



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 464 OF 2015

KENTAINERS LIMITED. APPELLANT

VERSUS

SAMSOM INDUMWA. RESPONDENT

*(Being an appeal from the judgment of the Hon. Senior Principal Magistrate H. E. K. Usui, CMCC
NO. 1161 OF 2012 dated 1ST September, 2015)*

J U D G M E N T

The Respondent Samson Indumwa filed the suit against the Appellant Kentainers Limited in the Magistrate court claiming: -

- a) General damages for pain, suffering and loss of amenities.*
- b) Damages for lost earnings and loss of earning capacity.*
- c) Special damages of Ksh.2,000/-*
- d) Costs of this suit.*
- e) Interest on (a) and (b) above at court rates until payment in full.*

The Appellant claim was that:

- i) At all material times relevant to this suit the Plaintiff was an employee of the defendant at the Defendant's premises.*
- ii) It was an express and/or implied term of contract between the Plaintiff and the Defendant and/or it was a duty of the Defendant to take all reasonable precautions for the safety of the Plaintiff while he was engaged in his work and not to impose the Plaintiff to a risk of damage or injury of which the said Defendant, its agents and/or representatives know or ought to have known and to provide and to maintain adequate and suitable plant appliances to enable the Plaintiff to carry out his work in safety; to take all reasonable measures to ensure that the Plaintiff's work was safe and to provide and maintain a proper system of work.*
- iii) On or about the 3rd January, 2011, the Plaintiff was engaged in his lawful duties at the Defendant's premises operating a molding machine when the machine caught fire and exploded spilling molten plastic which poured on him inflicting extensive and serious burns on him.*

iv) The accident was wholly caused by the negligence, carelessness, breach of statutory duty and breach of contract of employment on the part of the Defendant.

Particulars of negligence/breach of contract or statutory duty on the part of the Defendant/its agents were: -

- a) Exposing the Plaintiff to unsafe system of work.**
- b) Failure to ensure the safety of the Plaintiff while he was engaged in his work.**
- c) Exposing the Plaintiff to dangers it knows or ought to have known.**
- d) Failure to maintain and keep the stairs at the work place in a good and safe condition so that they do not pose any danger or cause any harm to the Plaintiff.**
- e) Making the Plaintiff carry such a dangerous solution in an open bucket in disregard of his safety.**
- f) Failure to provide the Plaintiff with qualified, competent and safe work mates who would not cause any harm to him while working.**
- g) Failure to take reasonable care to avoid the accident happening at the work place.**
- h) Causing the accident.**

V) As a result of the injuries sustained in the said accident, the Plaintiff has suffered severe permanent incapacity that has made him stay out of work after the accident and has lost earnings as well as lost his earning capacity.

Due to the negligence and/or Breach of statutory duty the Appellant severe burns over the face, upper limbs and upper torso.

The Respondent statement of defence denying the claim of any negligence. The Defendant averred that: -

a) The Defendant denies all the particulars of negligence, carelessness, breach of Statutory Duty and breach of terms of contract of employment attributed to it, its servants and/or agents as alleged and particularized in paragraphs 6 (a to h) all inclusive of the plaint and puts the Plaintiff to strict proof thereof.

b) In the alternative and without prejudice to the foregoing, the Defendants states that it took all reasonable and practical steps to ensure its employees safety and avers that it maintained safe and proper system of work, provided suitable plant, tackle, appliance and protective devices for its employees. In the premises, the injury occurred without any failure on the part of the Defendant.

c) Further and in the alternative and without prejudice to the foregoing if indeed the Plaintiff got injured whilst in the course of his duties with the defendant (which fact is hereby denied) the defendant avers that the Plaintiff wholly and/or substantially contributed to the occurrence of the subject accident.

Particulars of the Plaintiff's negligence and breach of terms of contract of employment.

- a) Failing to adhere to laid down safety rules, regulations and procedures.**
- b) Failing to take precautions for his own safety.**
- c) Voluntarily assuming risk.**

d) Willfully inflicted the injury therein on himself.

e) Failing to use protective gears and equipment provided for his use.

f) Failing to keep proper lookout and follow instructions given to him while performing his duties.

g) Being inattentive or otherwise failing to exercise sufficient care for his own wellbeing.

And prayed that the suit be dismissed with costs.

After the trial the learned trial magistrate entered judgment for Appellant against the Respondent for General Damages –Kshs.850,000/-

Special Damages – Kshs.20,000

Doctors and Court attendance – Ksh.6000/-

All totaling to Kshs.458,000/- plus costs and interest.

Dissatisfied with the judgment and quantum, the Appellant preferred this appeal on the grounds that: -

1. That the learned magistrate erred in law and in fact in failing to find that the Respondent had not proved any negligence on the part of the Appellant.

2. That the learned Magistrate erred in law and in fact in disregarding the documentary and oral testimony on record.

3. That the learned magistrate erred in law and in fact by failing to take into consideration the Respondent's own admission that the accident was sudden and not anticipated.

4. That the learned magistrate erred in law and in fact in failing to find that the Respondent had not proved any of the particulars of negligence or breach of contract or statutory duty set out in the plaint.

5. That the learned trial magistrate erred in law and in fact in finding that the Appellant was 100 liable for the accident against the evidence on record.

6. That the learned magistrate erred in law and fact in failing to apply proper legal principal regarding liability and thus arriving at a bad decision.

7. That the learned magistrate erred in law and in fact in finding that the nature of injuries sustained by the Respondent warranted an award of Ksh.850,000/-

Appellant, therefore, prayed to this court to: -

a) This court be pleased to set aside the judgment of the trial court and to make a fresh finding on liability dismissing the case against the Appellant.

b) That this court be pleased to set aside the award of damages and to make a fresh assessment of damages.

c) Costs of this appeal be awarded to the Appellant.

The Respondent filed a Notice of Cross-Appeal on the following grounds: -

1. That the learned Magistrate erred in law and fact in awarding the Respondent general damages of Kshs.850,000/-, an amount that is manifestly low considering the nature of the injuries sustained by the Respondent.

2. That the learned magistrate erred in law and fact in declining to award the Respondent damages for loss of earning, capacity despite the Respondent having sustained injuries that led to 10% permanent incapacity.

And prayed that: -

a) The court be pleased to enhance the award of general damages from Ksh.850,000/- to Ksh.1,200,000/= or such other higher award as will be deemed fit by the court.

b) The court be pleased to set aside the order declining to award damages for loss of earning capacity and substitute it with an order awarding loss of earning capacity arrived at as follows: -

- Salary per month	Ksh.9,183.75/-
- Age at time of accident	38 years
- Retirement Age	60 years
- Number of years to retirement	22 years
- Number of months in a year	12 months
- Suggested multiplier	22
- Permanent incapacity	10%
- $9,183.75 \times 12 \times 22 \times 10/100$	Ksh.242,451/-
- Loss of earning capacity =	Kshs.242,451/-

(or as may be awarded by court)

Briefly the evidence before the trial court was that the Respondent was employed by the Appellant as a machine Operator, operating the Roto Molding Machine which is used in the production of the Plastic tanks. On 3rd January, 2011 during the night shift, while moulding the product and after finishing the backside he proceeded to hold the middle side when fire got into the moulding machine, exploded and spilled molten plastic on his body. The molten plastic landed on his face, chest, hands and other parts of the body. He sustained injuries and was taken to the shift clinic in Embakasi who referred him to Nairobi West Hospital where he was admitted up to 18th January, 2011. He blamed the Appellant for the incident as he was not provided with an overall or helmet to cover his face.

Dr. Joseph Amugawa PW 3 examined the Respondent on 4th June, 2012 and prepared a medical report. On examination, the doctor stated that the Respondent had sustained 2nd degree burns. He had ugly healed scars with keloid formation on right face, nose and mouth. His present complaints was difficulty in focusing while in dim light; watering of the eyes when exposed to bright light.

At the close of the Respondent's case the Appellant did not tender any evidence for the defence nor file submissions on quantum.

The learned trial magistrate in her judgment found the Appellant liable and assessed general damages at Ksh.858,000/- precipitating this appeal.

By consent of the parties, directions were taken that this appeal be disposed of by way of written submissions. Mr. Mwaniki for the Appellant submitted that the trial magistrate erred in finding the Appellant liable in negligence which the Respondents evidence was that the plastic exploded unexpectedly and no evidence was adduced to show how the Appellant contributed to the explosion. Counsel submitted that in a suit such as this which is premised on negligence, the Plaintiff has the onus to prove negligence. In support of this contention counsel referred this court to the decision of **Eastern Produce (K) Ltd Vs Christopher Atlado Osiro (2006) eKLR** where the court stated:

“It is trite that the onus of proof is to he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that ‘There is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove some negligence against eh Defendant where the claim is based on negligence”

Salmon & Houstain in the law of Torts 19th Edn, where it is described as ‘conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage..... negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do’.

Counsel further submission factored in finding that the nature of injuries sustained by the Respondent warrant an award of Ksh.858,000/-. He submits that the Respondent suffered soft tissue injuries and that the award was so inordinately high as to represent an entirely erroneous estimate. Counsel referred to several authorities including **George Kinyanjui t/a Climax Coaches & Another Vs Hassan Musa Agoi (2016) eKLR** where the Plaintiff who suffered soft tissue injuries and a fracture and whose assessment at general damages of Ksh.800,000/- 2as held by the High Court to be higher. Counsel also invited this court to be guided in the decision in **Arrow Car Limited Vs Elijah Shamalla Bimono & Others (2004) eKLR**, where the Plaintiff who sustained sprain on the neck, soft tissue injuries on the neck, right ankle joints, sprain on left ankle and lacerated wound on ankle region was awarded Ksh.150,000/-

On the cross-appeal on quantum by the Respondent, Mr. Mwaniki submitted that the amount awarded in damages is high for injuries sustained in comparable authorities. Finally, he submits that the assertion that the trial court erred in not awarding damages for loss of earning capacity is without merit as the Respondent did not tender any evidence to show that the scare he sustained lowered his chances of getting work.

The grounds upon whether an Appellate court can interfere with the discretion of the trial court on the award of damages were well stated in **Butt Vs Khan (1981) KR 349** where Law J stated: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrive a figure which was either inordinately high or low.”

On the issue of genuine damages awarded and considering the injuries sustained, the award of Ksh.850,000/- cannot in my view,be said to be so high or so low as to warrant this court to interfere with the same. The award was adequate compensation for the injuries sustained and comparable to other recent decisions.

On the cross-appeal by the Respondent that the trial magistrate erred in failing to award damages for loss of earning cap city, the same has been considered. The trial magistrate indeed addressed her mind on that issue and rendered herself thus: -

“On the claim for loss of earning, I did not find any basis for the same. Apart from the scars, the Plaintiff has not suffered any other disability. He has not demonstrated that he is unable to get a job solely because of the scars and not due of scarcity of jobs experienced by any other Kenyan.

He is strong and capable of working. That claim is dismissed.”

Damages for loss of earning capacity are awarded where as a result of the injuries sustained, it is established that the Plaintiff cannot secure earnings he would have earned before the accident. The injuries must be such that the Plaintiff for instance cannot perform work he was doing before the accident. In the present case, the Respondents’ injuries left him with ugly scars on the right face. It was not shown in the trial court how the scars sustained have reduced his earning capacity. I, therefore, agree with the trial magistrate that the claim for damages under this held was not established.

In the result, I find no merit in the appellants appeal and the cross-appeal by the Respondent which are hereby dismissed. I confirm the judgment of the trial court for the Respondent/Plaintiff against the Respondent/Defendant awarded for the sum of Ksh.850,000/-, general damages, special damages of Ksh.2,000/-. Each party to bear its own costs of this appeal.

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

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S N RIECHI

JUDGE