REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 401 OF 2011

PASHA ENTERPRISES LIMITED..... APPELLANT

-V E R S U S –

BERNARD KINYUA GITHAKA KIBURI .....RESPONDENT

(Being an appeal against the judgement of L. Njora (Mrs), Principal Magistrate delivered in Nairobi in CMCC No. 4895 of 2009 on the 21/7/2011)

JUDGEMENT

1. Bernard Kinyuah Githaka Kiburi, the respondent herein, filed a compensatory suit against Pasha Enterprises Ltd, the appellant herein, claiming damages for the injuries he sustained while working for the appellant. It was argued that on or about 10th January 2009, the respondent was assisting other workers to load a disc of a grader onto a van when the disc fell onto the respondent causing him serious injuries. The respondent argued that it was a term of the employment contract and or it was an implied term of contract and or statutory duty that the appellant would take reasonable care of the respondent whilst under the appellant's employment to avoid exposing him to a risk of injury. The respondent blamed the appellant for the accident claiming it was caused by negligence and breach of contract or breach of statutory duty by the appellant on its servants or agents. The suit was heard by L. M. Njora (Mrs), learned principal magistrate who in the end apportioned liability in the ratio of 10%:90% as against the appellant. On quantum, the learned principal magistrate awarded the respondent ksh.7,000 and kshs.450,000 as special and general damages respectively.

2. The appellant was dissatisfied with the aforesaid decision hence this appeal.

3. On appeal, the appellant put forward the following grounds:

> ***1. THAT the learned trial magistrate erred in law and in fact in apportioning liability at 10%-90% in the respondent's favour having stated in her judgment that the respondent undertook the job on his own volition.***
>
> ***2. THAT the learned trial magistrate's award of kshs.450,000/= to the respondent by way of general damages is so excessive in the circumstances as to amount to an erroneous estimate of the damages suffered by him.***

4. When the appeal came up for hearing, learned counsels appearing in this 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 taken into account the rival submissions. On the first ground of appeal, it is the appellants' submission that the respondent did not tender evidence to prove on a balance of probabilities the particulars of negligence stated on the plaint against the appellant. The respondent has argued that he

tendered sufficient evidence to establish the particulars of negligence as against the appellant. The respondent urged this court to find that the order apportioning liability was merited hence it should not be interfered with. I have on my part re-evaluated the evidence tendered to prove liability by the respondent. The learned senior principal magistrate took into account the evidence presented before her and came to the conclusion that the respondent on his own accord decided to lend a helping hand to the appellant and in the process he was injured. The trial magistrate consequently found the respondent 10% blameworthy. The appellant is of the view that there was no basis at all for the learned principal magistrate to find the appellant 90% liable.

5. At the trial, the respondent (PW1) testified and summoned Dr, Washington Wokabi (PW2) a consultant surgeon to testify in support of his case. PW1 told the trial court that he begun to work for the appellant from 7th November 2008 until 10 January 2009 as a field service driver. PW1 further stated that on the fateful day he together with his fellow employees were assigned duty to work at Wanzooni in Machakos. The respondent claimed that the grinder/grader driver received a call that the grader stands were to be replaced. On that day PW1 said he was driving a land cruiser. He said a portable welding machine was loaded onto the land cruiser. PW1 went to Machakos where he picked up a welder by the name Kamanza and drove to where the grader was. PW1 together with his colleagues managed to remove the welding machine from the land cruiser and the welder begun his work. It was impossible to complete the welding on the grader. PW1 said the driver to the grader requested him to join hands with three others to lift the disc. It is said that the disc was so heavy forcing the quartet to release it. In the process it fell down thus seriously injuring PW1's hand and leg. PW1 tendered evidence showing that his index finger was amputated, his middle finger, left hand bone and the right leg femur were broken. The respondent was taken to Machakos general hospital where he was admitted for 10 days. PW1 said that the disc weighed between 100kgs and 200kgs. In cross-examination the respondent admitted that he was specifically employed by the appellant as a driver. PW1 further stated that he was requested by the appellant's grader driver to assist in loading he disc on the land cruiser to transport it to Machakos. The appellant summoned Stephen David Katoko (DW1) to testify in its defence. DW1 claimed the disc weighted between 50kgs and 60 kgs and could easily be lifted by three people. Dw1 further stated that three people attempted to lift the disc on to the land cruiser. He said PW1 was not requested to assist but on his volition offered to assist. In the process of lifting, DW1 said, the disc accidentally slipped and fell on PW1. Karanja Musyoki (DW2) corroborated the evidence of DW1 that PW1 came to assist in loading the disc on the land cruiser. DW2 said they did not request PW1 to assist but came on his own volition to assist. He said the disc was very heavy. He averred that all the workers help each other. DW2 stated that though they have cranes they did not need them on that day. I have taken time to analyse the evidence tendered by both sides. It is not in dispute that the respondent got injured while on duty. Though he was not assigned the duty of a loader, it is the evidence of DW1 and DW2 that the appellant's workers are at times forced to assist themselves in situations where one is in a difficulty like in this case. The evidence tendered by both sides show that the disc the respondent assisted his colleagues to lift was heavy. In my view PW1 did not need to seek the permission of his employer to assist his colleagues lift such a disc. It will be absurd if employees were to ask for permission to perform such a task in the field from the employer who could be stationed in a distant office.

6. However taking into account the weight of the disc perhaps it could have been prudent for the driver of the grader to request for a crane to lift the disc or in the alternative to request for more personnel to assist in lifting the same. In my humble view, the appellant cannot escape blame for the injuries the respondent suffered. The respondent got injured while in the course of his employment and while performing duties related to his work. On the other hand the respondent cannot also escape blame in this saga. It is apparent from the recorded evidence that the disc was being lifted by four people. When the disc slipped, three of them escaped unscathed while the respondent was unlucky. One can infer that the others took precaution when lifting the disc while the respondent did not.

7. In the circumstances I would apportion 30% liability. With Respect, I agree with the appellant that the learned principal magistrate did not attach any reasons as to why she apportioned 90% liability against the appellant and that is why I have re-evaluated the evidence and come to the conclusion that the order on apportionment of liability must be interfered with.

8. In the second ground of appeal, the appellant avers that the award on damages is high and excessive.

9. The respondent on the other hand is of the view that the award given is commensurate with the injuries the respondent sustained hence it should be left undisturbed. I have carefully reconsidered the authorities submitted by both parties before the trial court and before this court. It is not in dispute that the respondent tendered evidence showing that he suffered the following injuries:

i. Amputation of the left index finger.

ii. Fracture of the middle finger

iii. Compound fracture of the right tibia

It is also stated by Dr, Wokabi (PW2) that the respondent suffered 15% permanent incapacity.

10. In **Nairobi H.C.C.C. no. 607 of 1996, Zipporah Wambui Kibi =vs= Japhet Bett Karogo(unreported)**, this court awarded kshs.150,000/= for a fracture of one finger. In the case before this court now, there is a fracture of the middle finger and the amputation of the index finger.

11. This court in **Nakuru H.C.C.C no. 86 of 1998 Rosemary Bulinda =vs= Peter Kinyanjui Gakuru & 5 others, (unreported**) this court awarded 60,000/= as damages for a fracture of the femur and cuts.

12. The respondent had asked to be given an award of kshs.500,000/= as general damages plus kshs.7000/= as special damages. While the appellant suggested an award of kshs.280,000/= as sufficient. The learned principal magistrate gave the respondent ksh.450,000/= as general damages plus kshs.7,000/= as special damages.

13. I have considered the nature of injuries the respondent sustained vis-a-vis the awards made. I have also considered past awards made and I find the award given by the learned principal magistrate to be reasonable and commensurate with the injuries suffered. I in the circumstances do not intend to interfere with the award.

14. In the end, the appeal as against quantum is dismissed.

15. However the appeal as against liability is allowed as follows:

i. The order apportioning liability in the ratio of 10%:90% is set aside and is substituted with an order apportioning liability in the ratio of 30% as against the respondent and 70% as against the appellant.

ii. The award of ksh.457,000 (general and special damages) is subjected to 30% contribution, leaving a net award payable to the respondent of kshs.319,000/=

iii. The respondent to have costs of the appeal and the suit based on the new figure of ksh.319,000/=

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.... for the Respondent