REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 455 OF 2007

TONONOKA STEEL LIMITED.....APPELLANT

VERSUS

SYLVANUS ESIKURI TOKA ..... RESPONDENT

(Being an appeal from the judgement and decree of the honourable Mrs. Muketi in Nairobi (Milimani) – Chief Magistrate's Court Civil Suit No. 8988 of 2005 delivered on 26th April, 2007)

JUDGEMENT

1. Sylvanus Esikuri Toka, the Respondent herein, was a manual employee of Tononoka Steels Ltd, the Appellant herein. On or about 8th day of July 2005, the Respondent was injured when the Appellant's supervisor or director caused the Appellant's motor vehicle to run over the Respondent. The Respondent filed an industrial accident claim against the Appellant before the Chief Magistrate's Milimani Court vide the plaint 6th August 2005. The Appellant filed a defence to deny the Respondent's claim. The suit was heard and on 26th April 2007, the learned chief magistrate delivered judgement in favour of the Respondent in the sum of ksh.101,500/= plus costs and interest. The Appellant was dissatisfied hence this appeal.

2. On appeal, the Appellant put forward the following on appeal:

1. ***The learned magistrate erred in law and fact in finding and determining that an accident did occur when in fact no evidence was produced to that effect.***
2. ***The learned magistrate erred in law and fact in shifting the burden to the Appellant when in fact the Respondent had not proved the necessary facts to the requires standard.***
3. ***The learned magistrate erred in law and fact in failing to consider and rule on the submissions of the defendant to the effect that the plaintiff's claim as a workman was misconceived.***
4. ***The ksh.100,000/= awarded to the Respondent as general damages by the learned magistrate was manifestly excessive in the circumstances of the case as to make an erroneous estimate of the damage to which the Respondent is entitled.***
5. ***The learned magistrate erred in law in issuing an unreasoned judgement.***
6. ***The learned magistrate's decision in finding the Appellant 100% liable and awarding damages to the Respondent was contrary to the law and against the weight of the evidence led.***

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. It is the submission of the Appellant that the learned chief magistrate did not do an indepth analysis of the evidence adduced before rendering her decision. In the 1st and 6th grounds, the Appellant argued that the

trail magistrate erred in holding that an accident occurred yet the Respondent did not produce any abstract nor independent evidence to prove the occurrence of the accident on 8th July 2008. It is also pointed out that no evidence of ownership of the alleged motor vehicle were tendered. The Respondent on the other hand pointed out that the Appellant did not call any witness and or proffer any evidence to controvert the Respondent's evidence stands unchallenged. The Respondent did not specifically address his mind to the question of ownership and registration of the motor vehicle which ran over the Respondent. I have perused the plaint and in paragraph 5, the Respondent (plaintiff) avers that the Appellant's (defendant's) director or supervisor negligently and in breach of statutory duty caused the Appellant's motor vehicle to run over the Respondent thus making him sustain severe injuries. The Appellant filed a defence to deny the occurrence of the accident. It also denied knowledge of the injuries sustained. The Respondent testified before the chief magistrate's court. He stated that he was working in the Appellant's factory in Embakasi on 8.7.2005 when the Appellant's motor vehicle ran over him. The Respondent could only remember part of the registration number as KAN 351. Respondent blamed the Appellant for failing to provide a safe place for workers to wait to enter or exit the factory. The Respondent blamed the Appellant's driver for failing to hoot to alert others that he was moving the motor vehicle. At the time of the accident the Respondent stated that he was guarding the gate. He claimed that he was seated at the gate when the accident struck. The Respondent stated that though he reported to the police he was not issued with a police abstract. Despite the Respondent making serious allegations, the Appellant did not deem it fit to tender evidence to controvert. The Respondent mentioned the incomplete number plate of the motor vehicle which hit him. The Appellant did not contradict that piece of evidence. The Respondent also alleged that workers were not given a safe place where they would wait. That assertion was not controverted. The Respondent further told the trial court that the driver of the Appellant's motor vehicle did not hoot before making the motor vehicle move. Again, this piece of evidence is not contradicted. The Appellant denied that the Respondent was its employee. The Respondent tendered documentary evidence in form of payslips to prove that he as an employee of the Appellant. The evidence tendered in its totality shows that the Appellant was wholly to blame for the accident. The learned chief magistrate's decision to find the Appellant wholly liable cannot therefore be faulted. I find no merit in grounds 1 and 6 of the appeal.

4. It is alleged in ground 2 that the learned chief magistrate shifted the burden of proof to the Appellant. When she stated that the plaintiff(Respondent) sat at a potentially dangerous place. With respect, I do not think the learned chief magistrate shifted the burden of proof. The record shows that the Respondent had alleged that the Appellant did not provide its employees a safe place to wait. It was upon the Appellant to tender evidence to show that it provided its employees with a safe working environment.

5. In the 3rd ground, the Appellant argued that the trial chief magistrate failed to consider the Appellant's submission which was the effect that the suit did not qualify to be a claim of a workman since the Respondent was injured outside the Appellant's premises. I have looked at the record and it is true the learned chief magistrate did not consider this point. However this being the first appellate court, I am enjoined to re-evaluate the evidence and come up with my own conclusions but bearing in mind that I had no advantage of hearing the witnesses. The evidence tendered by the Respondent indicate that at the time of the accident, he was assigned the duty of guarding the gate. It is also apparent that he sat next to the gate at the material time. It cannot therefore be true that the Respondent was injured outside his place of work. I am convinced that the suit was properly before the trial court as a workman's claim since it arose in the course of performing his duties.

6. The Appellant has attacked the judgement in its 5th ground claiming that the same did not contain the concise reasons nor conclusive statement of facts. I have perused the rather brief judgement. The same contains the statement of the claim, the summary of the evidence tendered, the issues to be determined and the verdict. The learned chief magistrate was emphatic that the plaintiff(Respondent) presented evidence which were never controverted by the defendant (Appellant). The learned chief magistrate believed the Respondent's evidence. She formed the

opinion that the Respondent proved his case to the required standards in civil cases. I have on my part re-evaluated the evidence and came to the same conclusion as that of the trial chief magistrate.

7. In my view, the judgement meets the basic requirements of a judgment as envisaged under Order 21 of the Civil Procedure Rules. I therefore find ground 5 to be without merit.

8. In ground 4, the Appellant has complained that the award of kshs.100,000 to the Respondent as general damages is manifestly excessive. The Respondent is of the view that the award was not excessive. The Appellant was of the view that an award of ksh.50,000/= was reasonable. There is no doubt that the Respondent suffered a fracture of 3rd metatarsal left foot. In the case of **Mohamed Abdul Mohamed =vs= Maringo Bus Service Ltd H.C.C.C. No. 947 of 1988 (unreported)** this court awarded ksh.100,000/= for a fracture of 4 metatarsals.

9. The record shows that the learned chief magistrate considered the authorities supplied to her and came to the conclusion that the award of kss.100,000/= was reasonable and commensurate to the injuries sustained.

10. I have also perused the authorities cited by parties before the trial court and they are in respect of cases which were decided more than ten years ago. The Kenyan shilling has undergone inflationary beatings hence the same awards cannot give a true reflection of reasonable awards.

11. I find the award of kshs.100000/= on account of general

damages to be reasonable. Though the Appellant challenged the award of special damages of kshs.1,500/= on the basis that it was never pleaded nor proved, the record shows that the same was pleaded in paragraph 5 of the plaint.

12. It is also clear that the Respondent presented documentary evidence to prove the same. I find no merit in the appeal against quantum.

13. In the end, the appeal is found to be without merit. It is dismissed in its entirety with costs to the Respondents.

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent