



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 792 OF 2007

JAMES KIHARA WANJOHI.....APPELLANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION (K) LTD..RESPONDENT

(An appeal from the judgment and decree of the Hon. Mrs. A.N. Ongeri

delivered on 6th September, 2007 in Nairobi CMCC No. 6220 of 2003)

JUDGMENT

1. The Appellant sued the Respondent seeking recovery of damages. It was the Appellant's claim that while in employment of the Respondent on 27th June, 2000 he was hit by a falling stone while digging a trench. He averred that as a result of the accident he sustained a deep cut on the scalp parietal, loss of consciousness for a day, fracture on the frontal parietal, headache and numbness on the right side of the head and dizziness especially after bending forward.
2. At the trial, Dr. Washington Wokabi (PW1) recollected that at the time he examined the Appellant, he had wounds on the head. That the Appellant complained of frequent headaches and heaviness of the head and lack of concentration and painful jaws while eating. He stated that the Appellant had a scar on the head measuring 5cm × 3 cm and an x-ray report confirmed that the Appellant suffered a fracture of skull. He opined that the Appellant suffered a major head injury which resulted in fracture of the skull with loss of consciousness. He stated that the Appellant had recovered from the physical injuries and that the complaints were classified as post-head injury syndrome effect whose time of subsidence cannot be predicted. PW2 assessed the disability at 10%. He stated that he charged KShs. 2,000/= for the medical report and KShs. 5,000/= for court attendance to wit he produced the medical report and receipts for the report and attendance as P. Exhibit 1 (a), (b) and (c) respectively.
3. The Appellant testified that he was on the material day digging a drainage at Kirinyaga Road under employment of the Respondent when a container which he was filling fell on him and was hit on the head by a stone. He stated that fell unconscious for sometime. He was taken to Ideal Medical Centre. He stated that he spent KShs. 40,000/= for treatment but only had receipts for KShs. 13,100/= (P. Exhibit 6) since the other receipts got lost. He lamented that he had not fully recovered from the head injury and stated that his left side of the head was swollen. He stated that he was examined by Dr. Wokabi who charged him KShs. 2,000/= for the medical report and KShs. 5,000/= for court attendance. The Appellant blamed the Respondent stating that it had failed to give him protective gear including a helmet.

4. The Respondent tendered no evidence in rebuttal.

5. The trial magistrate heard the matter and dismissed it on the basis that the Appellant tendered no sufficient evidence but assessed the damages at KShs. 200,000/= which she could have awarded the Appellant had his case succeeded.

6. The Appellant felt aggrieved by the judgment and filed this appeal on the following grounds:-

i. That the learned magistrate erred in law and in fact in finding that the respondent was not liable to compensate the appellant and proceeded to dismiss the appellant's suit against the respondent for want of evidence.

ii. That the learned magistrate erred in law and in fact in finding that the appellant had failed to prove that he was employed by the respondent despite the appellant having presented sufficient and uncontroverted evidence to that effect.

iii. That the learned magistrate erred in law and in fact in finding that the respondent did not sustain injuries while in the employment of the defendant despite the appellant having presented sufficient and uncontroverted evidence to that effect.

iv. That the learned magistrate erred in law and fact in disputing the basis of the medical evidence presented before the court despite a clear testimony by the appellant's witness.

v. That the learned magistrate erred in law and fact in failing to analyse the appellant's evidence together with the exhibits produced and thereby proceeded to find that no evidence of treatment was tendered before the court.

vi. That the learned magistrate erred in law and fact in considering extraneous matters in weighing the appellants evidence in support of his claim despite the fact that the respondent tendered no evidence to the contrary and in effect raising the standard of proof than expected in law.

vii. That learned magistrate erred in law in failing to consider the submissions tendered by the Plaintiff together with the pleadings and the evidence on record and thereby find that the appellant had established a case on a balance of probabilities against the respondent.

viii. That the learned magistrate erred in law and fact in giving an assessment of general damages that was too low as to amount to a wrong estimate considering the serious nature of injuries sustained by the appellant.

7. This being a first appeal I am guided by the principle laid in *Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123*. I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusions.

8. The Respondent did not adduce any evidence to controvert the Appellant's case. The consequence of such failure was discussed in *Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988* Makhandia J held:-

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

9. In *Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007*, Ali-Aroni j, stated:-

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

10. In the absence of evidence in rebuttal from the Respondent, it follows that the Appellant proved his case on a balance of probabilities against the Respondent.

11. The principles to be applied by this court in assessment of damages were discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)** where it was held as follows:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

12. In the present case, I have carefully examined the decision of the trial court on quantum and see no misapprehension of the facts nor that the trial magistrate acted on wrong principles. In view of the foregoing, I find and hold that the quantum as assessed is reasonable and will not interfere with it. In the end I allow the appeal. The Appellant proved that he was an employee of the Respondent at the time of the accident. In my considered opinion, in measuring the duty of care, one must balance the risk against the measures necessary to eliminate the risks. The Appellant knowing that he was doing a dangerous job was under duty to be cautious while working. He too has to shoulder liability. In the circumstances I apportion liability between the Respondent and Appellant at the ratio of 70:30. The award of damages should therefore be adjusted taking into account the above mentioned apportionment of liability. Each party to meet its own costs of the appeal. The Respondent should however meet the costs of the suit based on the award adjusted on appeal.

Dated, Signed and Delivered in open court this 22nd day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent