



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL CASE NO. 5 OF 2013

SANATE BOI KHAUKHA.....APPELLANT

VERSUS

WARIMWE GENERAL CONTRACTORS LTD.....RESPONDENT

[Being an appeal from the judgment of the Webuye Principal Magistrate's court [C. Cheronno (PM)

delivered on 23rd January 2013 in Webuye P.M's civil case no. 198 of 2011]

JUDGMENT

1. Vide plaint dated 23rd December, 2011, the applicant **Sanate Boi Khaukha** sued the respondent **Warimwe General Contractors Ltd** seeking for general and special damages arising from an incident that occurred in the course of his employment with the Respondents. It was his claim that he sustained injuries and as a result he lost his right middle finger which was amputated due to the said injuries.
2. The Respondents filed a defence on 3rd January 2011 where it was admitted that the appellant was its employee. The defence however denied that it failed to provide protective gear, further all allegations of negligence on its part were equally denied.
3. The matter was heard and judgment delivered. On the 23rd of January, 2013. The judgment is what triggered this appeal. The trial magistrate did not find the respondent negligent and went ahead to dismiss the suit. He assessed general damages at Kshs. 150,000/=.
4. This is the first appeal and the court is charged with the duty of looking at the evidence a fresh having in mind that the trial court saw and heard the witnesses. The court must take this into account while arriving at an independent opinion.
5. In his plaint the appellant stated that he was an employee of the respondent a fact which was admitted and that on or about 12th day of October, 2011 while on duty he sustained injuries within the premises of Nzoia Sugar Company a site where the respondent had been contracted to lay slabs. It was his evidence that while laying stones a colleague brought more stones on a wheelbarrow and dropped them where he was and in the process one of the stones fell on him severely injuring his finger. He was taken to Nzoia Medical Centre where he was treated.
6. The Respondents admitted the facts above save that it denied that it had failed in its duty of care towards the appellant as an employer.

7. In dismissing the case the trial court was of the view that no negligence was proved against the respondent and that the appellant needed to have been careful. That the appellant was the sole author of his misfortune.

8. As regards the issue of liability I agree with the appellant's contention that the trial court erred. The respondent in my view should have furnished the appellant with protective gear which admittedly it did not. Secondly the colleague who placed the stones ought to have been careful. All these against the background that the appellant ought to have taken care of himself so as to avoid the accident. He did not inform the court what steps he took so as to avoid the accident. He is not blameless. I will apportion negligence on his part to 25%.

9. As regards quantum the authorities given by the parties are at variance. The court without saying what authorities it relied upon gave quantum as Kshs. 150,000/=. The appellate court can only interfere where the sum is inordinately low or high so as to arrive at an enormous estimate. Taking into account the fact that the appellant lost a finger which has left him with a permanent loss the sum of Kshs. 150,000/= inordinately low. I assess damages at Kshs. 250,000/=.

I am guided by *Sher Agencies Ltd. V. Felix Musumba Civil Appeal no. 7 of 2010 [Nakuru]*,
Longonot Horticulture Ltd. Vs. Isaac Omoch Kichama Civil Appeal no. 39 of 2005 (Nkr).

10. The trial court had assessed special damages at Kshs. 1,500/=. I will not interfere with this. The appeal succeeds and since I found contributory negligence the amount will be reduced by 25% to read as follows;

Kshs. 237,500 as general damages.

Kshs. 1,175

Total. 238,675.

Costs to the appellant.

Dated at Bungoma this 17th day of March 2015.

ALI-ARONI

JUDGE.