in High court Civil Appeal No. 65 of 2002 in Simba Posho Mills Ltd vs Fred Michira Ongut, [2005]eKLR and the finding of Aburich J in Civil Appeal No. 263 of 2006 Oluoch Erick Gogo vs Universal Corporation Ltd is persuasive in upholding the trial magistrates finding the defendant was 100% liable. The court was not told of any precautions the appellant under took to ensure. Safe working condition and like it was held in the case of Mumias Sugar Co Ltd vs Charles Wamatiti C.A 151 of 1987 of if an accident occurs in the employers is responsible and will be required to compensate the employee. The appeal therefore succeeds only as far as damages for future medical expenses is concerned and fails where appellant sought to have general damages for pain and suffering unsettled. Concerning the cross appeal I will also not interfere with the award made by the trial magistrate as he had opportunity to see the witness and even interrogate them. 25 % of Costs to the appellant and 95% of costs to the Respondent

A.ONG'INJO

JUDGE

29.6.2017

Before Adwera – Ong’injo Judge

Penina C/A - Assistant

Respondent – PIP

M/s Menye Kirima Advocate for Respondent N/A

Appellant – N/A

M/S Muthoga Gaturu and Co. Advocates for Appellants N/A

Court

Judgment delivered, dated and signed. Notice of Judgment to issue.

A.ONG’INJO

JUDGE