



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 132 OF 2008**

**MCNEEL MILLERS LIMITED.....APPELLANT**

**V E R S U S**

**MWANZIA KANGUTU.....RESPONDENT**

**(Appeal from the judgment of the Senior Resident Magistrate's Court Thika Mrs. G. Nyakundi, dated 26<sup>th</sup> February 2008 in SRMC No. 284 of 2007)**

**JUDGEMENT**

1. **Mwanzia Kangutu**, the respondent herein, filed a workman's compensation suit against **Mcneel Millers Ltd**, the appellant herein vide the plaint dated 29<sup>th</sup> March 2007. In the aforesaid plaint, the respondent sought for judgement against the appellant for general and special damages as well as the cost of the suit, interest and any other relief that the court deems fit. The suit arose out of a work accident which occurred on 7<sup>th</sup> March 2007 when the respondent was in the course of his employment. The respondent alleged that the appellant provided him with unsafe system of work where while he was performing his stacking duties, he was lifted alongside the sack of wheat he was carrying by a crane as a result of which he fell down and sustained serious injuries.

2. The claim is based on an employer's breach of common law of contractual duties towards his employee that led to the injuries suffered by the employee while in the course of duty. The dispute was heard by the trial magistrate who found the appellant 100% liable and awarded the respondent a sum of ksh.203,000/=, as damages.

3. The appellant aggrieved by the trial court's decision filed this appeal and relied on the following grounds.

***1. The learned magistrate erred in law in hearing and determining the suit when she lacked the jurisdiction to do so under Sections 16 and 58(2) of The Work Injury Benefits Act, 2007.***

***2. The learned magistrate erred in law and in fact by not considering the appellant's application to amend its defence when the same was orally made in court.***

***3. The learned magistrate erred in law and in fact in making a finding that the respondent was employed by the appellant in the face of an admission by the respondent that he was not so employed.***

***4. The learned magistrate erred in law and in fact in rejecting the appellant's documentary evidence without legal basis.***

**5. The learned magistrate erred in law and in fact by failing to take into account and to consider the evidence adduced on behalf of the appellant.**

**6. The learned magistrate erred in law and in fact in awarding an excessive amount of damages to the respondent.**

**7. The learned magistrate erred in law and in fact in failing to consider the written submissions of the appellant in arriving at her judgment.**

**8. In all the circumstances of the case, the findings of the learned magistrate are contrary to the evidence adduced.**

4. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters V Sunday post Limited (1958) EA at page 424**, it was held inter alia as follows:

***"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."***

5. The appellant's case was that, it fulfilled all the duties it owed the respondent as its employer and stated that the respondent was under a duty to take reasonable precautions for its' own safety. It claimed that the respondent merely stumbled and fell without any visible injury and was never referred to work ever since. It insisted that the respondent's injuries if any were solely caused by his negligence.

6. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by way of written submissions.

7. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant has listed eight (8) grounds of appeal, those grounds boil down to the twin issues of liability and quantum payable. I will start with liability. The respondent's evidence on liability was presented by 2 witnesses. PW1, a doctor and PW2 **Mwanzi Kangutu**. PW2 testified that he was employed by the appellant from the year 2000 where his duties comprised of loading and off loading. He stated that on 7<sup>th</sup>, March 2007, he reported to work and he was stacking sacks of wheat on a crane as usual. He claimed that the crane stopped and begun reversing causing him to put a sack on it, it however pulled the sack and caused him to fall from the stacks as a result of which he suffered injuries. It was the respondent's evidence that the crane machine was defective and the appellant would have it fixed only for it to breakdown thereafter. He also blamed the appellant for failing to provide him with protective clothing and safety measures in case of a fall. On cross-examination, he stated that he was removing wheat from the crane to stack while other employees were on the ground placing the wheat on the machine. He asserted that the crane caused him to fall after it pulled him.

8. The appellant on his part called 2 witnesses, DW1, a doctor and DW2. According to DW2, **Maxwell Irungu** who worked as a personnel administrator in the appellant's company, the respondent was not an employee of the company. He said that they would normally use contractors to hire the casual and that at the time, **Thomas Mbithi** was the contractor who could have possibly hired the respondent. He concurred with the respondent that they use cranes to stack the sacks and offload them at the top of the stacks. DW2 claimed that the crane was not defective since there was no such report made and since the same was electrical. He claimed the crane only move in one direction and therefore it cannot pull someone backwards. It was his evidence that they have a company protocol that when an employee is injured they are required to report to the supervisor, after which they receive first aid and thereafter they are taken to hospital. He claimed that he did not receive any report of injuries suffered in March 2007.

9. Looking at the pleadings as filed and the subsequent evidence by the parties, it is apparent that the respondent was injured. The respondent adduced evidence to the effect that he was employed on contractual basis by the appellant when he was injured. The appellant on its part denied having employed the respondent but instead averred that the respondent may have been employed by their contractor and as such the contractor should be held liable. The appellant in the process of exonerating itself from blame ought to have instituted third party proceedings to bring the contractor on board so he can defend himself. Failure to do so did not help his case. According to the evidence by the respondent which evidence was straightforward, he worked for the company, where he would stack sacks of wheat which sacks were carried by a crane. It is that crane that caused his fall thus injuring him. The respondent claimed that he had worked for the appellant since 2000 while the accident occurred in the year 2007. Seven (7) years is a long time to have worked for a company only for it to deny it does not know of him.

10. The appellant in its defence admitted that the respondent was its employee. It however claims that it was denied its oral prayer to amend the defence to dispute this claim. I have perused the proceedings and I did not see such a prayer for amendments in the proceedings. Even though there was one, the fact remains that the respondent undertook some work in the appellant's premises and as such, it was the obligation of the appellant to ensure his safety. The appellant did not controvert the claims by the respondent that he was not given any protective gear. Regardless of who contracted the respondent, he worked in the appellant's premises and he sounded convincing on the nature of his work which work he carried out for seven (7) years.

After a careful consideration of the divergent arguments on liability, I am convinced that the respondent proved his case to the required standards and I uphold the decision of trial magistrate as far as liability is concerned.

On the ground of the trial court lacking jurisdiction, the same was not raised in the trial court and the appellant cannot purport to raise it at this juncture. It's too late in the day.

11. On the other issue of quantum, PW1, **Doctor George Kamiri Karanja** testified that the respondent sustained injuries that included:

Fracture of distal radius right arm

Bruising on right side of the face

Pain and tenderness in right hip joint areas

DW1, **Doctor R. P Shah** on his part testified that the respondent suffered a fracture of right wrist and/or fracture of the right hand.

It is therefore apparent that the respondent if no other injuries was sported suffered a fracture of the right arm. The trial magistrate having considered nature of the injuries as per the medical reports awarded a sum of kshs.200,000/= as general damages and ksh.3000 as special damages. Looking at the submissions of the appellant as filed in the lower court, it proposed damages amounting to ksh.80,000/= having relied on the case no. **H.C.C. no. 641 of 1990 Kibwana Mwalimu –v- Bakari Slim Mvuli**. The respondents submissions if any, were not included in the Record of Appeal.

I have considered various decisions. In the case of **Henry Albert Andera V Car & General (K) Limited, Nairobi Civil Case no. 3187 of 1993**, the plaintiff suffered compound fractures on the right ring and little fingers and fracture of the radius and ulna bones of the right forearm as a result of the negligence or breach of duty of his employer was awarded general damages of ksh.400,000/= I am therefore of the considered view that the sum of ksh.200,000/= awarded by the trial court is not excessive in the circumstances and I uphold the same.

12. In the end, I find that the appeal lacks merit and is hereby dismissed. I uphold the judgment of the trial court. The respondent to have costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 25<sup>th</sup> day of November, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent